MAKARIO ANISIMAI v STATE (CAV0006 of 2008S)

SUPREME COURT — CRIMINAL JURISDICTION

GATES P, MARSHALL and MADIGAN JJ

1, 23 February 2012

Practice and procedure — appeal — criminal appeal — second appeal to Supreme Court — previous application to Supreme Court dismissed — jurisdiction — whether Supreme Court has jurisdiction to entertain second or further appeal — finality of criminal appeals in Australia — finality principle in English criminal appeals — statutory discretional referral by executive to Court of Appeal — position of criminal appeals in Fiji — before and after replacement of Privy Council by Supreme Court — no jurisdiction — abuse of process — Administration of Justice Decree s 8(5) — Constitution s 122(5) — Court of Appeal Act s 38 — Criminal Appeal Act 1907 (UK) s 1(6) — NSW Criminal Appeal Act 1912 — Criminal Penal Code ss 259, 262, 293(1)(b) — Supreme Court Act s 35(2).

The petitioner had already had an application by way of petition to the Supreme Court heard and dismissed. The petitioner sought a second such appeal by way of petition to the Supreme Court. The question for the Court was a jurisdictional one: does the petitioner have any further right of applying for special leave within the jurisdiction of the Supreme Court, or has the point of finality of appeals in this criminal case come and gone and there is no jurisdiction in the Supreme Court to entertain a second or further appeal in this case?

Held –

(1) There has been a wrong turning in ever deciding that s (5) of the Administration of Justice Decree 2009 could, in an appropriate case, apply to validate a second or further final criminal appeal in the Supreme Court. In each such second or further appeal to the Supreme Court, the Supreme Court has no jurisdiction to entertain a second or further appeal.

(2) Until the power of a single judge to finally dismiss a criminal appeal where there is no jurisdiction is included in the Supreme Court Act, it is for a Supreme Court of three judges to dismiss such petitions as being beyond jurisdiction and therefore an abuse of process because the time of finality in the appellant's criminal litigation has already come and gone. All that is required is a recounting of the previous proceedings and a simple statement that the second or further petition being beyond jurisdiction is an abuse of process because the time for finality has come and gone.

Application dismissed *in limine* on ground of lack of jurisdiction.

Cases referred to

Autodesk Inc v Dyason (No 2) (1993) 176 CLR 300; *R v Grantham* [1969] 2 QB 574 ; *R v Pinfold* [1988] QB 462; *Smith v New South Wales Bar Association* (1992) 176 CLR 256, considered.

Makin v Attorney- General (New South Wales) [1894] AC 57; *Grierson v R* (1938) 60 CLR 431, distinguished.

Ibrahim v R [1914] AC 599; *R v Bow Street Magistrate; Eex parte Pinochet Ugrate (No 2)* [2000] 1 AC 119, cited.

Timoci Silatolu and 3 Others CAV0005 of 2005, overruled.

Petitioner in Person.

P. Bulamainaivalu instructed by *Office of the Director of Public Prosecutions* for the Respondent.

[1] **Gates P.** I agree with the judgment of Justice William Marshall.

[2] **Marshall J.** This case was heard in the first instance by Anthony Gates President, Justice John Byrne and Justice William Marshall on 3rd August 2010. Justice John Byrne retired in October 2010. So a rehearing before the present Court became necessary. Justice Paul Madigan replaced Justice John Byrne and the rehearing took place on 1st February 2012.

[3] The Petitioner Makario Anisimai has already had an application by way of petition to the Supreme Court heard and dismissed on the 12th of February 2009. He now wishes to have a second such appeal by way of Petition to the Supreme Court. The question then is a jurisdictional one; does Makario Anisimai have any further right of applying for special leave within the jurisdiction of the Supreme Court or is it the case that in this criminal case the point of finality of appeals has come and gone and there is no jurisdiction in the Supreme Court to entertain a second or further appeal in this case.

Makario Anisimai

The Facts of Offending and the History of these Appeals

[4] The petitioner was convicted on 1 June 2006, after a trial in the High Court, of one count of robbery with violence, contrary to s 293(1)(b) of the Penal Code, Cap 17, and one count of larceny, contrary to ss.259 and 262 of the Penal Code. The count of robbery with violence related to theft of F$525,000 in cash, the property of the ANZ Bank, on 6 December 2002. The count of larceny related to the theft on 5th December 2002 of a number plate subsequently used in the robbery. The petitioner was sentenced to a total of 14 years imprisonment for the two offences of which he was convicted.

[5] The petitioner filed a notice of appeal with the Court of Appeal challenging both his conviction and his sentence. However, he was subsequently, on 26th August 2008 refused leave to appeal by President Gordon Ward sitting as a single Judge of that Court. The petitioner's case perhaps was not advanced by his escape from custody (and subsequent recapture) prior to the hearing of what was treated by President Gordon Ward as an application for leave to appeal against conviction and sentence.

