

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL MISC. NO. 116 of 2022

BETWEEN : **HAROON ALI SHAH**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Applicant in person.
: Mr. A. Singh for the Respondent.

Date of Submissions : 05 August, 2022

Date of Hearing : 05 September, 2022

Date of Ruling : 19 September, 2022

RULING

BACKGROUND INFORMATION

1. The applicant with three others face a count of failure to comply with orders contrary to section 69 (3) of Public Health Act 1935 and Regulation 2 of Public Health (Infectious Diseases) Regulation 2020.

2. It is alleged that on the 28th March, 2020 the applicant with three others entered into greater Lautoka area and disobeyed the lawful order issued by Permanent Secretary for Health and publicly announced by the Prime Minister prohibiting entry into greater Lautoka area.
3. The applicant pleaded not guilty to the charge and on 1st April, 2022 the matter proceeded to trial. The prosecution called one witness and at the end of the prosecution case the applicant made an application for no case to answer.
4. On 26th April, 2022 the learned Magistrate ruled that all the accused persons had a case to answer as charged. On 17th May, 2022 the applicant wrote a letter to the Magistrate's Court requesting that a case be stated for the High Court's consideration in the following terms:

“Does the Magistrate's Court have jurisdiction to try and/or convict for an offence that is not operative at law during the alleged date of commission of the said alleged offence as contained in the particulars of the charge.”

5. On 28th June, 2022 the application for the Magistrate's Court to state and sign a special case for the opinion of the High Court was dismissed.

APPLICATION TO THE HIGH COURT

6. The applicant being aggrieved by the decision of the Magistrate's Court in accordance with section 270 of the Criminal Procedure Act filed a timely application by a notice of motion supported by the applicant's affidavit sworn on 29th June, 2022 seeking the following orders:

1. *That the Learned Magistrate namely Ms. Senikavika Jiuta Resident Magistrate do state a case pursuant to section 266 of the Criminal Procedure Act as per the Applicant's letter of 17th May, 2022 addressed to the said Magistrate.*
 2. *That the Learned Magistrate do hold all further proceedings until the determination of this here application.*
 3. *That such other orders as is permitted under section 270 of the Criminal Procedure Act and the Inherent Jurisdiction of this Honourable Court.*
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7. The application by the applicant is opposed by the state. The state did not file any affidavit in reply but relied on the submission of state counsel.
 8. The applicant and the state counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

SUBMISSIONS BY THE APPLICANT

9. The applicant as per paragraph 17 of his affidavit and orally argued the following:
 - i. *The law did not exist which created an offence under section 69 (3) of Public Health Act, 1935 and Regulation 2 of Public Health (Infectious Diseases) Regulations, 2020.*
 - ii. *Consideration of Gazette No. 32 was totally erroneous by the learned Magistrate as no mention of it is made in the statement or particulars of offence.*
 - iii. *The Learned Magistrate fell into an error by completely failing to appreciate that section 69 (3) deals with powers only and there are*

approximately 19 sub-sections. The Learned Magistrate failed to realize that there was no mention of any Particulars of powers as contained in the sub-sections. Thus, the final amended charge was deficient in this regard.

- iv. That further, regulation 2 of the Public Health (Infectious Diseases) Regulations 2020 came into force on the 30th March, 2020. As against the most obvious the charge alleged the offence was committed on 28th March, 2020. The Learned Magistrate for reasons not known or explained held that it did not matter and said the offence was committed under Gazette 32, which was not pleaded in the amended charge.*

SUBMISSIONS BY THE RESPONDENT

10. The state counsel argued that section 266 of the Criminal Procedure Act is akin to section 246 (7) of the Criminal Procedure Act the current position of the proceedings is that the learned Magistrate has only delivered her case to answer ruling which does not bring the matter to a finality. Therefore it is premature of the applicant to ask that a case be stated for the High court to determine the issue raised.

