IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

Crim. Case No: HAC 117 of 2020

STATE

vs.

1. **INOKE DOKANAVOSA**
2. **TIMOCI RASOVA**

Counsel: Mr. M. Vosawale for the State

Ms. L. Ratidara for the 1st Accused

Ms. P. Mataika for the 2nd Accused

Date of Hearing: 16th September 2022

Date of Ruling: 19th September 2022

RULING

[On the Jurisdiction to try summary offences]

Introduction

1. The above named Accused persons are charged with 6 counts: Manslaughter: contrary to Section 239 read with section 46 of the Crimes Act, Aggravated Robbery: contrary to Section 311 (1) (a) of the Crimes Act, 2009, Rape: contrary to Section 207 (1) & (2) (a) of the Crimes Act, 2009, Aggravated Robbery: contrary to Section 311 (1) (a) of the Crimes Act, 2009, Aggravated Burglary: contrary to Section 313 (1) (a) of the Crimes Act, 2009, and Theft: contrary to Section 291 of the Crimes Act, 2009. Out of

these charges, counts 1 to 5 are indictable offences and count 6 alone is a summary offence.

2. When this matter was mentioned on 12th September 2022 prior to the commencement of the trial the defence raised the objection as to the jurisdiction of this Court to try the summary offence of theft (count No. 6). The objection was based on the recent Supreme Court judgment of **Eremasi Tasova v The State** (SC Crim. CAV 0012.2019 (25.08.2022).

The Objection

3. Both the learned Defence counsel submitted that in **Eremasi Tasova v The State (supra)** the Supreme Court has held that the jurisdiction to try summary offences is exclusively vested with the Magistrates court as such this Court does not have jurisdiction try the summary offence of theft (count No. 6) and that the prosecution cannot lawfully have and maintain the information in its present form.

Arguments of Parties

4. As the hearing of this matter was set for two weeks from the 19th September 2022, parties were granted time to consider the same and the objection was taken up for consideration on 16th September 2022. Both parties tendered written submissions and were also heard. The defence submission is that the Supreme Court in **Eremasi Tasova v The State** has determined that, jurisdiction to try any summary offence is exclusively vested with the Magistrates court and the Magistrate cannot divest himself of the jurisdiction so exclusively vested on him and is not permitted and cannot transfer such summary offences to the High Court. As such it was argued that this court does not have jurisdiction to try the count No. 6, the summary offence of theft and that the information requires to be amended accordingly.

5. The pith and substance of the prosecution submission is that inferentially the Supreme Court appears to have based its decision on principles of misjoinder and that no general principle had been laid down as to the jurisdiction of the High Court try a summary offence. The prosecution relying on section 59 (joinder) and section of 198(2) on the powers of the DPP in filling information argues that the High court

has jurisdiction to try a summary offence if it can be lawfully joined if based on any of the grounds of joinder.

The decision in **Eremasi Tasova v The State**

6. On the perusal of the said judgment of **Eremasi Tasova v The State** (supra), I observe that;
    a. two grounds of appeal had been considered and ground 1 that considered by the Supreme Court is that, "*the learned Trial judge had erred in law and in depriving the Appellant of his right to a fair trial by not remitting the Charge of resisting arrest to be tried in the Magistrate Court since it was a summary offence triable only in the Magistrate Court. Failure to do so resulted in a miscarriage of justice in the circumstances of the case and the Appellant*",
    b. Section 277 is reproduced in paragraph 22,
    c. At paragraph 23 it is stated that, "*There is no doubt therefore that the charge against the petitioner is that of committing a summary offence. The jurisdiction for trying such a charge lies with exclusively with a Magistrate as provided for in section 4(1) (b) of the Criminal Procedure Act 2009.*" [the words section 4(1) (b) should be section 4(1) (c)] . Then section 4(1) is reproduced.

