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

CRIMINAL APPEAL NO. AAU 079 of 2023
[In the High Court at Suva Criminal Miscellaneous Case No. HAM 148 of 2023]
[Magistrates court at Nausori - Tailevu Criminal Case No.01 of 2015]

BETWEEN	:	**ELIKI MOTOTABUA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**11 June 2024**
Date of Ruling	:	**12 June 2024**

RULING

[1] The appellant had been arraigned in the Magistrates court (MC) at Nausori for one count of possession of illicit drugs contrary to section 5 (a) of the Illicit Drugs Act.

[2] The appellant had been first produced in the MC on 02 January 2015 and when the case was ready to be taken up for trial on 20 April 2023, he had indicated to the learned Magistrate that he wished to file an application for a permanent stay in the High Court and sought an adjournment which the Magistrate had granted. On 05 May 2023, hearing in the MC had been vacated and the witnesses released as the appellant had applied for a permanent stay in the HC. Upon considering the permanent stay application, the High Court (HC) had refused it in its judgment delivered on 15

September 2023[1]. Arising from the MC record, the High Court judge had adverted to the following background in the judgment leading to his application in the High Court.

> *'3. The Applicant was produced in the Magistrate's Court on the 2nd of January 2015 with one Count of Found in Possession of Illicit Drugs, contrary to Section 5 (a) of the Illicit Drugs Act. The matter had proceeded through the pre-trial stages at a snail space for various reasons. The Applicant had substantively contributed to this delay by making clusters of applications and taking an unreasonably long time to organize his counsel, which he eventually did not obtain. Moreover, it appears from the Magistrate's Court proceedings that the Applicant was uncooperative, where he refused to accept the new set of disclosures provided by the Prosecution after he either misplaced or left his original set of disclosures somewhere. He had abusively told the learned Magistrate to use the new set of disclosures as toilet papers when the Prosecution generously offered him a new set of disclosures in order to take the matter forward. (vide page 15 of the Copy Record).*
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> *4. Irrespective of this delay, the hearing of this matter eventually commenced on the 30th of June 2020. The hearing was adjourned several times due to the non-availability of certain witnesses. However, the Prosecution managed to finish most of their main witnesses. In the meantime, the learned Resident Magistrate left the Jurisdiction after completing his contract, and the matter was listed before another Magistrate. The second learned Magistrate had, quite accurately, acted under Section 139 of the Criminal Procedure Act and explained to the Applicant his right under Section 139. The Applicant, with the consent of the Prosecution, opted for a trial de novo on the 24th of May 2022.*
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> *5. Subsequently, the matter was taken up for the hearing on three occasions. On all these occasions, the Prosecution was ready to proceed with the hearing, but some of their witnesses were unavailable. The Applicant had objected to part-hearing; hence, the hearing was vacated. The Applicant then filed this application in the High Court.'*

[3] Despite a direction by the HC in its judgment to the MC *'to conclude the hearing of this matter within a reasonable time without undue delay',* no substantive proceedings had happened at the trial in the MC since 15 September 2023 on account of the proceedings in the Court of Appeal regarding the appellant's current appeal.

[4] The appellant's appeal against the HC Ruling is timely.

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[1] **Mototabua v State** [2023] FJHC 672; HAM148.2023 (15 September 2023)

[5] The preliminary issue for the determination of this court at this stage is whether the appellant has a right of appeal and whether this court has jurisdiction to entertain and determine the appellant's appeal against the impugned HC judgment.

[6] It is very clear that the judgment of the HC is in fact an interlocutory order as the case against the appellant is yet to be determined in the Magistrates court after trial and if this court has no jurisdiction to entertain this appeal against the interlocutory decision of the HC, the appellant has no right of appeal against that decision and 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 15 September 2023 by the High Court refusing to issue a permanent stay has to be decided first.