[6] On 7th February 2008 an application for leave to appeal against conviction and sentence was renewed before a full Court of Appeal consisting of Madam Justice Shameem JA (presiding), Mataitoga JA and Daniel Goundar JA.

[7] Before the Court of Appeal on 7th February 2008 Makario Anisimai was represented by AK Singh. Judgment of the Court was handed down on 26th March 2008. The judgment commenced with an account of what had happened in the Magistrates Court. The Court of Appeal had the complete record in the Magistrates Court. It quoted from it in setting out the events relating to the transfer of the case to the High Court. That is because the principal ground of appeal alleged that the transfer to the High Court was a nullity. The Court of Appeal then set out the complete proposed grounds of appeal in full. There were nine in all.

[8] In deciding the alleged nullity in the transfer point the Court of Appeal followed the law explained by the Court of Appeal on the point in the case of *Abhay Kumar Singh v The State* Criminal Appeal No. AAU0009 of 2004S. The Court concluded at paragraph 24:

> *"In the case before us, (the Abhay Kumar Singh) decision is on point. The applicant was charged with an electable offence (robbery with violence), before the*

commencement date of the Amendment Act. He elected High Court trial. The prosecution made an application for the remaining charges to be similarly tried in the High Court. This appears to be because the 2nd accused had elected magistrates' court trial. The presiding magistrate explained the new transfer procedure to the applicant and his co-accused. They refused to consent. A preliminary inquiry date was set. On the day of the inquiry the applicant consented to the transfer. In doing so, he waived his right (preserved by virtue of s 15 of the Amendment Act) to a preliminary inquiry. The fact that he had earlier refused consent suggests that this waiver was informed and unequivocal. There was no breach of the Act. There is no merit in that ground of appeal."

[9] In paragraphs 25 and 26 the Court of Appeal discussed the other grounds of appeal:

"25. The remaining grounds raise issues in relation to representation and trial. The record shows that the applicant had asked for time to make arrangements for counsel of his own choice. He did not avail himself of the opportunity despite a two year time lapse from transfer to trial. During the trial, he cross-examined the police and civilian witnesses and presented a coherent defence to the Court. The record shows that he was assisted by the trial judge. A trial within a trial was held to determine the admissibility of his interviews. The ruling sets out the law and facts correctly and fairly. There are no obvious errors of law or fact.

26. Similarly, we find no merit in the proposed appeal in relation to his Lordship's summing up. The opinions of the assessors are not perverse and are unsurprising. The reference in the proposed grounds of appeal that the assessors were told that 'you can be sure about the confession' is in fact a summary of the State's case. Later in the summing up his Lordship clearly left the weight of the confession to the assessors. The sentence was clearly explained. The tariff for the offence of robbery with violence was increased by this court in Raymond Sikeli Singh & Others v The State [2004] AAU 008/04 and *Sakiusa Basa v The State* [2006] AAU0023/06. This was a large robbery of a security van. The applicant was said to have received $120,000 for his part. The evidence showed that this was, as the learned trial judge said, 'a well-planned and well executed armed robbery effected with violence'. In the circumstances we can see no merit in the appeal against sentence."

[10] The Court of Appeal decided that the renewed application for leave to appeal against conviction and sentence must be refused.

[11] Makario Anisimai then petitioned the Supreme Court for special leave to appeal his conviction and sentence. The panel hearing the case was presided over by Justice Kenneth Handley, the other Justices sitting being Justice David Ipp and Justice Ronald Sackville. The case was heard on 9th February 2009. Mr A K Singh again represented Makario Anisimai.

[12] Judgment of the Court was handed down on 12th February 2009. At paragraph 5 the Supreme Court referred to the oral hearing and the question to be addressed in detail:

"The petitioner has sought special leave to appeal to this Court from the judgment of the Court of Appeal. His petition identified a number of grounds of appeal. However, the only ground elaborated in oral argument on the petitioner's behalf was that he had elected to be tried in the High Court on the charge of robbery with violence and, having so elected, was entitled under the Criminal Procedure Code, Cap 21 ("CPC") to a preliminary inquiry before he could be validly tried on that charge in the High Court. Since no such preliminary inquiry was conducted before his trial, so the petitioner argued, his convictions could not stand and should be set aside by this Court."

[13] Under the heading *"THE STATUTORY FRAMEWORK"* the Supreme Court thoroughly and correctly analysed the legal framework of the new legislation and transitional provisions. Then under *"PROCEDURAL CHRONOLOGY"* what had happened in a series of hearings was fully set out and the record where relevant fully cited. Then there followed a careful summary of *"THE PETITIONERS ARGUMENT"*. After a full exposition under the heading *"THE COURT OF APPEAL JUDGMENT"* the Supreme Court explained its *"REASONING"* which ran through 13 detailed paragraphs.

