DIRECTOR OF PUBLIC PROSECUTIONS

A

v.

JACK HERITAGE

[SUPREME COURT, 1976 (Grant C.J.), 14th May]

B

Criminal Jurisdiction

Appeal—application to enlarge period of limitation for appealing from a decision of the Magistrate's Court—procedure—Criminal Procedure Code (Cap. 14) s. 291(1).

Where an applicant seeks to enlarge the period of limitation within which to
C appeal from a decision of the Magistrate's Court, he should first apply to that Court before making an application to the Supreme Court. At any application before either court, the magistrate or judge must exercise his discretion judiciously and not fancifully, and the Supreme Court should not lightly differ from the decision reached upon the application by the Magistrate's Court.

Per curiam: 1. The decision in *Isad Ali v. Reginam* 6 F.L.R. 1 was wrongly based
D on a judgment of the Supreme Court of Kenya which had no application to Fiji and did not represent its law.

2. There was no formal procedure set out in the Criminal Procedure Code relating to the application for enlargement; there was no need for any affidavits or documentation to be lodged beyond the application itself which might in some
E instances be verbal, and in the majority of cases no affidavits or even presence was required of the respondent. The decision in *Director of Public Prosecutions v. Jikar Ali* 21 F.L.R. 115 did state that documents in support of the application were necessary, but this was too formal an approach on the part of the judge in that case.

Other cases referred to:

F *R. v. Rudra Nand and Anor;* Lautoka Criminal Appeal 115 of 1974—unreported.

Application by the Director of Public Prosecutions for enlargement of the fourteen day period of limitation within which to lodge an appeal from the Magistrate's Court.

GRANT C.J. [14 May 1976]—

G

This is an application by the Director of Public Prosecutions under the proviso to section 291(1) of the Criminal Procedure Code for enlargement of the fourteen day period of limitation within which an appeal from the decision of a Magistrate's Court should be lodged.

In April 1976 a similar application was made in the appropriate Magistrate's
H Court which was unsuccessful.

To dispose of confusion arising from the decision in *Isad Ali v. Reginam* 6 F.L.R. 1, this was wrongly based on a judgment of the Supreme Court of Kenya which turned

on the particular wording of a section of the Kenya Criminal Procedure Code specifically providing that once an application was made to a subordinate court and refused by that court no further application lay to the Supreme Court but that the applicant could appeal against such refusal to one judge of the Supreme Court sitting in chambers. The procedure to be followed in Kenya was statutorily prescribed and a right of appeal provided which would not otherwise lie. This is of no application to Fiji which has no corresponding provision. The decision does not correctly represent the law in Fiji and should not be followed. No right of appeal lies, and there is no question of an applicant having to elect whether to pursue his application in the Magistrate's Court or the Supreme Court. However an application to the Supreme Court should only be entertained where an applicant has exhausted his remedies by first having unsuccessfully applied to the Magistrate's Court in question which should be disclosed in the affidavit in support of his application to the Supreme Court; and the Supreme Court will not lightly differ from the decision of the Magistrate's Court.

The previous history of this matter is that on the 23rd February 1976 the respondent was convicted on his own plea of two offences at Ba Magistrate's Court and was ordered to enter into a bond to keep the peace and be of good behaviour on each count. The case was not prosecuted by the Director of Public Prosecutions, nor by a legal officer authorised by him to be a Crown counsel (under the provisions of section 72 of the Criminal Procedure Code and the definition of "public prosecutor" in section 2(1) of the Criminal Procedure Code), but by police officer (under the provisions of section 76 of the Criminal Procedure Code). At the conclusion of the trial and on the same day the police prosecuting officer, following normal channels of communcation referred the police file to the Divisional Crime Officer Western, stationed at Lautoka, who reviewed the case and on the 8th March referred the file, with his recommendation that there should be an appeal against sentence, to the Director of the Criminal Investigation Department, stationed at Suva. The Director received the file by air on the 9th March and on the 11th March forwarded it to the Director of Public Prosecutions, stationed at Suva, with his recommendation endorsing that of the Divisional Crime Officer. The Director of Public Prosecutions received the file on the 16th March (a weekend plus a public holiday having intervened) and by the 18th March the petition of appeal was prepared and signed by the Director of Public Prosecutions. The documents were then forwarded to Crown counsel, stationed at Lautoka, and were received by him on the 20th March. Crown counsel was given to understand that an affidavit in support of the application would be required by Ba Magistrate's Court, and he deposed to an affidavit on the 26th March and filed it at Ba Magistrate's Court. The application was heard at Ba Magistrate's Court on the 5th April and adjourned to the 6th April to enable an amended affidavit to be presented. On the 6th April the hearing of the application was continued during which there were some matters in contention, including the fact that the magistrate, through excess of caution, recorded that the respondent was opposing the application although the respondent made it perfectly clear that he did not wish to say anything regarding the application; and the fact that certain counsel who were in court at the time of the application but who were not in any way concerned in it were invited to express their views. I am not surprised that the respondent had nothing to say regarding the application as it is difficult to envisage what he could possibly have said that was relevant or why his presence was required. It is for the applicant to show good cause, and it is for the court to decide whether the grounds put forward by the applicant constitute good cause. There may be cir-