Whether there is a right of appeal against the impugned ruling

[7] The Court of Appeal Act provides for three avenues to bring appeals to the Court of Appeal namely:

1. *Section 22(1), (2) and (3) of the Court of Appeal Act against convictions, sentences, acquittals or orders refusing bail pending trial in the High Court.*
2. *Section 22(1) and (1A) of the Court of Appeal Act against the decisions or sentences by the High Court in its appellate jurisdiction, on a question of law only or an unlawful or erroneous sentence.*
3. *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.*

[See ***Buadromo v Fiji Independent Commission Against Corruption*** *(FICAC) [2021] FJCA 14; AAU01.2021 (19 January 2021),* ***Chand v State*** *[2020] FJCA 221; AAU0130.2019 (9 November 2020) &* ***Nacagi v State*** *[2014] FJCA 54; Misc Action 0040.2011 (17 April 2014)]*.

[8] Sections 22(1), (2) and (3) and 22(1) and (1A) of the Court of Appeal Act have no relevance to the appellant's appeal. The High Court judgments refusing stay are given in its original jurisdiction (see **Takiveikata v State** [2004] FJCA 39; AAU0030.2004S (16 July 2004)]. The question whether a refusal of stay in criminal proceedings is a final judgment under section 3(3) of the Court of Appeal Act must be

determined by referring to "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 though it was preferable at least in the criminal jurisdiction for the court to maintain "the order approach" [see ***Buadromo, Takiveikata*** *and* **Nata v The State** [2002] FJCA 75; AAU0015U.2002S (31 May 2002)].

[9] Applying 'the order approach', it was considered in ***Nacag*** whether the order refusing stay of prosecution brought the proceedings to an end. It was held that the answer was obvious and the order refusing stay had not brought the proceedings to an end, as the trials were still pending in the Magistrates' Court. Further it was held that it therefore followed that the judgments of the High Court were not final, but, 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. The same conclusion was arrived at by a single judge of this court applying both 'order' and 'application' approaches in ***Buadromo,*** **Singh v State** [2023] FJCA 3; AAU079.2020 (20 January 2023) and just a few days ago in **Justin Steven Ho v FICAC** AAU 104 of 2022 (07 June 2024).

[10] In ***Singh***, I refused to follow **Shameem v State** [2007] FJCA 19; AAU0096.2005 (23 March 2007) which had 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 for reasons). I said:

> *[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 Act 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.'

[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 merit 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] Therefore, in the light of those judicial precedents, I hold that the impugned order of the High Court judge dated 15 September 2023 refusing to stay the proceedings in the Magistrates court is only an interlocutory order and not a final judgment as contemplated under section 3(3) of the Court of Appeal Act. Thus, the appellant has no right of appeal against that judgment. This is the conclusion one could arrive at whether you apply 'order approach' or 'application approach' (though at least for criminal matters 'order approach' is 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 against the appellant in Nausori Magistrates court is yet to be determined.

[13] Thus, the appellant has no right of appeal against the impugned HC judgment and therefore this court as no jurisdiction to entertain and determine the appellant's appeal and it should stand dismissed in terms of section 35(2) of the Court of Appeal Act.

[14] Although, my determination above would be sufficient to dispose of this appeal, since the appellant made submission on the powers of a single judge of this court, I shall deal with that as well for the sake of completion.

[15] The powers of a single judge of this Court in criminal appeals are set out in section 35 of the Court of Appeal Act. It is very specific and it does not give the single judge power to grant a stay of lower court proceedings pending appeal [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014), **Seru v State** [1999] FJCA 37; Aau0041d.99 (3 August 1999) & **Legeleqe v State** [2005] FJCA 2; AAU0005.2005 (21 January 2005)] or to grant leave to appeal against the refusal to issue a permanent stay of proceedings by the HC. As held by Chalanchini, P in ***Chaudhry*** even the full court would not have the power to stay conviction and sentence pending appeal even under section 28 read with section 13 of the Court of Appeal Act. Similarly, no stay powers are available to a single judge under section 28 read with section 20 (1) (e) and (k) of the Court of Appeal Act; nor under Rule 7(b) of the Court of Appeal Rules either (see ***Buadromo***).

