JOSEFA NATA v STATE

COURT OF APPEAL — CRIMINAL JURISDICTION

SHEPPARD, TOMPKINS and SMELLIE, JJA

28, 31 May 2002

[2002] FJCA 75

Practice and procedure — motions — what constitutes final judgment — want of jurisdiction — appeal — Penal Code (Cap 17) s 50 — 1997 Constitution ss 121, 121(2), 195, 195(2), 195(2)(e) — Court of Appeal Act (Cap 12) ss 3(2), 21.

The State filed a notice of motion for an order that the appeal by Josefa Nata (Appellant) be dismissed for want of jurisdiction. The Appellant was charged by the High Court for the crime of Treason. The ground for the appeal was that the crime of Treason is not known to the law of Fiji.

Held — (1) There are two schools of thought as to what constitutes a final judgment. The two approaches have been characterised 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. The application approach looked to the application rather than the order actually made as giving identity to the order. In the present case nothing turns on these considerations because it is 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.

(2) The order would not be final unless the entire cause or matter would be finally determined by the court. There is no final judgment here so that no right of appeal is conferred either by the Constitution or the Court of Appeal Act.

Notice of motion allowed.

Appeal dismissed.

Cases referred to

Charan v Shah Civil Appeal No 29/1994, cited.

White v Brunton [1984] QB 570, distinguished.

M. Waqavonovono for the Appellant

P. M. Ridgway for the Respondent

Judgment

Sheppard PJ, Tompkins and Smellie, JJA. To be dealt with is 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 is brought against a judgment of the High Court (Wilson J) in which his Lordship rejected a submission made on behalf of the Appellant that the crime of Treason, with which the Appellant has been charged, is 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 charge against the Appellant was brought pursuant to the provisions of s 50 of the Penal Code (Cap 17). Section 50 is headed with the words, "Treason by the law of England". It provides:

50. Any person who compasses, imagines, invents, devises or intends any act, matter or theory, the compassing, imagining, inventing, devising or intending whereof is treason by the law of England for the time being in force, and expresses, utters or declares such compassing, imagining, inventing, devising or intending by publishing any printing or writing or by any overt acts or does any act which if done in England, would be deemed to be treason according to the law of England for the time being in force, is guilty of the offence termed treason and shall be sentenced to death.

In brief the argument advanced on behalf of the Appellant is that since Fiji became a Republic in 1987, the section has had no force or effect. Reliance was placed particularly on the words, "treason by the law of England for the time being in force".

The present Constitution of Fiji came into force in 1997. It was amended by the Constitution Amendment Act (No 5 of 1998). Section 195 of the Constitution is headed, "Repeals and transitional". Subsection (1) of s 195 repealed the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990 and a number of other decrees promulgated in the years 1987 to 1991. Subsection 195(2) contains a number of savings provisions. Of relevance to the present proceedings is s 195(2)(e) which provides:

> *(e) all written laws in force in the State (other than the laws referred to in subsection (1)) continue in force as if enacted or made under or pursuant to this Constitution and all other law in the State continues in operation;*

It is the State's contention, a contention which the primary judge upheld, that the provisions of s 195(2)(e) of the Constitution operated to render s 50 valid and enforceable notwithstanding the change of the State to a Republic.

In a formal sense the trial of the Appellant has not yet commenced, but the primary judge has been concerned with preliminary questions including that of whether the charge is valid. As yet the Appellant has not been arraigned nor have assessors been empanelled.

The challenge made by the State to the competency of the appeal is based primarily on s 121(2) of the Constitution which provides:

> *(2) Appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any matter arising under this Constitution or involving its interpretation.*

It is submitted on behalf of the State that the judgment of the primary judge was not a final judgment and further, that there is not here a matter arising under the Constitution nor one involving its interpretation.

The Respondent also relies — its reliance was somewhat belated — on certain provisions of the Court of Appeal Act (Cap 12). Section 3(2) of that Act provides that the Court of Appeal shall have power and jurisdiction to hear and determine all appeals which lie to the court by virtue of the Constitution, this Act or any other law for the time being in force. Section 21 of the Court of Appeal Act provides for rights of appeal in criminal cases. Relevantly it provides that a person convicted on a trial held before the High Court may appeal to the Court of Appeal against his conviction on any ground of appeal which involves a question of law alone. The appeal in the present case is an appeal on a question of law. Section 21 also provides that an appeal will lie with the leave of the Court of Appeal or upon the certificate of the judge who tried the accused that it is a fit case for appeal against his conviction on a ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the court to be a sufficient ground of appeal. In either

case it is to be noted that no appeal lies unless there has been a conviction. The section therefore applies only where there is a final judgment. It follows that the provisions of the Constitution and those of the Court of Appeal Act are to the same effect except that s 121 of the Constitution will not enable the appeal to be brought unless, in addition to there being a final judgment, there is a matter arising under the Constitution or involving its interpretation.

