

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL MISC. NO. HAM 201 OF 2022

BETWEEN : **NITIN NITESH NAIR**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. J. Boseiwaqa and Mr. S.A. Koya for the
Applicant.
: Ms. R. Uce for the Respondent.

Date of Hearing : 19 January, 2023
Date of Judgment : 20 January, 2023

JUDGMENT ON NOTICE OF MOTION SEEKING
REVIEW

BACKGROUND INFORMATION

1. The applicant by Notice of Motion dated 5th December, 2022 supported by his own affidavit sworn on the same date seeks the following orders:

- a). *That the Magistrates' Court ruling on No Case To Answer dated the 11th day of November 2022 in the Nadi Magistrates' Court Criminal Case No. 846 of 2017 be reviewed.*
- b). *That the proceedings before the Nadi Magistrates' Court being Criminal Case No. 846 of 2017 be stayed until the determination of the Application herein.*
- c). *That time and service of this Notice of Motion be abridged.*

2. This application is made pursuant to section 260 and 262 of the Criminal Procedure Act 2009 and the inherent jurisdiction of the High Court. The applicant faces one count of indecent assault contrary to section 212 (1) of the Crimes Act at Magistrate's Court, Nadi. The applicant pleaded not guilty and the matter proceeded to trial. The prosecution after calling two witnesses closed its case. The defence made a no case to answer application.
3. On 11th November, 2022 the learned Magistrate ruled that the applicant had a case to answer on the evidence adduced by the prosecution.
4. The applicant aggrieved by the decision of the learned Magistrate filed an application in this court seeking a revision of the ruling on no case to answer delivered by the Magistrate's Court.
5. The application filed is opposed by the state, the state counsel did not file any affidavit in reply but made submissions in support. The main thrust of the argument raised by the state is that the application for the exercise of the revisionary powers of the High Court in the circumstances of the case is premature and lacks jurisdiction.

LAW ON REVIEW

6. Section 260 of the Criminal Procedure Act states:

(1) The High Court may call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to —

(a) the correctness, legality or propriety of any finding, sentence or order recorded or passed; and

(b) the regularity of any proceedings of any Magistrates Court.

(2) The High Court shall take action under sub-section (1) upon the receipt of a report under the hand of the Chief Justice which requests that such action be taken. (my emphasis)

7. The power of revision or review is provided for by section 262(1) of the Criminal Procedure Act whereby the High Court may in the case of a conviction exercise any of the powers conferred upon it by section 256 and 257 of the Criminal Procedure Act. In the case of any order other than an order of acquittal made by the Magistrate's Court, this court may make an order to alter or reverse the order of the lower court.

8. Section 262 of the Criminal Procedure Act states:

(1) In the case of any proceedings in a [Magistrates Court] the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 256 and 257; and

(b) in the case of any order other than an order of acquittal, alter or reverse such order.

(2) No order under this section shall be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by a lawyer in his or her defence.

(3) The High Court shall not impose a greater punishment for the offence, which in the opinion of the High Court the accused has committed, than might have been imposed by the court which imposed the original sentence.

(4) Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction.

(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

SUBMISSIONS

9. As per the order of this court both counsel filed helpful written submissions and also made oral submissions during the hearing for which this court is grateful.
10. The applicant's counsel argued that this court has inherent jurisdiction and also pursuant to section 262 of the Criminal Procedure Act the jurisdiction to hear and allow the application filed in order to remedy an injustice. Counsel submitted that this court can therefore review the interlocutory order delivered by the Magistrate's Court.
11. Counsel relies on the comments made by the Court of Appeal in *The State vs. Vishal Chand and two others*, AAU 0085 of 2012 (28 May, 2015) in particular paragraph 26 inter alia:

"...The High Court's inherent powers exist to remedy an injustice when the proceedings are alive in the Magistrates' Court. Inherent jurisdiction cannot be exercised when the proceedings have come to an end in the Magistrate's Court."

12. The applicant's counsel also raised that the High Court in *State vs. Lemeki Tabusoi HAC 168 and 180 of 2016, (03 November, 2016)* had in exercise of its revisionary powers set aside the no case to answer ruling of the Magistrate's Court pursuant to section 262 (1) (b) of the Criminal Procedure Act.
13. Finally, the applicant's counsel submitted that the ruling on no case to answer delivered by the learned Magistrate is improper since it contains a wrong offence mentioned in paragraphs 10 to 12. Asking the applicant to put forward his defence in the circumstances would be prejudicial. Counsel further added that prejudice would creep in because the applicant would not receive a fair trial if proper procedures were not followed. According to counsel one cannot be expected to be charged for one offence, at trial the prosecution adduces evidence for the charged offence but the ruling delivered mentioned a totally different offence was a serious short coming.
14. Counsel further stated that it will be incorrect and prejudicial for the applicant to have to answer to an offence he had not pleaded to. It is therefore crucial that this court intervenes and correct the legality and propriety of the ruling delivered.