7. The determination, legal principles and the reasons in respect of this issue are all crystalized into in paragraph 24 of the said judgement which is as follows:

> "*Consequently, the charge of resisting arrest ought to have been tried by a Magistrate and could not have been transferred to the High Court which had no jurisdiction to try the charge in terms of section 277 (b) of the Crimes Act 2009 read with section 4 (1) (c) of the Criminal procedure Act 2009. The Magistrate gravely erred in divesting himself of jurisdiction exclusively vested in him and impermissibly conferring it on the High court. Ex facie, there is a miscarriage of justice as far as the fourth count is concerned. Accordingly, the petitioner is granted special leave to appeal in respect of ground 1 urged by his counsel and must succeed."*

8. Finally the Court has held that that conviction of the petitioner on this count by the High Court was without jurisdiction and set aside the conviction.

What is the ratio of **Eremasi Tasova**?

9. It is the *ratio decidendi* that binds this court. As to what the ratio was explicitly stated by Lord Justice Buxton in **Kadhim v Housing Benefit Board, Brent** [2000] EWCA Civ 344 (20 December 2000) as follows;

> *"Cases as such do not bind; their rationes decidendi do. While there has been much academic discussion of the proper way of determining the ratio of a case, we find the clearest and most persuasive guidance, at least in a case such as the present where one is dealing with a single judgment, to be that of Professor Cross, in Cross and Harris, Precedent in English Law (4th edition) at p 72:*
>
> *"The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him."."*

10. Upon reading paragraphs 22 to 24 the Supreme Court decision to my mind the ratio or the rule of law expressly or impliedly stated and treated as a necessary step in reaching the conclusion is that, *the Magistrate is vested with the exclusive jurisdiction in respect of summary offences which the Magistrate cannot divest and transfer to the High Court; and that the High Court has no jurisdiction to try a summary offence*.

11. As the objection is that this Court does not have jurisdiction try the summary offence of theft (count No. 6) in order to consider the said objection, it is necessary to consider the statutory provisions conferring jurisdiction to the High Court as well as the procedure of instituting action in criminal matters.

Criminal Jurisdiction of the High Court

12. For a criminal court to successfully take cognizance of an offending and try an offender such court should in the first instance be conferred with criminal jurisdiction by substantive statutory provisions and then the procedure to institute action and bring the accused before the court should be provided for by the procedural law.

13. First let me look at the provisions that vest jurisdiction. High Court is established by sections 3(2) and 18 of the High Court Act read with sections 97 and 100 of the Constitution. The jurisdiction is determined and conferred by section 18 of the High Court Act read with section 100(3) of the constitution and section 35(1) of the Criminal procedure ACT (herein after referred to as the CPA).

14. Section 100 (3) of the Constitution reads thus:
100(3). The High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other original jurisdiction as is conferred on it under this Constitution or any written law.

15. Section 100(3) spells out the forum jurisdiction or the substantive criminal jurisdiction of the High Court. By virtue of which, the High Court is vested with unlimited original criminal jurisdiction to hear and determine any criminal proceeding under any law. This Court is vested with the power to try any offence under any law that may be committed within *inter alia* territorial jurisdiction of the High Court. Section 35 of the Criminal Procedure Act complements section 100 (3) of the constitution in determining and specifying the powers of the High Court and its criminal jurisdiction. Section 35 reads as follows:

Powers of the High Court

35(1)The High Court may inquire into and try any offence subject to its jurisdiction at any place where it holds sittings. (emphasis added).
(2)All criminal cases to be heard by the High Court shall be—
(a)instituted before a Magistrates Court in accordance with this Act; and
(b)transferred to the High Court in accordance with this Act if the offence is— *(i) an indictable offence; or*
(ii) an indictable offence triable summarily, and the accused has indicated to the Magistrates Court that he or she wishes to be tried in the High Court.

16. Section 35 (1) stipulates that the High Court is vested with the power to try "**any offence"** subject to its jurisdiction. The reference to jurisdiction here is to the preceding provision of the section 32 of the CPA which determines the general territorial jurisdiction of the Courts of Fiji. According to which the High Court has the power to try any offence committed within the territorial limits of Fiji or as such law may prescribe.

