ABHAY KUMAR SINGH v STATE (AAU0009 of 2004)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, GALLEN and PENLINGTON JJ

6, 16 July 2004

Criminal law — appeals — amendments — transfer order — preliminary inquiry — electable and non-electable offences — double construction — Constitution of the Republic of Fiji 1997 — Court of Appeal Act (Cap 12) s 22(1) — Criminal Procedure (Amendment) Act No 13 2003 ss 1(2), 7, 15, 226 — Criminal Procedure Code (Cap 21) ss 220, 222, 235 — Electable Offences Decree 1998 — Penal Code (Cap 17) s 131.

The Appellant was charged with attempting to pervert the course of justice for inducing a witness in a corruption case in which he was engaged as counsel for the Accused, by giving false evidence in the pending trial or to leave the jurisdiction and be unavailable to give evidence. The case was adjourned several times. Meanwhile, the Criminal Procedure (Amendment) Act No 13 of 2003 s 1(2) took effect.

Thereafter, the prosecution applied for the case to be tried before the High Court invoking ss 220 (as recently amended) and 222 of the Criminal Procedure (Cap 21). The Appellant objected and asked the prosecution to give its reasons but was declined on the ground that the prosecution was not obliged to give any reason. Subsequently, the magistrate granted the application of the prosecution. On 20 November 2003 which was after the transfer order, the Chief Justice issued Practice Direction No 1 of 2003 relating to the transfer of cases to the High Court.

The Appellant objected to the order by appealing to the High Court but the appeal was dismissed. The High Court ruled that it was provided under s 15 of the Amendment Act that the old rule applied only to accused persons who were charged with electable offences made before 13 October 2003 which the Appellant was not charged with.

The Appellant made the following arguments: (a) the Amendment Act applied only to criminal charges filed after 13 October 2003; (b) s 15 of Amendment Act applied to all accused persons whose charges were filed before 13 October 2003, whether electable or non-electable offence; (c) the old rule in s 220 was applicable to the Appellant; and (d) s 15 of the Amendment Act was open to "double construction" and that s 220 did not have retrospective effect.

Held — The preliminary inquiry and committal proceedings were no longer available under the Amendment Act and instead changed the procedure to be followed in transferring proceedings from the Magistrates Court to the High Court. The changes gave rise to the right of the prosecutor to apply for a transfer of proceedings before the presentation of evidence and the transfer does not require a preliminary inquiry. Thus, the Amendment Act did not include the Appellant's offence to which he was charged as the charge was a non-electable offence. It was not the intention of the parliament not to include under the Amendment Act an accused person who was charged with a non-electable offence when the same took effect. The new s 220 of the Criminal Procedure Code (Cap 21) applied to the Appellant when the Amendment Act took effect on 13 October 2003. Hence, the effectivity of the Criminal Procedure Code retrospectively applied to the Appellant's case. The High Court did not err in making its decision that the prosecutor had the right to apply for a transfer of the Appellant's case to the High Court subsequent to 13 October 2003 as he was charged with a non-electable offence.

Appeal dismissed.

Cases referred to

Rajnesh Rajeshwar Prasad v State [2003] FJHC 140; *State v Preet Singh Verma* [2002] FJHC 3, cited.

Rodway v R (1990) 169 CLR 515; 92 ALR 385, considered.

G. P. Shankar for the Appellant

P. Ridgeway for the Respondent

Ward P, Gallen and Penlington JJ. This is an appeal on a question of law under s 22(1) of the Court of Appeal Act (Cap 12) as amended. It concerns the proper construction and application of the Criminal Procedure (Amendment) Act No 13/2003.

Background

The Appellant is a barrister and solicitor. He has a legal practice at Nausori. He faces three charges of attempting to pervert the course of justice. The gist of the three charges is that he attempted to induce a state witness in a corruption case, in which he, the Appellant, was engaged as counsel for the accused, to give false evidence in the pending trial or to leave the jurisdiction and be unavailable to give evidence until the trial was over. The charges are preferred under s 131 of the Penal Code (Cap 17).

