

ISIKELI LEQELEQE v STATE (AAU0005 of 2005)

COURT OF APPEAL — APPELLATE JURISDICTION

5 WARD J

21 January 2005

10 **Criminal law — appeals — whether right to appeal — order refusing stay of execution pending appeal — Constitution s 121(2) — Court of Appeal Act ss 21, 35, 35(2).**

15 This was an appeal against the judgment of the High Court under s 121(2) of the Constitution. The Appellant requested that pending the determination of his appeal to the Court of Appeal, a stay be granted to all the hearings on the 21 counts of larceny by a servant, forgery and falsification of accounts for which he was charged.

20 The Appellant filed an application for stay of the criminal trial in the High Court together with his supporting affidavits. On the same day, the judge refused the Appellant's application for stay because no petition of appeal was filed before the court. Following the refusal, the trial proceeded and the witnesses gave evidence. The case continued. The issue was whether there was a right to appeal.

25 **Held** — (1) Section 35 of the Court of Appeal Act (the Act) did not give a single judge the power to grant a stay of execution pending appeal. There was no right of appeal under s 21 of the Act unless the appeal was against conviction. There was no conviction, hence, there was no right to appeal.

(2) The Court of Appeal held that the application for a stay was not in the interests of justice as it attempted to appeal interlocutory orders and will just delay the criminal trial. It was vexatious as there was no right of appeal and no right to seek leave to appeal. It was proper for the learned judge to continue the trial after he refused the application to stay. Appeal dismissed.

30 **Case referred to**

Seru v State AAU0041 and AAU0042 of 1990, considered.

O'Driscoll (for *Iqbal Khan*) for the Applicant

Ridgeway for the Respondent

35 **Ward J.** The Appellant is currently being tried in the High Court at Lautoka on 21 counts of larceny by servant, forgery and falsification of accounts. He was originally charged with 32 offences alleged to have been committed at various dates from August 1999 to August 2001 but the number of charges was reduced in an amended information filed, it appears, on 17 January 2005.

40 Whether that was the first day of trial is not clear from the affidavits. The petition of appeal, filed on 19 January 2005, briefly describes the events as follows:

45 On the 18th day of January, 2005, the Appellant filed Application for Stay at High Court, Lautoka together with supporting Affidavit of the Appellant in accordance with the Constitution of the Republic of Fiji Islands.

On 18 day of January, 2005, His Lordship Justice Kishore Govind refused the application for Stay.

50 The Appellant by his Counsel made application before His Lordship that the Appellant intends to exercise his right to Appeal His Lordship's Judgment by virtue of Section 121(2) of the Constitution of the Republic of Fiji Islands and requested that pending the determination of the Appeal a stay be granted in respect of the hearing of all the twenty-one (21) counts.

His Lordship Mr Justice Kishore Govind refused Appellant's application for stay of proceedings pending appeal as he stated there was no Petition of Appeal before him.

The Appellant intends to appeal against the decision of His Lordship Mr Justice Kishore Govind.

5 The grounds are then set out and relate entirely to the learned judge's refusal of the stay.

This court was told today that, following the trial judge's refusal of a stay, the trial proceeded on 19th and a total of five witnesses gave evidence. The case is continuing today.

10 Filed with the petition of appeal yesterday was a notice of motion seeking:

(a) That the criminal trial in High Court, Lautoka; Action No HAC0206.2003L be stayed pending the determination of this appeal to the Fiji Court of Appeal.

(b) Any other order or orders the Honourable court deems just.

15 The Applicant faces an insuperable hurdle. The powers of a single judge of this court in criminal appeals are set out in s 35 of the Court of Appeal Act. It is very specific and it does not give the single judge power to grant a stay of execution pending appeal. The issue was dealt with at length by Tikaram P in *Seru v State* AAU0041 and AAU0042 of 1990, in which he concluded:

20 I have no hesitation in ruling that a single judge has no power under section 35 of the Court of Appeal Act to stay a criminal trial or proceedings pending appeal. The Court of Appeal Act has been amended twice in 1998 first by Act No 13 of 1998 and then by Act No 39 of 1998. It is significant to note that Section 35 itself was revised and enlarged by Act No 13 of 1998 but no power was given to a single judge to grant a stay.

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In my view any inherent jurisdiction that this Court might possess under section 119 of the Constitution cannot be invoked to counter any statutory intention displayed by parliament. In this case I have no doubts that Parliament purposely did not give a single judge power to stop a criminal trial pending appeal. In short it is not a case of any lacuna brought about by oversight. ...

30 In view of the reasons given I hold that a single judge of the Court of Appeal has no power to make a stay order stopping a criminal trial pending appeal whether the appeal (or proposed appeal) is from a final judgment or an interlocutory judgment.

That is the end of the matter and the application for a stay must be refused.

35 However, counsel for the State asks the court to strike out the appeal under s 35(2) on the grounds that it is frivolous or vexatious and bound to fail because there is no right of appeal or right to seek leave to appeal.

Section 35(2) provides:

40 (2) If on the filing of a notice of appeal or of an application for leave to appeal, a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal.

The right of appeal to the Court of Appeal is found in s 121 of the Constitution:

45 121. — (1) The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by law.

(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.

50 (3) The Parliament may provide that appeals lie to the Court of Appeal, as of right or with leave, from other judgments of the High Court in accordance with such requirements as the Parliament prescribes.

The right of appeal has been subjected by parliament to limitations in the Court of Appeal Act. As a result, that right is subject, in the case of criminal appeals, to s 21 of the Act:

- 5 21. — (1) A person convicted on a trial before the High Court may appeal under this Part to the Court of Appeal—
- (a) against his conviction on any ground of appeal which involves a question of law alone;
 - 10 (b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any 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; and
 - (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

15 It is quite clear that there is no right of appeal unless the appeal is against conviction. There is no conviction and there is, therefore, no right of appeal.

It has been stated many times that it is not in the interests of justice to delay criminal trials by attempting to appeal interlocutory orders. That would be the effect of this application for a stay and, having refused it, the learned judge was right to continue with the trial.

20 There is no right of appeal and no right to seek leave to appeal and an appeal filed in those circumstances is clearly vexatious.

The appeal is dismissed under s 35(2) but without prejudice to the Applicant's right to raise the same matter in any appeal brought against conviction if that is the result of the trial.

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Appeal dismissed.

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