[14] In paragraph 35 the Supreme Court concluded:

> *"[35] For these reasons, this Court is unable to accept that the findings made by the Court of Appeal should be disturbed. It follows that the factual foundation for the petitioner's submissions is wanting and those submissions must be rejected."*

[15] The Supreme Court then considered the other issues raised in Makario Anisimai's petition for special leave. I set out what it said:

> *" OTHER ISSUES*
>
> *[40] The petitioner advanced other arguments in his written submissions, but his counsel did not develop them in oral argument. In any event, they are without substance.*
>
> *CONCLUSION*
>
> *[41] The petitioner has not satisfied any of the criteria for the grant of special leave to appeal to this Court specified in s7(2) of the Supreme Court Act* 1988.
>
> *[42] The petition must be dismissed."*

[16] The other issues were what the Court of Appeal had considered and their conclusions are set out at paragraph 9 above.

CONCLUSIONS

[17] I have set out the earlier proceedings in detail to show that the Court of Appeal and the Supreme Court were meticulous in their analysis on fact and law on the only issue that the Court thought to be arguable. The Court of Appeal had considered and concluded on other issues raised. Their conclusion on these other issues were shared by the Supreme Court although they did not put their analysis in writing. It is not necessary to deal with unarguable points; if it was proceedings and judgments would became unjustifiably extended to no purpose. The hearing of other cases where there are merits would be delayed.

[18] This was never more than an appeal based on a technicality involving transfer to the High Court. At a fair trial the learned High Court judge found Makario Anisimai *"guilty"* of an armed robbery involving the theft of $525,000 – a huge sum by any standards. The three assessors gave their opinion also as *"guilty"*. There are no legal arguments on the fairness of the trial. It was a trial according to law where the rules of law determining admissibility of caution statements were carefully followed. Our system allows one final appeal to the Supreme Court even where the informed observer would say that after the High Court and the Court of Appeal had pronounced as they had on the points, the appeal to the Supreme Court was bordering upon the vexatious. But a two tier appeal system is part of the checks and balances required by the rule of law even though in the Supreme Court the appeal put forward is bordering on the vexatious.

[19] But a second or further appeal to the Supreme Court is another matter. If such rules allow this in our legal system it becomes *"open season"* for clogging the system with such appeals. There is nothing to stop it happening again and

again in the same case. If so the hearing of appeals that are meritorious is inevitably delayed. The time of Fiji's top judges are wasted on cases that should never be before them. Also the prestige of the Supreme Court suffers because at the top of the pyramid it is, as a court of final appeal, only supposed to be dealing with matters of public and general importance with regard to the administration of criminal justice.

[20] If the law is examined and it is found that a second or further appeal to the Supreme Court is beyond the jurisdiction of the Court, that still leaves a problem. That problem is that there is no filter in the Supreme Court Act for the summary dismissal of claims for which there is no jurisdiction. That means that the case must be prepared and brought before three judges of the Supreme Court for them to inevitably pronounce that there is no jurisdiction.

Finality in Criminal Appeals

[21] In Fiji the problem of finality in criminal appeals and the prevention of successive petitions for special leave being heard by the Supreme Court when they arise out of the same investigation and trial procedures already exhaustively reviewed has been addressed on a number of occasions in recent years.

[22] What gives petitioners like Makario Anisimai a foot in the door are constitutional provisions such as s 122(5) of the 1997 Constitution which, before it was abrogated, provided:

> *"The Supreme Court may review any judgment, pronouncement or order made by it."*

[23] The exact same words have been re-enacted in s 8 of the Administration of Justice Decree 2009 subsection (5).

[24] In the United Kingdom criminal appeals and finality have been addressed by successive statutes since 1907. The procedural and substantive problems unique to criminal cases, render it appropriate to consider s 8(5) and whether it applies to criminal appeals.

[25] In CAV0005 of 2005 *Timoci Silatolu and 3 Others*, to which I also refer below the origins of the Privy Council power to rehear cases was explained in this way:

> *"A court of final appeal has power in truly exceptional circumstances to recall its orders even after they have been entered in order to avoid irremediable injustice. This was established by decisions of the Privy Council, particularly in Indian appeals, Maharajah Pertab Narain Singh v Maharanee Subhao Koer ex parte Trilokinath* (1878) LR 5 Ind App 171, 173; *Venkata Narasimha Appa Row v The Court of Wards; Ex parte Rajah Gopala Appa Row* (1886) 11 App Cas 660; *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (No 2) (1982) 150 CLR 29, 38-9."