The charges were filed in the Magistrates Court at Suva on 25 July 2003. The case was called in the Magistrates Court on the same day. The Appellant pleaded not guilty to all three charges. The case was then adjourned until 1 August for disclosure. It was then adjourned successively to 15 August and 18 August. On the latter date the prosecution confirmed that it wanted a further statement from a state witness. Accordingly the case was adjourned to 29 August for mention.

When the case was called on 29 August there was a discussion on the release of the Appellant's passport, this being relevant to bail. By consent the case was again adjourned, this time to 31 October for mention.

Here, it is to be noted that earlier on 18 September 2003 the President assented to the Criminal Procedure (Amendment) Act No 13/2003 s 1(2) provided that that act was to come into force on a date appointed by the minister by notice in the Gazette. In the event the Amendment Act came into force on 13 October 2003.

On 31 October the case was again adjourned by consent to 3 November for mention. On the latter date the prosecution in reliance on s 220 (as recently amended) and s 222 of the Criminal Procedure Code (Cap 21) applied for the matter to be tried in the High Court. The Appellant by his counsel objected to the transfer. He sought reasons from the prosecution. That request was declined on the ground that the prosecution was not obliged to give any reasons. The Appellant's counsel however did not dispute the powers contained in s 220. The magistrate granted the application, observing that he was now without jurisdiction. The case was adjourned until 28 November for mention in the High Court.

On 20 November 2003 which was after the transfer order, the Chief Justice the Hon Daniel Fatiaki issued Practice Direction No 1 of 2003 relating to the transfer of cases to the High Court. We shall refer to this Practice Direction later in the judgment.

The Appellant then appealed to the High Court. He challenged the order made by the magistrate on the application of the prosecution to transfer the proceeding to the High Court. The appeal came on for hearing before Shameem J on 13 February 2004. In a judgment delivered on 23 February 2004 the judge affirmed the magistrates order and dismissed the appeal.

The Criminal Procedure Code (Amendment) Act No 13/2003

The Amendment Act abolished the preliminary enquiry and committal proceedings in the Magistrates Court and made a number of changes to the procedure for the transfer of proceedings from the Magistrates Court to the High Court.

Central to this appeal are first s 220 in its old and new form and s 15, the only transitional provision in the Amendment Act.

Section 220 in its old form provided:

> 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 Supreme Court or if before the commencement of the trial an application in that behalf is made by a public prosecutor that it shall be so tried, the magistrate shall not proceed with the trial but in lieu thereof he shall hold a preliminary inquiry in accordance with the provisions hereinafter contained, and in such case the provisions of section 235 shall not apply

Section 7 of the Amendment Act amended s 220. In its new form it provides:

> 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 Supreme Court or if before the calling of evidence at the trial an application in that behalf is made by a public prosecutor that it shall be so tried, the magistrate shall not proceed with the trial but shall transfer the case to the High Court under Part VII.

It is to be noted that the changes concerned the right of the prosecutor to apply for a transfer of the proceedings from the Magistrates Court to the High Court. The effect of the amendments to s 220 was first, that an application for transfer could be made by the prosecutor before the calling of the evidence instead of before the commencement of the trial and second that the transfer would take place without a preliminary enquiry (which, of course, was consistent with other provisions in the Amendment Act which abolished the preliminary enquiry.)

Section 15, the transitional provision, provides:

> This Act does not apply to charges for electable offences pending in the magistrate's courts before the commencement of this Act except where the accused person consented to his or her case being transferred to the High Court under the new section 226

By way of explanation there are electable and non-electable offences. A list of electable offences is set out in the Electable Offences Decree 1998: see Gazette 4 March 1988. A charge preferred under s 131 of the Penal Code (the section in point in this case) is a non-electable offence.

The High Court appeal

In the High Court the Appellant relied on para 6 of the Chief Justices Practice Direction No 1 of 2003. It provides:

> The amendment Act applies only to criminal charges filed after the 13th of October 2003. Those accused persons whose charges were filed prior to that date are still entitled to the old Preliminary Inquiry procedures.

The Appellant contended that s 15 of Amendment Act applies to all accused persons where the charge was filed before 13 October 2003 (the date of the commencement of the Amendment Act) whether the charge was an electable offence or a non-electable offence. He, further contended that s 220 in its old form was applicable to the Appellant's case as he had been charged before the Amendment Act came into force and that the trial had commenced when he pleaded not guilty to the charges and that accordingly it was too late for the prosecutor to apply for a transfer.