DETERMINATION

11. It is important to consider the provision of the law that governs case stated by the Magistrate's Court to the High Court. Section 266 of the Criminal Procedure Act states:

Case stated by Magistrates Court

266.-(1) After the hearing and determination by any Magistrates Court of any summons, charge or complaint, if either party to the proceedings is dissatisfied with the determination as being-

- (a) *erroneous in point of law; or*
- (b) *in excess of jurisdiction, or*

the party may make written application to the Magistrates Court within 1 month from the date of the determination, for the Magistrates Court to state and sign a special case setting forth the facts and the grounds of such determination for the opinion on the matter of the High Court.

(2) Upon receiving an application under sub-section (1), the magistrate shall promptly draw up the special case and transmit it to the Chief Registrar of the High Court together with a certified copy of the conviction, order or judgment appealed from and all documents referred to in the special case and the provisions of section 253 shall apply.

(3) If the Magistrates Court of its own motion wishes to refer any determination by it to the High Court on a point of law, the Magistrate may, within 1 month from the date of such determination, state and sign as special case setting forth the point of law for the opinion of the High Court,

(4) Where a Magistrate decides to act under sub-section (3), the Magistrate shall promptly transmit the special case to the Chief Registrar of the High Court together with a certified copy of the conviction, order or judgment appealed from and all documents referred to in the special case and the provisions of section 253 shall apply.

12. The applicant has correctly brought this application before this court under section 270 of the Criminal Procedure Act which states as follows:

Procedure on refusal of magistrate to state case

270.-(1) When a magistrate has refused to state a case it shall be lawful for the appellant to apply to the High Court within 1 month of the refusal, upon an affidavit of the facts, for a ruling calling upon the magistrate and the respondent to show cause why the case should not be stated.

(2) The High Court may make its ruling under sub-section (1) absolute or may discharge it, with or without payment of costs, and the magistrate, upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognisance [as] provided by this section.

13. It is important to note that the purpose of a case stated from the Magistrate's Court to the High Court is to hear and determine the question or questions of law arising in the case stated. Section 266 of the Criminal Procedure Act needs to be cautiously read with particular attention to the opening sentence "After the hearing and determination by any Magistrate's Court of any summons, charge or complaint..."
14. In my considered judgment there is no ambiguity in the sentence construction, the language or the words used. The ordinary dictionary meaning of the words mentioned above is that the charge (as in this case) has to be heard and determined first. Thereafter the learned Magistrate can either upon application or on its own motion consider whether there is any question of law that needs to be referred to the High Court as case stated.
15. Section 275 of the Criminal Procedure Act supports the above by stating the contents of the case stated. The contents clearly mention the completion of the trial before a case can be stated to the High Court on a question of law only. A case stated by the Magistrate's Court under section 266 of the Criminal Procedure Act is different to appeals filed under section 246 of the

Criminal Procedure Act. Under section 246 an appellant is at liberty to argue both questions of law and facts whereas a case stated is only confined to a question of law. In both instances the matter in the court of first instance has to be heard and determined resulting in a finality.

16. In order words there has to be a final decision made by the learned Magistrate which is either reviewable or appealable for the High Court to exercise its jurisdiction. At the present time the trial in the Magistrate's Court is not complete with a ruling given that the applicant and others charged with him have a case to answer. The trial has to be complete before any determination can be made by the Magistrate's Court which will then enable the aggrieved party on grounds of:

a) erroneous point of law; or

b) in excess of jurisdiction;

to apply to the Magistrate's Court to state and sign a special case setting forth the facts and the grounds of such determination for an opinion on a question or questions of law by the High Court.

17. The reason for the above is to avoid delay in finality of charges and fragmentation of the trial. In the case of *Asif Ismail vs. State [2018] FJHC 794; HAA01.2018 (22 August 2018)* this court had made a similar observation in respect of section 246 (7) of the Criminal Procedure Act from paragraphs 15 to 23 as follows:

15. *Section 246 (1) begins with the following:*

"Subject to any provision of this Part to the contrary..."