'Any offence'

17. In **Koroi v The State** [2002] FJHC 152; HAA0055.2002S (23 August 2002) the meaning word "***offence***" as appearing in section 28(1) of the then Constitution, appearing in the right to counsel provision, was considered in the context of criminal trials and proceedings and the following comprehensive and composite interpretation was formulated and held that;

> *" "**Every person charged with an offence has the right**". It then goes on to specify those rights including the right to counsel. The question is whether the Right to Counsel is confined to charges under the Penal Code or extends to other offences too. This answer depends on the meaning of the word 'offence'.*
>
> *Prima facie an offence is equivalent to a crime – per Collins J. in DERBYSHIRE COUNTY COUNCIL v. DERBY 1896 2 Q.B. 57 at 58. The Dictionary of English Law by Earl Jowitts says **'the word offence has no technical meaning in English Law, but it is commonly used to signify any public wrong, including, therefore not only crimes or indictable offences, but also offences punishable on summary convictions ... it is used as a comprehensive term to cover anything for which a court can inflict punishment'**. In section 2 of the Interpretation Act Cap. 7 "offence" is defined as "**any crime, felony, misdemeanour or contravention or other breach of, or failure to comply with, any written law for which a penalty is provided**". In the Penal Code it is defined as "**an act attempt or omission punishable by law**".*
>
> *These definitions suggest that if penal consequences follow from certain acts or omission, then that particular act or omission is to be treated as an offence. One has to look at the consequences to the accused of a conviction for such act or omission. If it could result in payment of fine or loss of liberty in any way or any other type of penalty, then the act or omission is an offence. The amount of fine or level of penalty is immaterial."*

This interpretation stands valid and applicable to the law as it stands today. That being so the words '***any offence'*** will mean and encompass offences of whatever nature that may be and is created by any statute.

18. As I see, all criminal offences created by statute in Fiji are of 2 categories. They are;

    i. *Offences under the Crimes Act 2009 and*

    ii. *Offences under other laws.*

19. The above offences are referred to in section 4(1) and section 5 of the CPA respectively and each category has 3 types of offences which I will elaborate subsequently.

20. Sections 4 of is as follows;

Offences under the Crimes Act 2009 and extension of jurisdiction

Section 4 *(1) Subject to the other provisions of this Act—*

(a) any indictable offence under the Crimes Act 2009 shall be tried by the High Court;

(b) any indictable offence triable summarily under the Crimes Act 2009 shall be tried by the High Court or a Magistrates Court, at the election of the accused person; and

(c) any summary offence shall be tried by a Magistrates Court.

(2) *…….*

(3) *…….*

21. Sections 5 is as follows

Offences under other laws

Section 5

(1) Any offence under any law other than the Crimes Act 2009 shall be tried by the court that is vested by that law with jurisdiction to hear the matter.

(2) When no court is prescribed in any law creating an offence and such offence is not stated to be an indictable offence or summary offence, it may be tried in the Magistrates Courts in accordance with any limitations placed on the jurisdiction of classes of Magistrate prescribed in any law dealing with the administration and jurisdiction of the Magistrates Courts.

22. For clarity if I may list the said types of criminal offences they are as follows:

Offences under the Crimes Act [section 4(1)]

1. ***Indictable offences*** [section 4 (1) (a) CPA];
2. ***indictable offence triable summarily*** (electable offences)[section 4(1)(b) CPA];
3. ***summary offences*** [section 4 (1) (c) CPA];

Offences under other Acts [section 5(1) and (2)],

4. ***offences triable by High Court*** – The statute creating the offence stipulates and vests the jurisdiction to hear such matter in the High Court but does not specifically name as any one of the above. [section 5 (1) CPA];
5. ***offences triable by the Magistrate*** – The statute creating the offence stipulates and vests the jurisdiction to hear such matter in the Magistrates Court. [section 5 (1) CPA];
6. ***offences of which no forum is mentioned*** – The statute creating the offence does not mention the court and does not specifically name to be indictable or summary. These offences are triable by the Magistrate in view of section 5(2) of the CPA. [section 5 (1) (2) CPA].