[26] It should be noted that this rule did not apply in England in respect of the House of Lords which was until 2009 the Court of Final Appeal for the United Kingdom. However when it was established in the nineteenth century that the Privy Council could revisit cases it had previously decided with (apparent) finality, the same principle extended to all colonial jurisdictions. So just as there was in India, there was a power of renewed appeal to the Privy Council for Fiji, Australia and New Zealand and all other colonial or former colonial jurisdictions which maintained the Privy Council as their final Court of Appeal. There is no doubt that the provision *"The Supreme Court may review any judgment, pronouncement or order made by it"* was intended to replace the rights enjoyed by Fijian litigants to petition the Privy Council with the same rights to petition

the Fiji Supreme Court. But it was not intended that the right to petition the Privy Council should be extended in any way.

[27] That the Privy Council power is what enlivens s 8(5) of the Administration of Justice Decree 2009 is beyond doubt. The rest of s 8 simply empowers and prescribes rules relating to the jurisdiction of the Supreme Court in Fiji. These rules are drafted to interlock with the Supreme Court Act 1998.

[28] But s 8(5) provides an unusual power which is a rarity within the whole range of common law and civil law systems. At least since Roman Law the principle of finality has ruled in respect of civil and criminal cases. The reason is that there are compelling reasons in any civil society for permitting disputes in law to be fully and fairly litigated with the proviso that it is against the interest of the users of any legal system and against the public interest for there to be any open door to endless rehearings criminal or civil. That is why finality in litigation is almost a universal norm.

[29] I say *"almost"* because the one relevant exception is the Privy Council rule based upon nineteenth century civil appeals from India to the Privy Council.

[30] The important question here is whether the legacy of this abnormal rule in Fiji is a provision which allows open ended appeals in the Supreme Court in anything other than in civil appeals. If there is no authority historical or contemporary that this abnormal rule has ever been applied by the Privy Council to criminal cases, the conclusion is that this abnormal rule is limited to civil cases. The history of criminal appeals in the United Kingdom and in its Colonies provides another pointer.

[31] The immediate background to this debate is that two earlier decisions of the Supreme Court of Fiji have proceeded on the basis that s 8(5) applies to criminal cases and criminal appeals. Were they correctly decided?

[32] In the nineteenth century there was no general appeal in criminal cases to the Privy Council. Nor in the United Kingdom to the House of Lords. For example *Makin v Attorney-General (New South Wales)* [1894] AC 57 was an appeal from the Supreme Court of New South Wales. New South Wales, at that time was an independent British Colony. The jury had found the Defendant and his wife guilty of murder. Four points of law were considered by the Supreme Court of New South Wales on appeal. One was abandoned by the defence and the other three were decided in favour of the prosecution. Prior to the substantive hearing of the appeal to the Privy Council there was an application for special leave to the Board. At this time a panel of judges granted special leave to appeal to the Board from the judgment of the Supreme Court because with regard to the matters of law raised *"some of the questions raised [were] of grave and general importance"*.

[33] On the very important legal issue of similar fact evidence the Board upheld the trial judge and the view of the Supreme Court of New South Wales and dismissed Makin's appeal. The Makins were executed. No one could imagine a second or further appeal to the Privy Council after the first. Many others found guilty of murder never applied to the Privy Council for leave to appeal at all. After an appeal to the Supreme Court of New South Wales if their sentence was not commuted they were executed in accordance with law.

[34] Another criminal appeal, this time from Hong Kong by way of special leave to the Privy Council is *Ibrahim v R* [1914] AC 599. The legal issue on which special leave to the Privy Council was granted was relating to the jurisdiction of the Court of trial. The unit of the British Army in which Ibrahim

was serving when he shot dead an officer was 126th Baluchistan Infantry, Ibrahim was a subject of the Ameer of Afghanistan and the place of offence was Shameen Island near the city of Canton (now called Guangzhou) in China. Because of this jurisdictional point of law special leave was granted. The case is now important for the rules as to when an oral confession of guilt will be admitted in evidence. But the Board ruled against Ibrahim on the points of law raised and dismissed the appeal. No one in Hong Kong could imagine a second or further appeal to the Privy Council after the Privy Council had reached finality by dismissing Ibrahim's appeal. Ibrahim was executed in accordance with law. Up to 1997 when the appeal to the Privy Council ceased, Criminal appeals to the Privy Council had to have special leave. There were never second or further appeals or applications for special leave to the Privy Council after the Privy Council had rejected an appeal in a criminal case.

[35] Of the criminal cases decided in the Colonies the fact was that a minute portion only were ever granted special leave to appeal on points of law *"of grave and general importance"*. There was no general right of criminal appeal to the Privy Council. In no criminal case that the Privy Council did hear was there ever a second application back to the Privy Council for a review of the facts and law on the basis that the earlier hearing had involved fundamental mistakes of fact or law. In other words in the few criminal cases that the Privy Council did hear, their hearing was attended by a strict rule of finality.