16. *The above sentence states that section 246 (1) is subject to any provision in Part XV – Appeal from Magistrates Courts which includes*

the entire section 246 of the Criminal Procedure Act. Section 246 (7) specifically states that “no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person”.

17. *In my view section 246 (7) literally means an accused person’s guilt is not finally determined until that accused is sentenced. The entering of a conviction is a step towards finality of guilt but not the final determination of guilt. It is only when an accused is sentenced that his or her guilt is finalized not before that. This provision should be given a wide interpretation to achieve its purpose which is to consider appeals from the final determination of a matter in the Magistrates Court.*

18. *Cooke J. said in Reid v Reid [1979] 1 NZ LR 572 at 594 that the literal rule of interpretation was defined and explained by Higgins J. in Amalgamated Society of Engineers v Adelaide Steamship Co Ltd [1920] HCA 54; (1920) 28 CLR 129 at p. 161-162 as follows:*

“The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.”

19. *For the above reasons, the Petition of Appeal filed by the appellant is premature and is not properly before the court. This court therefore has no jurisdiction to hear this appeal. As it is, the proceedings in the Magistrate’s Court is still pending once that court is ceased with the*

matter upon sentence of the accused then only the appeal period shall begin. The Petition of Appeal filed is an interlocutory appeal and there is no right of an appeal provided for under the law.

20. *There is no need for this court to consider the merits of the grounds of appeal.*
 21. *Before I leave it is important to mention that the legislative drafters would have never contemplated “piece meal” appeals from the Magistrates Court to the High Court. If the legislation had allowed a right of appeal after an accused was convicted and before a sentence was pronounced a chaotic situation would have arisen.*
 22. *An accused would delay sentencing in the Magistrate’s Court until his or her appeal against conviction was decided by the High Court and then exercise another right of appeal against sentence. The justice system would be clogged to the extent that the general public and the victims would lose confidence in the judicial system.*
 23. *It can never be the intention of the legislature to allow for such appeal procedures. An accused has a locus standi to appeal against his or her conviction or sentence or both after a sentence had been delivered. Any appeal filed by an appellant before being sentenced will be without any legal basis and therefore premature.*
18. Furthermore, it is to be noted that section 329 of the repealed Criminal Procedure Code is similarly worded to the current section 266 of the Criminal Procedure Act. In *Land Transport Authority vs. Hemendra Vishwa, Ilango & Kailesh Prasad [2003] HAM 31 of 2003 (12 November, 2003* Shameem J. stated as follows:

There appears to be no procedure available for a magistrate to refer a matter to the High Court for determination of his or her own motion. This is unfortunate. Referring a question of law to the High Court may be a responsible and sensible option for a magistrate to choose to take. There may be several reasons, possible delay being one of them, why the parties might prefer not to make an application under section 329.

...Further section 329 pre-supposes that a determination has been made on a summons, charge or complaint. In this case no such determination was made, the learned Magistrate preferring to refer the matter to the High Court before she had made a decision on the application for withdrawal of charges.

In the circumstances I find that I have no jurisdiction to consider this application. If however the Magistrate proceeds to make a decision, the appellate and revisionary jurisdiction of this court may also be available to the parties and the court.

CONCLUSION

19. For the above reasons, this court has no jurisdiction to hear the application filed by the applicant.

ORDERS

1. The application for the Magistrate's Court to state and sign a special case for the opinion of the High Court is dismissed due to lack of jurisdiction;

2. The stay of proceedings in the Magistrate's Court issued by this court on 4th July, 2022 is hereby set aside;
3. The Magistrate's Court is to proceed to determination in accordance with the law.



Sunil Sharma
Judge



At Lautoka
19 September, 2022

Solicitors

Applicant in person.
Office of the Director of Public Prosecutions for the Respondent.