23. As the High Court is vested with the jurisdiction to *try any offence* it necessarily will mean and include all the above categories of offences including summary offences. The High Court is certainly vested with unlimited original criminal jurisdiction to *try any offence* however for the court to take cognizance of a particular offending or the offender, apart from so conferring jurisdiction it is also necessary to have the procedure to invoke the criminal jurisdiction. Thus, in addition to the substantive law that confers the substantive criminal jurisdiction, the procedural law should provide for the procedure and the mechanism for the institution of action including matters connected with the trial and determination of such matter.

<u>Procedure to Institute a criminal case to be heard in the High Court</u>

24. Section 35(2) of the CPA mandates that all criminal matters and cases to be heard in the High Court should be instituted in the Magistrates court and then be transferred to the High court. The procedure to so institute a criminal case is provided for by section 35(2) of the CPA which reads thus;

35(2) All criminal cases to be heard by the High Court shall be—

(a)instituted before a Magistrates Court in accordance with this Act; and

(b)transferred to the High Court in accordance with this Act if the offence is—

- *(i)an indictable offence; or*
- *(ii)an indictable offence triable summarily, and the accused has indicated to the Magistrates Court that he or she wishes to be tried in the High Court.*

25. According to which all criminal cases to be tried by the High Court should be instituted before the Magistrates Court in accordance with the provisions of the CPA. Cases may be so instituted by filing a complaint or charge as provided for by section 56 of the CPA.

Transfer of cases to the High Court

26. The scheme of the CPA is that upon action being so instituted before a Magistrates Court, the Magistrate it is then required to transfer proceedings if there be any indictable or electable offences which the accused does not opt to be tried by the Magistrate's court [(section 35(2) (a) and (b) CPA]. This will be *Indictable offences* and *indictable offence triable summarily* (type 1 and 2 above) will be transferred under section 35 read with section 191 of the CPA. As for *summary offences*, *offences triable by the Magistrate* and *offences of which no forum is mentioned* (type 3, 5 and 6 above) they are summary trials and may be transferred under section 188 read with section 191 of the CPA.

Section 188 reads thus;

Power to stop summary trial and transfer to High Court

188 (1) If before or during the course of a trial before a Magistrates Court it appears to the Magistrate that the case is one which ought to be tried by the High Court the Magistrate may transfer the case to the High Court under Division 3.

(2) ……

Section 191reads thus;

Power to transfer to the High Court

191. A Magistrate may transfer any charges or proceedings to the High Court.

27. If I may further elaborate sections 35 and 188 of the CPA provide the grounds and circumstances of transferring whilst the statutory power to make such transfer orders is conferred by section 191 (Division 3 of Part XIII) of the Criminal Procedure Act. Thus section 191 is in effect a general enabling and empowering provision. As for offences under category 4, *offences triable by the High Court* the transfer is made under section 194 (c) of the CPA.

28. Accordingly, by so instituting action and transferring charges or proceedings will invoke the criminal jurisdiction of the High Court and enable such High Court to take cognizance of such charge, proceeding or case. When any matter or a case is so transferred by virtue of section 198 of the CPA, the DPP or the Commissioner of FICAC as the case may be is empowered and authorized to file information in the High Court.

Section 198 reads as follows;

Filing of an information

198 (1) An information charging an accused person and drawn up in accordance with section 202 shall be filed by the Director of Public Prosecutions or by the Commissioner or Deputy Commissioner of the Fiji Independent Commission Against Corruption …….