[36] The rule of finality in criminal cases was the position in England up till 1907. The Criminal Appeal Act of 1907 allowed a very limited appeal from the newly created Court of Criminal Appeal to the House of Lords in s 1(6) which read:

> *"(6) If in any case the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that court to any other court."*
>
> For many years the certificate of the Attorney General has been replaced in England by the obtaining of leave from either the Court of Appeal or the House of Lords on a point of law of general public importance.

[37] In no cases where the Court of Criminal Appeal was the place of finality, was there ever a second application or appeal back to the Court of Criminal Appeal requesting or requiring a review on the basis that its earlier ruling should be overturned on account of fundamental mistake of law or fact. The same is true for the House of Lords with regard to the occasional criminal case it heard on a point of law of exceptional public importance.

[38] Very quickly the 1907 Criminal Appeal Act in England was introduced into the Colonies. The Acts, such as the Criminal Appeal Act of 1912 in New South Wales were all in *pari materia* with the 1907 Act in England. In Australia, now that there was a Commonwealth High Court of Australia, the very limited appeal on point of law was to that Court where in England it was to the House of Lords. There were now no criminal appeals to the Privy Council. However in a single state colony such as Fiji there remained the very restricted application for special leave to the Privy Council on the grounds of a point of law of grave public importance.

Finality of Criminal Appeals in Australia

[39] The High Court of Australia heard the appeal of *Grierson* in September 1938. It is reported as *Grierson v R* (1938) 60 CLR 431. The facts were that Grierson had been convicted at Quarter Sessions in New South Wales in 1932 of (1) assault with intent to rob and (2) causing grievous bodily harm by using corrosive fluid (ammonia) on one Winnocot. He was sentenced to ten years with hard labour on the first charge and to thirty-five years on the second charge, the sentences to be concurrent.

> *"In March 1933 an appeal by Grierson against his conviction and sentences on the grounds, inter alia, that he was wrongly convicted, that the sentences were harsh and unconscionable, and that fresh evidence was available, was dismissed by the Court of Criminal Appeal, except that the sentence of thirty-five years' imprisonment was altered to a sentence of penal servitude for life. An application by Grierson for special leave to appeal from the decision of the Court of Criminal Appeal was refused by the High Court in August 1933.*
>
> *In June 1934 representation were made on behalf of Grierson to the Minister of Justice for the State of New South Wales for an inquiry under sec.475(1) of the Crimes Act 1900 (NSW) on the ground that certain material facts had become known respecting the evidence of one of the material witnesses for the Crown at the trial. The Minister replied that, having considered the fact disclosed, he would not recommend an inquiry under the section. In July 1937, Grierson appeared in person before the Court of Criminal Appeal in support of a further application for leave to appeal against his conviction and sentences, but that court upheld a preliminary objection taken by the Solicitor General that the court had no jurisdiction to entertain the application by reason of the fact that an appeal had already been maintained to the court and dismissed after the merits had been determined."*
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> An application by Grierson for special leave to appeal against that decision was made to the High Court of Australia in September 1938.

[40] It is to be noted that the history and pattern is exactly the same in *Grierson* as this court is currently dealing with in the case of *Makario Anisimai*. The matter is fully dealt with first time round by the Court of Appeal and a petition by way of special leave to the High Court of Australia is made and refused. Then a new appeal to the Court of Criminal Appeal in New South Wales is repelled by that Court. From that there is an attempt for a second time to bring a petition for special leave to the High Court of Australia. The only difference between *Grierson* and the present case is that in the present case, the step of appealing to the Court of Appeal for a second time is not taken. There is simply a new petition to the Supreme Court for special leave.

[41] In the New South Wales Court of Criminal Appeal (second occasion) Chief Justice Jordan dismissed Grierson's second appeal *in limine*. He said (at pages 432-433):

> *"The point which has been raised is exactly covered by the decision … in R v Edwards* [No. 2], and I am of opinion that this court should follow that decision. When an appeal has once been fully heard and disposed of, that is, in my opinion, an end of the matter so far as appeal is concerned, and the prisoner cannot continue to appeal from time to time thereafter, whenever a new point occurs to him or to his legal advisers or whenever a new fact is alleged to have come to light. This does not mean that injustice must necessarily occur when new substantial evidence pointing to a prisoner's innocence is discovered after his appeal has been finally disposed of. In such a case recourse may be had to sec.26 of the Criminal Appeal Act of 1912, or to sec.475 of the Crimes Act 1900. There is no reason to suppose that the procedure provided by those sections is not adequate for the consideration of any matter which it may now be sought

to raise on behalf of the prisoner. For these reasons I am of the opinion that the preliminary objection taken on behalf of the Crown must be sustained, and that we must decline to entertain the present application."