DETERMINATION

15. At the outset it is important to mention that the inherent jurisdiction of the High Court is to be exercised sparingly in exceptional circumstances. There are established instances in which this jurisdiction is exercised by the principal court. Any application for the review of interlocutory orders of the lower courts should be viewed with extreme care so as not to impede or delay justice in that court.
16. Over the years the jurisprudence that has developed makes it clear that the primary consideration for the use of inherent jurisdiction of the High Court is to prevent the abuse of the court processes and for the effective administration of justice. The Court of Appeal in *Chand's* case (supra) has provided the following guidance and pertinent observations from paragraphs 13 to 17 in respect of the application of inherent powers of the High Court:

Paragraph 13

The inherent powers, on the other end, are ancillary powers, which are necessary to enable the Courts to act effectively within their jurisdiction as explained by Richmond J in Taylor v Attorney – General (1975) 2 NZLR 675 at p.682:

“But when one speaks of the ‘inherent jurisdiction’ of the Court to make orders of the kind now in question the problem really becomes one of powers ancillary to the exercise by the Courts of their jurisdiction in the primary sense just described. Many such ancillary powers are conferred then by statute or by rules of court, but in so far as they are not so conferred then they can only exist because they are necessary to enable the Courts to act effectively within their jurisdiction in the primary sense.”

Paragraph 14

The purpose of the inherent powers was also explained in by Lord Morris of Borth-y-Gest in R v Connelly (1964) 48 Cr App R 183 at 206-207:

“There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rule of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.”

Paragraph 15

In Shah v Nand (unreported Misc. Case No. HAM0018 of 2003S; 30 April 2003), the applicant had commenced a private prosecution against the respondent in the Magistrates’ Court. In the course of that prosecution, the learned Magistrate made orders adverse to the applicant. The applicant then moved to invoke the inherent jurisdiction of the High Court to review the orders made by the Magistrates’ Court. Shameem J refused to grant relief for the following reasons at p 4:

“Given the nature of the orders sought, I cannot agree that I have jurisdiction to entertain this application. The orders are not necessary for the effective administration of justice or to prevent the abuse of the process of this Court. Further, to entertain a review of the learned Magistrate’s decision in this manner, would be to fly in the face of section 325 of the Code which provides that where a right of appeal exists, a party may not seek review.”

Paragraph 16

In State v Naitini (aka George Speight) (unreported Criminal Appeal No. HAA93 of 2000; 4 January 2001) the State applied to invoke the inherent

jurisdiction of the High Court to set aside certain pre-committal hearing orders of the Magistrates' Court under the inherent jurisdiction of the High Court. The nature of the inherent jurisdiction of the High Court was explained by Shameem J at p 6:

"In summary therefore, the High Court may use its original inherent powers to prevent an abuse of its own processes, to regulate proceedings validly brought before it, to stay proceedings in the subordinate courts to protect proceedings brought in the High Court and to ensure that justice is properly administered. However any exercise of that power affecting proceedings in the lower courts, should be sparing and exceptional, and must be limited to the legality and the propriety of decision made in the subordinate courts."

Paragraph 17

In Naitini, Shameem J refused to invoke the inherent powers of the High Court saying that the State's complaints rested with the appellate jurisdiction of the High Court and statue allowed the State to appeal.

17. Furthermore, I direct my attention to paragraph 26 in *Chand's* case (supra) in particular to the observations that the inherent powers of the High Court exists to remedy an injustice when the proceedings are alive in the Magistrate's Court. In my judgment the comments made by the Court of Appeal cannot be read in isolation, the facts in *Chand's* case are distinguished from the current case.
18. In *Chand's* case the Court of Appeal was considering an appeal from the decision of the High Court to review and quash the order of discharge made by the Magistrate's Court by substituting an order of acquittal using its inherent powers. The Court of Appeal held that the High Court had acted without jurisdiction when it reviewed and quashed the order of discharge made by the Magistrate's Court. The state's appeal was dismissed for want

of jurisdiction since the Court of Appeal Act did not have any provision for appeal of orders made under the inherent jurisdiction of the High Court.