(2) In the information, the Director of Public Prosecutions or Commissioner of the Independent Commission Against Corruption may charge the accused person with <u>any offence</u>, either in addition to or in substitution for offence in respect of which the accused person has been transferred to the High Court for trial. (emphasis added)

29. By virtue of subsection 2 of section 198 of the CPA, the DPP or the Commissioner is empowered and authorized to include ***any offence*** either in addition or in substitution of the offence that has been so transferred. This provision makes it abundantly clear that upon a valid transfer the DPP or the Commissioner is

conferred with the discretionary power to include any charge in the information and this will necessarily enable and empower the High Court to lawfully try such offence. The use of the words *any offence* in section 198 (2) in my view most certainly contemplates all 6 types of offences under both categories referred to above which most certainly and necessarily include summary offences. However, the power to so include any offence will be subject to section 59 of the CPA which will necessarily have to be based on some valid basis of joinder. Section 59 is as follows;

Joinder of counts in one charge or information

59 (1) Any offence may be charged together in the same charge or information if the offences charged are—

- *(a) founded on the same facts or form; or*
- *(b) are part of a series of offences of the same or a similar nature.*

(2) ……..
(3) ……..

30. The use the words *any offence* in section 59 too, certainly contemplates all 6 types of offences referred to above as far as the High Court is concerned. Therefore, the DPP or the Chairman of FICAC, is empowered to include in an information any summary offence or an offence triable by the Magistrate's Court so long as it can be lawfully joined with the offences or the offending that had been so transferred to the High Court.

Are summary offences exclusively triable by the magistrate?

31. A court enjoys original jurisdiction when it has got the authority to hear the case in its first instance, however a court would have exclusive jurisdiction only if the whole and sole authority to hear and determine such case is vested with a that particular court and no other court. On the analysis of the said statutory provisions it is apparent that thought the Magistrates Court is vested with an original jurisdiction to try summary offences as the Magistrates is empowered by section 188 of the CPA to transfer to the High Court any summary trial The Magistrates Court certainly does not have *exclusive* jurisdiction in respect of summary offences.

32. According to the above analysis and on a plain reading of the relevant provisions it is apparent that a summary offence may be lawfully transferred to the High Court under Section 188 of the CPA. That being so the High Court may take cognizance and has jurisdiction to try summary offences. Correspondingly by virtue of Section 100 (3) of the Constitution read with section 35 of the CPA, the High Court is vested with an unlimited criminal jurisdiction to try any offence. Upon the transfer of such a summary trial under Section 188 of the CPA the DPP or the chairman of FICAC as the case may be, by virtue of Section 198 (2) is empowered to include any offence in addition or in substitution of the charge so transferred. As such according to the said statutory provisions this court is lawfully entitled to try count No. 6 the summary offence of theft on the Information as in its present form.

The Decision in the Case of **Eremasi Tasova**

33. However, the defence submitted that the judgment in the case of **Eremasi Tasova v the State** (supra) has held otherwise. This Court is absolutely bound to follow any legal principle laid down by the Supreme Court or the Court of Appeal that is relevant and applicable to any issue considered by this court. This is so in view of the principles of *stare decisis* or the principles of binding president which is also incorporated in Section 98 (6) of the Constitution which specifically states that, *decisions of the Supreme Court are subject to sub section (7) binding on all other courts of the States*. Therefore, this court is certainly bound by and required to follow any principle of law as laid down by the Supreme Court.

What is the ratio of **Eremasi Tasova v the State**?

34. The defence submitted that **Eremasi Tasova v the State** has determined that the High Court is not competent to hear a summary offence. The facts of **Eremasi Tasova** as appearing from the said judgment are as follows. The petitioner was charged with four counts namely two counts of robbery, a third count of theft and a fourth count of resisting arrest. The petitioner was found guilty and convicted in respect of all four counts after trial though he preferred an appeal to the Court of Appeal he was not successful. The Court of Appeal has upheld his conviction and

had not considered his sentence. The petitioner had appealed to the Supreme Court against the said judgment and leave has been granted in respect of the convictions and sentence. At the hearing the petitioner had pursued the appeal only against the conviction of count four and the sentence. Their Lordships have considered grounds of appeal against the conviction of the charge of resisting arrest and at paragraph 24 of the judgement their Lordships have granted special leave to appeal and decided that there is a miscarriage of justice as far as the fourth count is concerned and held that the said ground should succeed.