[16] The appellant also relied on section 14(2)(o) of the Constitution which states that every person charged with an offence has the right of appeal to, or review by, a higher court to say that this court has jurisdiction to entertain his appeal against the refusal of his application for a permanent stay. He also cited **Seru v State** [2003] FJCA 26; AAU0041.99S & AAU0042.99S (30 May 2003) and **Nalawa v State** [2010] FJSC 2; CAV0002.2009 (13 August 2010) in support of his appeal. It is plainly clear that section 14(2)(o) of the Constitution merely recognises a general right of appeal under Bill of Rights to a person charged. All other provisions regulating this right regulate how this right is to be exercised.

[17] In ***Seru*** (2003), the Full Court of the Court of Appeal was considering an appeal against *convictions* and the court allowed the appeals as the court was driven to the conclusion that in the circumstances of this case, the delay which occurred between charge and trial was unreasonable and therefore the appeals must succeed on that ground alone. Prior to trial the appellants had applied to the High Court that the information be stayed, on the ground that their rights under section 29(3) of the

Constitution (Amendment) Act 1997 (the Constitution) had been infringed which provision stated that every person charged with an offence has the right to have the case determined within a reasonable time. When the appellants appealed to this court against the refusal of stay applications by the High Court, the President ruled that it was not a matter within the jurisdiction of a single Judge and directed that the appeals should be referred to a full court, but the trial proceeded without that happening. In the result the appeals seeking to overturn the refusal of the stay were not heard. What the full court eventually heard was the final appeals against convictions and not appeals against the refusal of stay application. Thus, ***Seru*** (2003) is not an authority for the proposition that this court has jurisdiction to entertain an appeal against the refusal of a stay application by the HC under section 14(2)(o) of the Constitution as that question was never argued and determined.

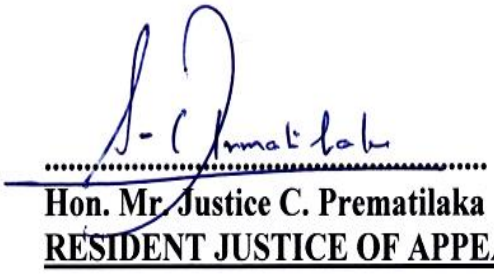
[18] ***Nalawa*** is not an authority for the proposition that a single judge or the Full Court has jurisdiction to entertain an appeal against the refusal of a stay application by the HC. It deals with the principles relating to the approach that should be taken by courts *vis-à-vis* stay applications in the light of section 29(3) of the then Constitution (Amendment) Act 1997 which is similar to section 15(3) of the present Constitution. It is not an authority on section 14(2)(o) of the present Constitution. However, the right under section 14(2)(o) of the present Constitution is justiciable under the jurisdiction of the High Court for constitutional redress at any stage.

[19] However, I am concerned with the unacceptable delay (though the HC judgment shows how the appellant himself had been responsible for it in no small measure) in this matter not seeing a finality for 08 years where there had been about 80 mention dates. Had the appellant continued with the trial when the Magistrates court and the prosecution were ready to proceed with the trial, perhaps it may well have been over by now. The next mention date is said to be in July 2024.

[20] This kind of delay, if persisted with, has the potential to bring the administration and system of justice into disrepute in the eye of the public irrespective of who was responsible for the delay. There is already a clear and unequivocal directive by the HC to the MC to conclude the matter within a reasonable time.

Orders of the Court:

1. Appeal is dismissed in terms of section 35(2) of the Court of Appeal Act without prejudice to the appellant's right to raise the matter of unreasonable delay in any appeal brought against conviction if that is the result of the trial.
2. The learned Magistrate at Nausori is directed to have case No. 01 of 2015 mentioned within the next two weeks with notice to both parties and fix the trial at an early date.
3. The learned Magistrate is also directed to conclude the trial and deliver judgment before the end of the year 2024.
4. The counsel for the prosecution and the appellant are directed to fully cooperate with the learned Magistrate to achieve full compliance with order (3) above.
5. The Court of Appeal Registry is directed to send a copy of this Ruling to the learned Magistrate at Nausori forthwith.



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

Solicitors:

Appellant in person
Office of the Director of Public Prosecution for the Respondent