19. Here the situation is different from *Chand's* case hence in my judgment the comments of the Court of Appeal at paragraph 26 (as stated in paragraph 17 above) were *obiter dicta*. There is no dispute that section 260 of the Criminal Procedure Act is the enabling and empowering provision for the exercise of revisionary jurisdiction by the High Court. The power of revision does not come into being until a report is received under the hand of the Chief Justice who requests that such action be taken.
20. In the application before this court the Chief Justice did not invoke his powers for a review of the ruling delivered by the Magistrate's Court. Moreover, section 262 of the Criminal Procedure Act does not exist on its own but is a follow on provision to section 260. Section 262 mentions the powers of the High Court on revision which comes into being only after the Chief Justice has sanctioned the revision.
21. Furthermore, in *Tabusoi's* case (*supra*) the facts are distinguished as well. The learned Magistrate had in his no case to answer ruling for two counts of unlawful cultivation of illicit drugs contrary to section 5 (a) and (b) of the Illicit Drugs Control Act mentioned that the Magistrate's Court had no jurisdiction to hear the matter hence the proceedings conducted in the Magistrate's Court was a nullity.
22. The two files from the Magistrate's Court were transferred to the High Court pursuant to section 194 (c) of the Criminal Procedure Act. Upon due consideration of the transfer order and the relevant provisions of the applicable law the learned Judge came to the conclusion that the Magistrate's Court had the jurisdiction to hear the matter hence he

remitted the files back to the Magistrate's Court for continuation of the hearing.

23. Here it is the applicant who is making an application seeking orders under the revisionary and inherent jurisdiction of the High Court in the absence of any sanction by the Chief Justice and also notwithstanding the fact that the applicant has a right of appeal after the final determination of the matter as per section 246 (7) of the Criminal Procedure Act. In view of the above the applicant does not have any locus in the present application.
24. Moreover, upon perusal of the ruling delivered by the learned Magistrate there is no doubt that paragraphs 10 to 12 have nothing to do with the charge of indecent assault. For completeness the relevant paragraphs are reproduced herewith:

Paragraph 10

*The accused in this case is charged with one count of **Failed to supply sufficient sample for breath analysis upon the direction of a police officer** contrary section 103(1) and 114 of Land Transport Act 35 of 1998.*

Paragraph 11

Section 103 (1) (b) of the Land Transport Act reads as follows:

(1) A person who –

(b) fails or refuses to undergo a breath test or breath analysis when required to do so by a police officer, commits an offence.

Paragraph 12

Accordingly, to prove the offence of **Failed to supply sufficient sample for breath analysis upon the direction of a police officer**, against the accused in this case the prosecution must prove the following elements beyond reasonable doubt;

- a) That **the accused in this case** has been directed by a police officer to provide a sufficient sample of breath for analysis;
- b) That the accused **has failed or refused** to provide a sufficient sample of breath for analysis.

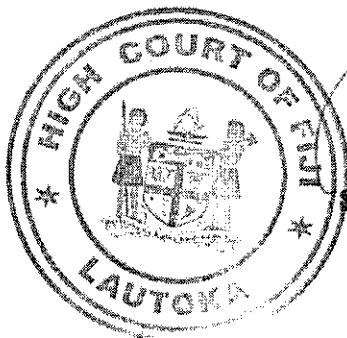
SUPERVISORY JURISDICTION


25. Although the applicant's counsel has filed an application for review or revision the proper application in my view should have been to seek directions under the supervisory jurisdiction of the High Court. However, after considering the urgency of the matter this court can exercise its supervisory jurisdiction (as opposed to inherent jurisdiction) by issuing directions with the view to correct an inadvertent oversight in paragraphs 10, 11 and 12 of the ruling delivered by the Magistrate's Court on 11th November, 2022. Section 100 (6) of the Constitution of Fiji gives this court the power to intervene under its supervisory jurisdiction. Section 100 (6) provides:

The High Court has jurisdiction to supervise any civil or criminal proceedings before a Magistrates Court or other subordinate courts and may, on an application duly made to it, make such orders, issue such writs and give such directions as it considers appropriate to ensure that justice is duly administered by the Magistrates Court and other subordinate courts.

CONCLUSION

26. The application for the exercise of revisionary and inherent jurisdiction of the High Court is dismissed for want of jurisdiction. In accordance with section 100 (6) of the Constitution of Fiji and in the interest of justice this court under its supervisory jurisdiction issues the following directions:
- (a) The Magistrate's Court is hereby directed to deliver an amended ruling on no case to answer in criminal action no. 846 of 2017 within seven days from today;
 - (b) Upon compliance with (a) above the ruling on no case to answer dated 11th November, 2022 will be deemed withdrawn for all purposes;
 - (c) The substantive file in the Magistrate's Court is to be called on 27th January, 2023 for the amended ruling to be delivered and further directions (if any) may be issued by the Magistrate's Court in the proceedings;
 - (d) The applicant is to appear in the Magistrate's Court on the above mentioned date as part of his bail conditions.




Sunil Sharma
Judge

At Lautoka
20 January, 2023

Solicitors

Messrs Siddiq Koya Lawyers, Nadi for the Applicant.
Office of the Director of Public Prosecutions for the State.