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

CRIMINAL APPEAL NO. AAU 104 of 2022
[In the High Court at Suva Miscellaneous Case No. HACDM 001of 2021L]
[Magistrates court at Nadi case No.966 of 2014]

BETWEEN : **JUSTIN STEVEN HO**

Appellant

AND : **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. S. Heritage for the Appellant**
: **Mr. J. Work for the Respondent**

Date of Mention : **06 June 2024**

Date of Ruling : **07 June 2024**

RULING

[1] The appellant had been arraigned in the Magistrates court (MC) at Nadi for one count of *bribery* [section 4(1) (a) of the Prevention of Bribery of Promulgation No.12 of 2007] and *false or misleading documents* [section 335 of the Crimes Act] allegedly committed in October 2014 at Nadi in the Western Division.

[2] The appellant had been first produced in the MC on 24 October 2014 and, while the trial was in progress albeit with a considerable delay, he had applied for a permanent stay of proceedings in the MC to the High Court (HC) on 12 February 2021. The High Court had refused the appellant's application in its Ruling delivered on 09 September

2022[1]. Despite an order by the HC that *'Further in consideration of the prolonged delay in this matter, this Court direct the* ***Learned Magistrate of Nadi*** *to commence the trial in the substantive matter, 966/2014 promptly'*, this court was informed by both parties that no substantive proceedings had happened at the trial in the MC since 09 September 2022. The case had been mentioned in the MC on 29 May 2024 and trial had been fixed for 09 December 2024.

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

[4] 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 Ruling.

[5] Both counsel agreed during the hearing that Ruling of the HC is an interlocutory order as the case 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 09 September 2022 by the High Court refusing to issue a permanent stay on criminal proceedings in Case No. 966 of 2014 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. 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

[1] **Ho v Fiji Independent Commission Against Corruption** [2022] FJHC 569; HACDM001.2021L (9 September 2022)

the Magistrates' Court. The state submitted that a refusal of stay of proceedings was 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?***
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> *[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:*
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> > *"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.*
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> *The Court concluded that it was preferable at least in the criminal jurisdiction for the court to maintain "the order approach."*
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> *[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. The Court held:

'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. The Court of Appeal said:

> *'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.*
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> *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.*
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> *(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.*
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> *(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] I canvassed the same issue in detail in a few previous Rulings[2] including a detailed analysis in **Bimlesh Singh v State** AAU 079 of 2020 (20 January 2023) where 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 and 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.*

[2] **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)

[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 09 September 2022 refusing to stay the proceedings in the Magistrates court is only an interlocutory order and not a decision or a final judgment as contemplated under section 3(3) or section 22 or of the Court of Appeal Act. Thus, the appellant has no right of appeal against that Ruling. 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 against the appellant in Nadi Magistrates court is yet to be determined.

[13] Thus, the appellant has no right of appeal against the impugned HC Ruling 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] However, I am perturbed by the unacceptable delay (though the HC Ruling shows how the appellant himself and his trial counsel had been responsible for it in no small measure) in this matter not seeing a finality for 10 years. Since 24 October 2014 till 12 February 2021, the most crucial witness for the prosecution, custom officer Sakiusa's evidence had not been concluded, for among other things, as a defence the

appellant makes allegations of entrapment against Sakiusa. Since 12 February 2021 till the HC Ruling on 09 September 2022 no trial proceedings had taken place in the Magistrates court. Then the appellant had filed the current appeal in the Court of Appeal on 06 October 2022. Had the appellant continued with the trial without any of these interruptions it may well have been over by now. The trial is presently fixed before a new Magistrate to be taken-up only on 09 December 2024. The parties had agreed to adopt the proceedings that were taken before the previous Magistrate. This is in the backdrop of the fact that the appellant had been initially charged on 24 October 2014.

[15] 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. I am also troubled by the fact that despite the clear and unequivocal directive on 09 September 2022 by the HC to the MC to conclude the matter promptly, nothing worthwhile had happened to date. Again the delay might be attributable to all parties involved who have not taken a concerted effort to comply with the HC directive. That is, however, not an excuse for the blatant disregard for the HC order. This, to say the least is most unsatisfactory.

Orders of the Court:

1. Appeal is dismissed in terms of section 35(2) of the Court of Appeal Act.
2. The learned Magistrate at Nadi is directed to have case No. 966 of 2014 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 both parties 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 Nadi forthwith.

COURT OF APPEAL FIJI

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