Shameem J rejected these contentions. She found:

> Section 15 of the Amendment Act provides in very clear terms and without any ambiguity that the option to request the old procedures applied only to accused persons charged with electable offences before the 13th of October 2003. There is no dispute at all that the Appellant is not charged with electable offences. The section does not apply to non-electable offences such as murder, or to cases subject to section 220 application. Thus, even where a charge is laid before the 13th of October, 2003, a Magistrate who considers that the case is more suited for High Court trial, may order transfer under the new section 226 as long as the offence was non-electable. It follows that in this case, the prosecutor could make the application for the new-style transfer because he made it after the 13th of October 2003, and the offences are non-electable.

and a little later:

> Counsel for the Appellant suggests that this means that section 15 of the Amendment Act applies to all accused persons, whether charged with electable offences or not. With respect, I cannot agree. A Practice Direction cannot amend legislation. Section 15 clearly applies only to accused persons charged with electable offences. Paragraph 6 of the Practice Direction must therefore be assumed to apply to those accused persons specified in section 15 of the Amendment Act. It does not apply to the Appellant.

The judge having reached these conclusions found it unnecessary to consider the question of whether the trial had commenced with the plea of not guilty. She observed however that the argument of the Appellant had not persuaded her to depart from her decision made in respect of the old s 220 in *Rajnesh Rajeshwar Prasad v State* [2003] FJHC 140, wherein she found that the state could make a s 220 application at any time before it opened its case in the Magistrates Court.

The Appellant now appeals to this court against the judgment of Shameem J which had the effect of affirming the magistrates order transferring the Appellant's case to the High Court.

The Appellant's contentions on this appeal

In this Court the Appellant once again contended that his case was outside the reach of the new s 220 and that Shameem J had accordingly erred in law in finding that it was available to the prosecutor to invoke.

Mr G P Shankar conducted the appeal in this court. He was not counsel in the High Court. He explained that the Appellant was charged in the Magistrates Court on 25 July 2003 with non-electable offences and that the Amendment Act was not in force at the time the Appellant was charged and pleaded. Mr Shankar accepted that under the old s 220 there could be a transfer to the High Court in the two circumstances stated therein, namely if it appeared to a magistrate either before or during the course of a summary trial in that court that the case was one which ought to be tried in the High Court; and second if — and he emphasised the next words — before the commencement of the trial in the Magistrates Court the prosecutor applied for a transfer. Counsel accepted that in those circumstances the Magistrate was required not to proceed with the summary trial but, instead, to hold a preliminary hearing as the first step towards a High Court trial. Mr Shankar recognised that under the old s 220 an accused was not entitled to seek a High Court trial.

While Mr Shankar conceded that s 15 is confined to electable offences he nevertheless submitted first that "similar considerations should apply to non-electable offences" and that accordingly the old s 220 applies to the Appellant's case.

Then on the assumption that that submission was accepted, he contended that that section was no longer available to the prosecutor because the Appellant had pleaded not guilty to the charges in the Magistrates Court and the trial had commenced. In short he submitted that the prosecutor's application was too late. Mr Shankar, in support of the submission that the trial had commenced on the entry of the pleas, relied on a decision of Fatiaki J in *State v Preet Singh Verma* [2002] FJHC 3. He asked us to decline to follow the later decision of Shameem J in Prasad in which Shameem J had declined to follow Fatiaki J.

Next Mr Shankar submitted that s 15 of the Amendment Act was open to "double construction" and that the new s 220 could not have retrospective effect.

Mr Shankar's argument on the Chief Justice's Practice Direction differed from that which had been advanced to Shameem J. In this court Mr Shankar, while accepting that the Practice Direction could not amend an Act of Parliament, maintained that it explained the Amendment Act and, in effect, confirmed the construction contended for by the Appellant, namely, that the old s 220 applied to the Appellant's case.

In the oral hearing before us Mr Shankar did not pursue a number of other arguments arising out of the 1997 Constitution which had been put forward in the written submissions filed on behalf of the Appellant ahead of the hearing.