[42] Justice Owen Dixon (as he then was) in the High Court of Australia explained why special leave must be refused at pages 435-437:

"This is an application on behalf of a prisoner for special leave to appeal from a decision of the Supreme Court of New South Wales sitting as a Court of Criminal Appeal. The court refused an application on the part of the prisoner to reopen an appeal which he had brought unsuccessfully from his conviction or to give him leave to bring a fresh appeal. His conviction took place on 15th December 1932, and the appeal which he brought from the conviction on 10th March 1933. The ground assigned for his application to reopen the former appeal or to permit a new one is an allegation that facts had become known concerning a material witness for the Crown which might affect the conviction.

The Supreme Court held, in accordance with a decision of the Supreme Court of South Australia (R v Edwards (No 2) [1931] SASR 376), that a second appeal from a conviction could not be entertained after the dismissal, upon the merits, of an appeal or application for leave to appeal and that the first appeal could not be reopened after a final determination.

In my opinion this conclusion is correct. The jurisdiction is statutory, and the court has no further authority to set aside a conviction upon indictment than the statute confers. The Criminal Appeal Act of 1912 (NSW) is based upon the English Act of 1907. It does not give a general appellate power in criminal cases exercisable on grounds and by a procedure discoverable from independent sources. It defines the grounds, prescribes the procedure and states the duty of the court. The statute deals with criminal appeals rather as a right or benefit conferred on prisoners convicted of indictable offences and sets out the kind of convictions and sentences from which they may appeal and lays down the conditions on which they may appeal as of right and by leave and the procedure which they must observe. It limits the time within which appeals and applications for leave to appeal may be brought, subject, however, to a discretionary power in the court to extend the period except where the sentence is capital. The grounds or principles upon which the court is to determine appeals are stated, and the duty imposed on the court of dismissing an appeal, unless on those principles it determines that it should be allowed. The determination of an appeal is evidently definitive, and a conviction unappealed is equally final. No considerations controlling or affecting the conclusion to be deduced from these provisions are supplied by analogous civil proceedings. Appeal is not a common-law remedy, and proceedings at law are only subject to that remedy by statute (Attorney General v Sillem (1863) 2 H & C 581*, at 608, 609; 159 ER 242, at.253. A second writ of error could not, it would seem, be brought upon the same record after an affirmance upon the first (Lambell v Pretty John* (1725) 2 Stra 690; 93 ER 786; *Horne (or Herne) v Bushell* (1733) 2 Stra 949; ER 961; 2 Barn KB 253, 260, 262; 94 ER 482, 489.; *Burleigh v Harris* (1734) 2 Stra 975; 93 ER 978; *Winchurch v Belwood* (1692) 1 Salk 337; 91 ER 296.

In Chancery, rehearings, that is, appeals, were no longer admitted after enrolment of the decree, although an independent bill of review might be filed based upon error apparent or on facts newly discovered (Sidney Smith's Chancery Practice, 7th ed. (1862), vol.1, p.809 et seq.). Under the Judicature system an action may be brought to set aside a judgment obtained by fraud, but it is an independent proceeding equitable in its origin and nature (Ronald v Harper [1913] VLR 311, at 318, per Cussen J.: Halsbury's Laws of England, 2nd ed, vol 19, p 266, and the cases there collected, particularly *Jonesco v Beard* [1930] AC 298. But under that system no court has authority to review its own decision pronounced upon a hearing inter partes after the decision has passed into a judgment formally drawn up (In re *St Nazaire Co* (1879) 12 ChD 88). If the prisoner has abandoned his appeal, the Court of Criminal Appeal in England will exercise a discretion to allow him to withdraw his notice of abandonment,

notwithstanding that it operates as a dismissal of the appeal (Halsbury's Laws of England, 2nd ed., vol.9, p.273, and the cases cited in note o). But in such a case there has been no determination by the court, and there is no English case in which, after such a determination, an appeal has been reopened or a fresh appeal has been entertained.

Notwithstanding the dismissal of an appeal, the powers conferred by sec.26 of the Criminal Appeal Act of 1912 (NSW) and by sec.475 of the Crimes Act 1900 (NSW) remain exercisable at the instance of the executive.

In my opinion the application should be refused."

[43] Of key importance here is the fact that neither leading Counsel nor the Court consider that the Privy Council principle above referred to is worthy of any comment or explanation. There were civil appeals from the High Court of Australia to the Privy Council until around 1980. But although the anomalous *"exceptional circumstance"* rule was always declared to exist in civil appeals, I can find no instances where a second civil appeal to the Privy Council from the High Court of Australia was ever taken.