35. In coming to this conclusion their Lordships have upon considering Section 277 (b) of the Crimes Act and Section 4 (1) (c) of the CPA and held that resisting arrest ought to have been tried by the Magistrate and could not have been transferred to the High Court which had no jurisdiction to try the said charge in view of section 277 (b) of the Crimes Act read with section 4 (1) (c) of the CPA. Their Lordships also held that the Magistrate erred in divesting of the jurisdiction exclusively vested in the Magistrate and it was impermissible to confer it on the High Court. This being so the ratio of the said judgment as it appears to me is that in view of Section 4 (1) (c) of the CPA, the jurisdiction to try a summary offence is exclusively vested in the Magistrate and cannot be transferred to the High Court.

Is this *per incuriam*?

36. Section 4 of the CPA unambiguously commences by declaring that it is *subject to the other provisions of the CPA*. Thus, when section 4 (1) (c) provides that any summary offence shall be tried by a Magistrate Court it is subject to section 188 of the CPA. Section 188 of the CPA empowers Magistrate to transfer a summary trial. Further, 198(2) empowers the DPP or the Commissioner of FICAC to add or substitute any offence at the point of filing information upon proceedings been so transferred. Further, Section 59 enables the addition or substitution of any offence provided it comes within a lawful ground of joinder.

37. On the perusal of the said judgment, with utmost respect I humbly observe that the attention of their Lordships of the Supreme Court has not been brought to the said

statutory provisions of sections 188, 198 (2) and section 59 of the CPA. These are the other provisions of the CPA that section 4 (1) (c) is subject to. On the above exposition it is evident that on a plain reading of these sections it is evident that the Magistrate is empowered to transfer any summary trial to the High Court and any summary offence may be included in an information. Correspondingly by section 100(3) of the constitution read with section 35(1) of the CPA the High Court is vested with unlimited original Criminal jurisdiction to try any offence.

38. The said principle as laid down by **Eremasi Tasova V The State**, that the jurisdiction to try a summary offence is exclusively vested in the Magistrates Court and it is impermissible to transfer a summary offence to the High Court had been made without reference to or considering and adverting to the provisions of Sections 188, 198 (2) and section 59 of the CPA. These statutory provisions are clearly contrary to the said finding.

39. On a careful perusal of the said judgment of **Eremasi Tasova V The State** I observe that the learned counsel who appeared in that forum have unpardonably failed and neglected to bring to their Lordships attention the said relevant provisions of the statute and thus it appears that the Supreme Court has made the said decision in ignorance or forgetfulness of the existence of the said inconsistent statutory provisions. In the circumstances I am reluctantly and with extreme hesitation compelled to consider that the said lapse had rendered so much of the said decision in **Eremasi Tasova** one made *per incuriam* as far as the binding precedent is concerned.

Principles of *stare decisis*

40. It is common ground that in the hierarchy of the Courts the High court is bound by the decisions of the Supreme Court as well as the Court of Appeal. As the doctrine of *stare decisis* or the doctrine of precedent is a part of our law and the Constitution, the principles of law determined by the such Courts guide the subordinate Courts in deciding similar disputes and are absolutely **bound** by the principles enunciated by their Lordships in their decisions.

41. The decision of an ultimate or Appellate Court has a dual aspect. Firstly, the immediate decision of the dispute between the parties and secondly the principles of law which the Court lays down in deciding that dispute. The actual and immediate decision of the dispute binds the parties. That being so the principles of law guide and bind the Court in deciding future similar disputes and courts of coordinate jurisdiction regard themselves as bound by the principles enunciated by such decisions. The rule of *per incuriam* can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue.