The DPP's contentions on this appeal

Mr Ridgeway for the Director of Public Prosecutions sought to uphold the judgment of Shameem J which affirmed the order of the magistrate transferring the proceedings to the High Court.

Mr Ridgeway submitted that s 15 was quite plain and that it did not have "a double construction" as contended for by Mr Shankar. Mr Ridgeway contended that parliament had deliberately drawn a distinction between electable and non-electable offences in s 15. It had preserved the old procedures for electable offences only. It followed, so Mr Ridgeway submitted, that the new s 220 applied to the Appellant's case as he was charged with non-electable offences and that as such this case was not within s 15.

Mr Ridgeway further submitted that even although the new s 220 had a retrospective effect it was a procedural provision concerning the manner of trial and was an exception to the common law rule that a statute ought not to be given retrospective operation. In support of this submission he cited from the judgment of the High Court of Australia (Mason CJ, Dawson Toohey, Gaudron and McHugh JJ) in *Rodway v R* (1990) 169 CLR 515 at 518; 92 ALR 385 at 387 (*Rodway*) where their Honours said:

> The rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure. Indeed, strictly speaking, where procedure alone is involved, a statute will invariably operate prospectively and there is no room for the application of such a presumption. It will operate prospectively because it will prescribe the manner in which something may or must be done in the future, even if what is to be done relates to, or is based upon, past events. A statute which prescribes the manner in which the trial of a past offence is to be conducted is one instance.

Our consideration of the submissions and our decision

We consider that the appeal can be dealt with quite shortly. In our view the outcome turns on the proper construction of s 15, the only transitional provision in the Amendment Act and the consequences of that construction. We agree with Mr Ridgeway's submission that s 15 is quite plain in its meaning. We conclude that that provision creates an exception from the application of the remainder of the Amendment Act. It provides that the Amendment Act does not apply to charges for electable offences pending in the Magistrates Court before the commencement of the Act ie 13 October 2003, unless the accused has consented to a transfer to the High Court under the new s 226 (which of course is not in point). We consider that this is an understandable exception in that before the Amendment Act came into effect a person charged with an electable offence had a right of election as to the mode of trial and the right to a preliminary hearing if he elected a High Court trial. Parliament by this transitional provision has preserved that right.

We are unable to accept Mr Shankar's submission that "similar considerations should apply to non-electable offences" which would result in the old s 220 applying to the Appellant. In our view, as Mr Ridgeway submitted, had parliament intended to exclude cases from the operation of the Amendment Act where an accused person was facing non-electable offences when the Amendment Act came into force it would have said so; but significantly it did not do so.

It inevitably follows from these conclusions that the new s 220 became applicable to the Appellant when the Amendment Act came into force on 13 October 2003. In his case it had a retrospective effect. Plainly the new s 220 is a procedural provision. It prescribes the manner in which the trial of a past offence may be conducted. It is unquestionably, in our view, a provision which is an exception to the common law rule that a statute ought not be given a retrospective effect, as stated by the High Court of Australia in *Rodway*.

And for completeness, we reject Mr Shankar's submission on the Chief Justice's direction. With respect that direction did not correctly set out the effect of the Amendment Act as we have construed it. That Act did not apply only to criminal charges filed after 13 October 2003. Now the prosecutor has the right to apply for a transfer from the Magistrates Court to the High Court "before the calling of evidence at the trial" in the Magistrates Court in the case of non-electable offences whenever the charge was filed and in the case of electable offences if the charge was filed after 13 October 2003.

We find it unnecessary to consider and determine Mr Shankar's submission that upon the Appellant pleading not guilty to the charges the trial (in the Magistrates Court) had commenced as clearly, the prosecution's application was made "before the calling of evidence" at a trial in the Magistrates Court.

Having reached these conclusions we find that Shameem J was correct when she determined that the prosecutor was entitled (after 13 October 2003) to make an application for a transfer of the Appellant's case to the High Court as the offences he was charged with are non-electable.

Result

For the reasons given the appeal is dismissed. We affirm the order of the magistrate transferring the proceedings against the Appellant to the High Court.

Appeal dismissed.