[44] Owen Dixon J, a jurist of great authority, must be taken to have known that there was an exceptional power to rehear civil final appeals derived from the Privy Council. But he would also have known that, after the formation of the Commonwealth, there were no criminal appeals at statute or common law to the Privy Council. So in referring to criminal appeals as creatures of statute rather than the common law, he is explaining that there exists no principle whatsoever that modifies or alters the application of finality in these circumstances.

[45] The Australian civil cases are clear that while there is a discretion in civil cases to rehear final appeals the threshold which the would be second time petitioner must surmount is very high; that threshold is placed high because of the need for finality. Finality in this context is very influential and the chief factor in dismissing most applications. But the difference is that in this civil law context the finality principle is not dispositive.

[46] The Australian civil cases establish that the power of the appellate courts to reopen and review their judgments and orders is to be exercised with great caution and with the principle of finality well in mind.

[47] The applicable principles were considered in *Autodesk Inc v Dyason* (No 2) (1993) 176 CLR 300, 303 where Mason CJ said:

"What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and this … cannot be attributed solely to the neglect of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases."

The principles relating to individual appeals were further summarized in *Smith v New South Wales Bar Association* (1992) 176 CLR 256, 265 where the High Court of Australia said:

"The power is discretionary and, although it exists up until the entry of judgment, it is one that is exercised having regard to the public interest in maintaining the finality of litigation. Thus, if reasons for judgment have been given, the power is only exercised if there is some matter calling for a review … these considerations may tend against the reopening of a case."

[48] In my opinion the judgment of the Supreme Court in Criminal Appeal No. CAV0002 of 2006 of 2003 of *Timoci Silatolu* delivered on 17th October 2008 contains serious errors.

[49] For one thing *R v Bow Street Magistrate; Ex parte Pinochet Ugarte* (No 2) [2000] 1 AC 119 was not decided on any principles related to the Privy Council powers but were a development of the common law.

[50] But the crucial and egregious error is the assumption through a misreading of Australian authority that these Privy Council principles ever applied to criminal cases decided under the Fiji criminal appeal statutory framework.

[51] It follows that the edifice of providing for a lawful framework for disposing of second applications for special leave in the Supreme Court after the dismissal of the first application for special leave, constructed by the Supreme Court in the *Silatolu & Others* judgment is based on fundamental error. It must now be discarded. It further follows that inasmuch as the Supreme Court followed the *Timoci Silatolu* edifice in (rightly) dismissing the appeals of *Eliki Mototabua*, *Abhay Kumar Singh*, *Vidali Yaba*, *Navau Lebobo* and *Paula Vura* (the number of the lead case *Eliki Mototabua v The State* is Criminal Appeal No.CAV0006 of 2006S) it was not applying correct principles.

The Finality Principle in English Criminal Appeals

[52] If the appropriate legal conclusion is that the Privy Council principle does not apply to criminal cases what is the position of finality in England and how does it interact with special powers for reopening criminal appeals after final appeals in criminal cases have been dismissed? In this context the long term statutory safeguard against later discovered fundamental miscarriage of justice is a reference by the executive branch of government back to the Court of Appeal sitting within its criminal jurisdiction. The judgments in *R v Grantham* [1969] 2 QB 574 and *R v Pinfold* [1988] QB 462 consider finality in criminal appeals and the interaction of the statutory criminal appeal framework with the statutory executive reference procedure. A recent change substituting a single judge for the Home Secretary in the United Kingdom does not affect this argument.

Grantham and Pinfold

[53] In both cases defendants convicted of murder who had already taken their right of appeal to its fullest extent wished to rely on an alleged change of story by a principal prosecution witness and accomplice which might exonerate them.

[54] *Grantham* was a Court Martial Appeals Act case. Almost twenty years later *Pinfold* was decided under the Criminal Appeal Act. The legal framework is the same but the section numbers are different.

[55] Lord Lane CJ giving judgment in *Pinfold* at pages 465 and 466 referred to Widgery LJ's judgment in *Grantham* as authoritative. The passage says:

> *"Widgery L.J., giving the judgment of the court, which consisted of Lord Parker C.J., Widgery L.J., and Lawton J., dealt with a number of points which have been raised before us. He dealt with the question of the notices of abandonment, at pp.578-579, putting forward the same sort of propositions as this court has ventured to put forward a minute or two ago. Secondly he mentions the question of the desirability of bringing an end to the proceedings. He said, at p.580:*
>
> > *"Parliament must be presumed to be mindful of the need to make an end to proceedings and prima facie an appeal means one appeal and 'an application' means one application. Although s 11(2) contains some safeguard against frivolous applications, we do not think that repeated applications are contemplated merely because they are made at the appellant's own risk."*
>
> *Then he goes on to consider the question of the Secretary of State's powers under, so far as we are concerned, s 17 of the Criminal Appeal Act 1968. He said, at p580:*

"If s 8 [of the Courts-Martial (Appeals) Act 1968] envisages more than one appeal arising out of the same conviction, the purpose of the Secretary of State's powers … becomes obscure, because it would follow that the applicant could always approach the court directly without the intervention of the Secretary of State."