42. It is true that the principles of *stare decisis* has been incorporated to the constitution. However, the said binding precedent is not absolute it is subject to exceptions. One of which is per incuriam. This exception was adverted to in the case of **Cakaunitavuki v Colonial Fiji Life Ltd** [2012] FJCA 21; ABU012.2020 (7 January 2021) where it was opined thus;

> *"[15] When could it be said that a decision has been made **per incuriam**?*
>
> Rupert Cross on Judicial Precedent
>
> *[16] In his celebrated work on the doctrine of Judicial precedent, (Clarendon, 1991, Revised), the learned Professor sums up and says, it is when a Court has given a ruling (decision) in :*
>
> *(i) ignorance of a statute*
> *(ii) disregard of an authoritative judicial precedent*
> *(iii) non-consideration of a fundamental rule of law."*

43. Further in the case of **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019) His Lordship Justice Prematilaka has tacitly accepted and applied the exception of per incuriam to avoid the binding precedent of a Supreme Court Judgment. Further there to in the case of **Nand v Khan** [1997] FJCA 26; Abu0066u.95s (14 August 1997) the Court of Appeal has clearly stated that per incuriam is a ground to avoid the binding precedent where it held thus;

> "*The appellant's case depended on the correctness of the 1990 decision of this Court that he lost his right of appeal because the respondents paid the cheque into their trust account. Generally, a Court other than the highest in the jurisdiction is bound by its own previous decisions (Young v. Bristol Aeroplane*

Co. Ltd. [1944] K.B. 718). However, there are exceptions to that general rule. The first is where the Court has inadvertently given two conflicting decisions; it clearly cannot be bound by both. The second is where the previous decision is inconsistent with a decision of a court higher in the hierarchy of courts in the jurisdiction. The third is where the decision was given ***per incuriam,*** *that is to say where statutory provisions or a binding decision of a higher court have been overlooked*"

44. Therefore, it is settled law that though the principle of binding precedent is incorporated in the constitution it is certainly subject to exceptions. One of such exception certainly is *per incuriam*. In the Indian Constitution too there is a similar provision where binding precedent is incorporated in Article 141 of the Indian Constitution. However, it is subject to all the exceptions including that of per incuriam. This was so held in the in the case of **Siddharam Satlingappa Mhetre vs State of Maharashtra And Ors.** [2 December, 2010 **(**Criminal Appeal No. 2271/2010)] by the Supreme Court of India as follows;

> *"138. The judgments and orders mentioned in paras 135 and 136 are clearly contrary to the law declared by the Constitution Bench of this Court in Sibbia's case (supra). These judgments and orders are also contrary to the legislative intention. The Court would not be justified in re-writing section 438 Cr.P.C.*
>
> *139. Now we deem it imperative to examine the issue of per incuriam raised by the learned counsel for the parties. In Young v. Bristol Aeroplane Company Limited (1994) All ER 293 the House of Lords observed that `Incuria' literally means `carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The `quotable in law' is avoided and ignored if it is rendered, `in ignoratium of a statute or other binding authority. The same has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."*
> *(emphasis added)*

45. In the recent decision of the England and Wales Court of Appeal considering the application of the rule of *per incuriam* in the case of **Kadhim v Housing Benefit Board, Brent** [2000] EWCA Civ 344 (20 December 2000), Lord Justice Buxton

held that, the judge of the High Court was not constrained by the judgment of the Court of Appeal of England if such decision of the higher court comes within an expectation to the rules of precedent ie; *per incuriam or sub silentio*. (at paragraph 42). Lord Justice Buxton at paragraphs 19 and 20 endeavoured to explain what *per incuriam* is, as follows;

