

**AJAY CHAND v STATE (AAU0022 of 2011)**

COURT OF APPEAL — CRIMINAL JURISDICTION

5 CALANCHINI AP

20 September, 3 December 2012

10 **Criminal Law — jurisdiction — appeal against sentence — guilty plea — magistrate recorded conviction — High Court imposed sentence — whether jurisdiction of Court of Appeal rightly invoked — irregularity in procedure — miscarriage due to irregularity — exercise of revisional jurisdiction — regularise conviction — Court of Appeal Act ss 21(1), 35(2) — Crimes Decree ss 255(b), 369(1) — Criminal Procedure Decree ss 193(1), 194(a)**

15 The appellant was brought before the Magistrates' Court and faced charges for two offences, one of which was indictable. The appellant entered a plea of guilty and was then convicted by the magistrate. The matter was then transferred to the High Court. The High Court Judge heard the plea in mitigation and sentenced the appellant.

**Held –**

20 (1) There was no conviction on a trial held in the High Court. It was the learned magistrate who formally convicted the appellant in proceedings in the Magistrates Court following the appellant's pleas of guilty. The High Court imposed a custodial sentence only after transfer of the matter by the learned Magistrate and after he had convicted the appellant. Therefore, there was no jurisdiction for this Court to hear the appellant's appeal.

25 (2) When a magistrate records a guilty plea in respect of an indictable offence, the case is transferred to the High Court. It is for the judge in the High Court to proceed to record the conviction and to impose the sentence. The magistrate has proceeded to record a conviction when there was no jurisdiction to do so.

Appeal dismissed

30 *Appellant in person.**M. Korovou* for the Respondent.

35 [1] **Calanchini AP.** On 4 November 2010 in the Magistrates Court at Lautoka the Appellant pleaded guilty to one count of committing an act intended to cause grievous harm contrary to s 255 (b) of the Crimes Decree 2009 (the Decree) and one count of damaging property contrary to s 369(1) of the Decree.

40 [2] The pleas of guilty were accepted by the Magistrate pursuant to jurisdiction given to him under s 193 (1) of the Criminal Procedure Decree 2009. The Magistrate convicted the Appellant and then ordered the transfer of the proceedings to the High Court for sentencing under s 194 (a) of the Criminal Procedure Decree.

45 [3] On 27 January 2011 the learned High Court Judge sentenced the Appellant to a term of 3 years imprisonment with a non-parole term of 2 years for the unlawful act offence. For the offence of damaging property the Appellant was sentenced to a term of 9 months imprisonment to be served concurrently with the first sentence.

50 [4] The Appellant's notice of appeal was filed in the Court on 15 March 2011 and was as a result some 16 days out of time. The Appellant has at all times been acting for himself. The issue of late filing was not raised at the hearing of the application for leave to appeal against sentence. Having considered the grounds

of appeal I have concluded that the Appellant has raised two arguable grounds for appealing against sentence. I therefore propose to extend the time for filing his notice of appeal to 15 March 2011.

5 [5] There is however a question of jurisdiction which must be considered first before discussing the grounds of appeal. Pursuant to s 21 (1) of the Court of Appeal Act Cap 12 a person convicted on a trial held before the High Court may appeal to the Court of Appeal with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law. In  
10 order to invoke the jurisdiction of the Court of Appeal for it to determine an appeal against sentence the Appellant must have been (i) convicted (ii) on a trial (iii) held before the High Court and (iv) punished with a sentence that is not one fixed by law.

15 [6] The Appellant appeared before the learned Resident Magistrate on 4 November 2010 in the Lautoka Magistrates Court. The record shows that the two charges were read and explained to the Appellant who indicated that he understood the charges. The Appellant pleaded guilty to both charges on his own free will. A summary of the facts was read to the learned Magistrate. The  
20 Appellant admitted the facts. The learned Magistrate then proceeded to formally convict the Appellant in respect of both charges. The Appellant was remanded in custody for mention on 18 November 2010 to enable a medical report to be produced. The matter was subsequently relisted for sentencing on 16 December 2012. On that day the learned Magistrate ordered that the case be transferred to  
25 the High Court for the sentencing of the Appellant pursuant to s 194 (a) of the Criminal Procedure Decree.

[7] On 21 January 2011 the Appellant appeared in the High Court for mitigation. On 27 January 2011 the learned High Court Judge sentenced the  
30 Appellant to three years imprisonment with a non-parole term of two years in respect of the unlawful act. The Appellant was sentenced to nine months imprisonment to be served concurrently for damaging property. In his sentencing decision the learned High Court Judge noted that the Appellant had entered a plea of guilty in respect of the two charges. The learned Judge then stated in paragraph  
35 2:

*'Having convicted the accused on both charges, the Magistrate transferred the matter to this Court for sentence, pursuant to s 194 (a) of the Criminal Procedure Decree.'*

40 [8] In summary then, the Appellant was brought before the Magistrates Court in Lautoka charged with two offences one of which was indictable. The Appellant entered a plea of guilty and was then convicted by the learned Magistrate. The matter was then transferred to the High Court. The learned High Court Judge heard the plea in mitigation and sentenced the Appellant.

45 [9] It is apparent from this outline of the proceedings that as the matter presently stands, there is no conviction on a trial held in the High Court. In this case, it was the learned Magistrate who formally convicted the Appellant in proceedings in the Magistrates Court following the Appellant's pleas of guilty. The High Court imposed a custodial sentence only after transfer of the matter by  
50 the learned Magistrate and after he had convicted the Appellant. There is therefore presently no jurisdiction for this Court to hear the Appellant's appeal.

[10] The problem has arisen because of an irregularity in the procedure adopted by the learned Magistrate which was not brought to the attention of the learned High Court Judge. The procedure for transferring accused persons to the High Court is set out in sections 193 and 194 of the Criminal Procedure Decree.

5 [11] So far as is relevant, s 193 states:

*‘(1) A magistrate has jurisdiction to accept a guilty plea for any offence (including an indictable offence) before a case is transferred to the High Court.*

10 *(2) When accepting a guilty plea under sub-section (1) the Magistrate shall not proceed to conviction, but this shall be reserved for the High Court after the transfer of the case.’*

[12] Then s 194 (a) state:

*“If an accused person has:*

15 *(a) entered a plea of guilty to an indictable offence and the plea has been recorded by the Magistrates Court or*

*(b) \_ \_ \_; or*

*(c) \_ \_ \_;*

*the Magistrate shall order the transfer of the charges \_ \_ \_ to the High Court for sentencing \_ \_ \_.”*

20 [13] When the two sections are read together, and it is my view that they must be, then it is apparent that when a magistrate records a guilty plea in respect of an indictable offence, the case is to be transferred to the High Court. It is for the learned Judge in the High Court to proceed to record the conviction and to impose the sentence.

25 [14] The present proceedings have miscarried due to an irregularity. The learned Magistrate has proceeded to record a conviction when there was no jurisdiction to do so.

30 [15] In view of these observations the Record of the Magistrates Court proceedings and the High Court file should be referred to the High Court for the exercise of its revisional jurisdiction under Division 2 of Part XV of the Criminal Procedure Decree.

35 [16] In the meantime the present appeal is dismissed under s 35(2) of the Court of Appeal Act. The Appellant may lodge a fresh appeal after the High Court has regularised the conviction pursuant to the exercise of its revisional jurisdiction.

*Appeal dismissed.*

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