cumstances in which the court considers it necessary to hear from the respondent but this must be the exception rather than the rule. As to the intervention of counsel who were not concerned in the application, this would not have arisen had the matter been dealt with in chambers, which is the usual forum for an application of this type. However, the main misunderstanding appears to have been caused by certain comments contained in the judgment of the Supreme Court in *R. v. Rudra Nand and Daya Ram* (Lautoka Crim. App. No.115/74) as amplified in a judgment of the Supreme Court in the *Director of Public Prosecutions v. Jikar Ali* (21 F.L.R. 115). In the former judgment, dealing with a situation in which a magistrate had failed to record anything on the case file but had simply noted at the foot of a letter that leave to appeal out of time was granted without even stipulating the extended date by which the appeal should be lodged, it was held than on an application before a magistrate for enlargement of the period within which an appeal must be lodged "A serious and lawful approach is necessary and such situations are not to be treated casually and without regard for the law". In the latter judgment, these words were treated as meaning that an affidavit or some other document should be filed in support of an application by the Director of Public Prosecutions. In my judgment, with respect, this was an unwarranted gloss on the words used in the former judgment which meant no more than that a magistrate must approach the matter judicially and not fancifully. If a formal procedure was to be adopted it would have to be of general application, and it would be most unreasonable to expect an accused who had been committed to prison to arrange for an affidavit to be prepared and to have it sworn before a commissioner for oaths. No such procedure is contemplated by the Criminal Procedure Code or any rules made thereunder, and no such procedure is necessary on an application to a Magistrate's Court as distinct from the Supreme Court. It is quite usual when a magistrate is a visiting justice for a prisoner to ask him for leave to appeal out of time, whereupon he arranges for the prisoner to be brought to chambers where he hears the application, noting the grounds on which an enlargement is sought, whether or not the application is granted and if it is the date to which the period of limitation is enlarged. That is enough, so long as the information before the magistrate is sufficient to enable him to exercise his discretion judicially; and it would be quite wrong to place artificial restrictions in the way of a person who has good cause for appealing out of time or to allow mere technicalities to stand in the way of justice. There may be circumstances in which a magistrate, to enable him to exercise his discretion judicially, requires an affidavit to be filed and/or requires the other party to the proceedings in respect of which the appeal relates to be present, but in normal circumstances this should not arise.

It is quite clear on the facts of this application that there was no undue delay either on the part of the police or on the part of Director of Public Prosecutions. The position is analogous to that envisaged by section 291(2)(a) of the Criminal Procedure Code as being "good cause", namely a case where the barrister and solicitor engaged by the appellant was not present at the hearing before the Magistrate's Court and for that reason requires further time for the preparation of the petition. It is apparent that in a case prosecuted by the police outside the Central Division it is well nigh impossible for the Director of Public Prosecutions to lodge an appeal within fourteen days; and in view of this it is probable that in the near future favourable consideration will be given, in the appropriate quarter, to enlarging the fourteen day period prescribed by section 291(1) of the Criminal Procedure Code to twenty-eight days, so as to reduce the number of occasions on which the Director of Public Prosecutions is obliged to apply for enlargement. Be that as it may, each.

application must be dealt with on its merits and I am satisfied that the Director of Public Prosecutions has shown good cause for the period of limitation being enlarged. A

The period of limitation is accordingly enlarged so as to enable the appeal to be lodged no later than the 21st day of May 1976.

Application granted; period of limitation enlarged.

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