> *"19. Per incuriam?*
>
> *20. The only escape from the ratio of a previous decision of the Court of Appeal has for long been thought to be provided by the three categories of case set out in the judgment in Young v Bristol Aeroplane Co [1944] KB 718. Of those, the only one even potentially applicable to the present case is that the court is not bound by a previous decision reached per incuriam. That rule is, however, to be understood in narrow terms. As Sir Raymond Evershed MR put it in Morelle v Wakeling [1955] 2 QB 379 at p 406:*
>
> *"As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."."*

46. In the Indian Supreme Court case of **Thota Sesharathamma and another v. Thota Manikyamma (Dead) by LRs. and others** (1991) 4 SCC 312) a bench two judges of the Supreme Court held that the three-judge bench decision in the case of Mst. Karmi v. Amru (1972) 4 SCC 86 was per incuriam and observed that:

> "*...It is a short judgment without adverting to any provisions of Section 14 (1) or 14(2) of the Act. The judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in Badri Pershad v. Smt. Kanso Devi. The decision in Mst. Karmi cannot be considered as an authority on the ambit and scope of Section 14(1) and (2) of the Act."*

47. Then Lord Godard, C.J. in **Huddersfield Police Authority v. Watson**, 1947 KB 842 : (1947) 2 All ER 193), observed that, where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness

of the existence of the case or statute, it would be a decision rendered in *per incuriam*. Hence it can be well concluded that the principle of *per incuriam* is an established principle of law whereby the judgments made in forgetfulness or ignorance of a certain precedent, law, statute or a statutory provision laid down by an enactment is not a proper and valid judgment and therefore it is an exception to the rule of the doctrine of *stare decisis* and such a decision does not hold good to be a valid precedent for other related similar cases.

48. Thus now it is necessary and I am reluctantly compelled to humbly conclude that the laying down that, *the jurisdiction for trying a summary offence lies exclusively with a Magistrate as provided for in section 4(1) (c) of the Criminal Procedure Act 2009; and the Magistrate erred in divesting himself of jurisdiction exclusively so vested in him and it is impermissible to confer it on the High court; and the High Court was without jurisdiction to try a summary offence* in **Eremasi Tasova v The State** had been made without any reference to, and consideration of the contrary provisions of sections 188, 198 (2), section 59 of the CPA and section 100(3) of the Constitution and to that extent the said judgment is one made *per incuriam* and the principles so determined by the said judgment are not binding to that extent.

49. Further, on a perusal of the said judgment of **Eremasi Tasova v The State** I humbly and respectfully observe that there is no reference either directly or in the passing to the provisions of Sections 188, 198 (2) and section 59 of the CPA. Hence, I am unable to ignore the fact that their Lordships attention have not been brought to bear upon these directly relevant provisions of the statute. Accordingly, the only irresistible conclusion I am reluctantly compelled to arrive at is that the provisions of sections 188, 198 (2) and section 59 of the CPA have not been brought to the attention of their Lordships and the said Court has thus made the said decision in ignorance or forgetfulness of the existence of the provisions of Sections 188, 198 (2) and section 59 of the CPA.

50. Thus, it is evident and I have no doubt that if the said statutory provisions were brought to the conscious attention of the said Court, their Lordships certainly would not have concluded as done in the said judgment. I regretfully observe that it is the

Counsels' unpardonable failure to bring to the conscious attention of their Lordships the provisions of sections 188, 198 (2) and 59 of the CPA caused their Lordships to so determine.

51. Accordingly, I am reluctantly compelled to humbly and respectfully determine that so much of the said decision in **Eremasi Tasova v The State** (supra) is *per incuriam* to that extent as far as the binding precedent is concerned and thus the said authority would not to that extent bind this court.

Conclusion

52. In the aforesaid circumstances I hold that count No. 6 had been lawfully joined to the information and this court is competent to try the said summary offence on the information as it stands and that the prosecution is entitled to proceed on the said information.

53. Accordingly, the objection raised by the defence is over-ruled and rejected.

At Suva

19th September, 2022.

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for both the Accused.