In the present case we have reached the conclusion that the Respondent's motion should succeed not because we necessarily think that there is no matter arising under the Constitution or involving its interpretation but because we are firmly of opinion that there is no final judgment.

In the run of the argument it emerged that there have developed two schools of thought as to what constitutes a final judgment. The two approaches have been characterised as "the order approach" and "the application approach".

In the context of civil litigation this matter was been discussed by this court in *Charan v Shah* Civil Appeal No 29 of 1994. There the court said (at 3) that neither the term final order nor the term interlocutory order had been defined by statute in Fiji. The court pointed out that before 1988 there was no statutory assistance provided in England and the courts had been required to undertake the task of identification by reference to the general principles underlying the common law. The English courts found that there were two possible alternative approaches, the "order approach" and the "application approach". These terms were explained as follows. 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. Although the "order approach" was preferred by the English Court of Appeal in some early decisions, it was the "application approach" which prevailed. By 1984 that court had no doubt of that when it gave its judgment in *White v Brunton* [1984] QB 570.

The judgment in *White* was given by Lord Donaldson MR. His concern was plainly with trials of civil matters without a jury. What his Lordship set out to achieve was a situation in which issues decided in the course of a split trial could be the subject of an appeal without leave. Judgments given in respect of a split issue were thus to be regarded as final judgments. The practical outcome of *White* was that it led to, or rather confirmed, a situation in which parties dissatisfied with the court's decision on a separately heard issue could appeal as of right even though there were other issues in the case which remained to be decided. The idea of this was the expeditious despatch of the court's business and the saving of costs in substantial numbers of cases.

In the way that the matter was dealt with in the Fiji Court of Appeal in the *Charan* decision the application approach is stated a little differently from the way in which it is stated by Lord Donaldson in *White*. As mentioned, the court said that the order was treated as final only if the entire cause or matter would be finally determined whichever way the court decided the application. For that reason there seems to be a degree of unevenness between the approach of this court, or at least this court's understanding of the application approach, and that of the English Court of Appeal. It may be noted that the 1999 edition of the Supreme Court Practice (UK) refers to *White v Brunton* (see vol 1, at 644) as

deciding that an issue ordered to be tried as a preliminary issue is not a decision preliminary to a final order but is to be treated itself as a final order so that leave to appeal is not required.

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.

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.

The question whether there is here a matter arising under the Constitution or involving its interpretation was discussed. We express the provisional view that the need the court would have to consider the provisions of s 195(2)(e) of the Constitution in relation to s 50 of the Penal Code does give rise to a question of the interpretation of the Constitution. We do not, however, decide the matter because it is unnecessary for us to do so and we express no final view upon it.

It remains to mention submissions made to us by counsel for the Appellant which were said to be "in the public interest". Counsel's concern was to persuade us that we should make some remarks in the judgment which would indicate our view that the court ought to have the flexibility of deciding that it would give leave to appeal in a criminal case in relation to an issue such as is involved here or other issues which might involve a trial miscarrying if particular evidence was led or not led. Plainly it has been convenient to have such provisions in force in both New Zealand and Australia and we are of opinion that it would similarly be convenient if this court were to have jurisdiction conferred on it to entertain appeals by leave (not as of right) in cases where it deems it appropriate in the interests of the efficient despatch of business to deal with preliminary matters or even some matters which arise in the course of a trial.

However nothing that we say in this respect can affect the outcome of this case. There is, in our opinion, no final judgment here so that no right of appeal is conferred either by the Constitution or the Court of Appeal Act. Accordingly, the State's notice of motion is allowed. The appeal purportedly brought by the Respondent is dismissed. We make it clear, however, that that does not put an end to his right to complain of the finding that treason is a crime known to the law of Fiji. In the event that he is convicted of the crime, that is a matter upon which he can rely on on appeal because, if there be a conviction, there will be a final judgment and there will be a right of appeal. All we have decided is that the

course taken by the Respondent so far is premature. He must await the outcome of the trial before raising the point in this court.

In the circumstances we make no order as to costs.

In summary the orders we make are as follows:

(1) The State's notice of motion is allowed.

(2) The appeal brought by the Appellant is dismissed without prejudice to his right to raise the same matter in any appeal brought by him against any conviction which may eventuate as a consequence of his trial.

(3) There be no order as to costs.

Notice of motion allowed.

Appeal dismissed.