As to that, Mr Mansfield puts forward this proposition. He submits that it is not the applicant's fault that the evidence which is sought to be adduced has come to light late in the day. He did not know that it existed. He suggests that to cast the applicant upon the mercy of the Secretary of State would be an injustice. It is imposing between the applicant and the court a further discretion, that of the Secretary of State, which may not be exercised in his favour and that, he submits, would be unfair.

But the final and most important part of the judgment so far as the application with regard to s 23 is concerned is to be found in almost the last paragraph of the judgment. Widgery LJ, said, at p 580:

"Mr Eastham, however, takes one further point. He refers us to s 28(1) of the Act, under which this court can receive fresh evidence and points out that under s 28(2) it is provided that where such evidence is tendered the court shall receive it if the conditions of the subsection are satisfied. Accordingly, he contends that where an application for leave is based on fresh evidence of an acceptable kind the court must have jurisdiction to hear the application, since it cannot otherwise comply with the mandatory terms of s 28(2). In our judgment, however, s 28 presupposes the existence of a competent appeal or application, and is concerned only with the procedure thereon."

In other words what Widgery LJ is saying is that before s 28 – which in our case is s 23 – can come into operation at all, the applicant must bring himself within s 1 of the Criminal Appeal Act 1968 in our case.

That judgment in R v Grantham [1969] 2 QB 574, although it is based upon the Courts-Martial (Appeals) Act 1968 and not upon the Criminal Appeal Act 1968, is in our judgment in effect binding upon us. Even if it were not strictly binding upon us, it would be of such great force as to compel us to follow it. In any event, in the judgment of this court it is correct."

[56] The closeness of these English authorities with the authoritative Australian exposition in *Grierson* (supra) should be noted. Both are concerned with the interaction between finality in criminal appeals and the statutory remedy for suspected long standing fundamental miscarriage of justice by means of discretionary executive references to the Court of Appeal. In Australia there is the trial. The first appeal is to the state Supreme Court and the second and final tier of appeal is to the (Federal) High Court of Australia if leave to appeal is granted. In England there is the trial with a first tier appeal to the Court of Appeal and a second tier with special leave to the House of Lords. It is the same in both except for the State/Federal overlay in Australia. In both countries when appeals are exhausted finality means that there is no jurisdiction for further proceedings.

The Statutory Discretionary Referral by the Executive to the Court of Appeal

[57] The provision in the United Kingdom which keeps the door open indefinitely for the retrying of criminal cases is the statutory procedure which allows for the Secretary of State to refer appeal cases or appeal issues to the Court of Appeal without limit of time. The Secretary of State only uses this power where there is cogent or overwhelming evidence, usually not available at trial, which shows that the criminal trial courts and appeal courts may have proceeded on a fundamental error of fact or law. One instance is where science can provide near certain facts and answers from tests and technologies not available at the

time of the trial. This is assisted if there has been retention of body samples used in the original trial. Another situation is where a later investigation shows that the crime allegedly committed by the appellant was without doubt committed by another person and that the appellant was not involved.

[58] In Fiji legislation based upon the Home Secretary's reference power was brought to Fiji. The same rules should apply to it as in England. However it is concealed together with Prerogative of Mercy powers in s 38 of the Court of Appeal Act. I refer to the power contained in s 38(a).

[59] Section 38 says:

> *"Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in considering the exercise of such prerogative with reference to the conviction of a person by or in the High Court or to the sentence (other than sentence of death) passed on a person so convicted, whether or not the person convicted has petitioned in that behalf, may, if he thinks fit, at any time either –*
>
> *(a) refer the whole case to the Court of Appeal and the case shall then be heard and determined by the Court of Appeal as in the case of an appeal by the person convicted; or*
>
> *(b) if he desires the assistance of the Court of Appeal on any point arising in the case, refer that point to the Court of Appeal for their opinion, thereon, and the Court shall consider the point so referred and furnish the Governor-General with their opinion thereon accordingly."*

In my opinion it is clear that for *"Governor General"* we should now read *"the President of Fiji"*.

[60] Since Fiji has a two tier system of criminal appeals, should the President refer a criminal case back to the Court of Appeal there would then be triggered a right to petition the Supreme Court. Since there are now appeals from acquittals as well as convictions in criminal cases in Fiji, there is jurisdiction for both sides to appeal within the three tier system. Since the President is only likely to refer cases under s 38(1) to the Court of Appeal where there is consensus between the prosecution and the defence that something new and fundamental has arisen, there is in such cases little likelihood of the prosecution appealing an acquittal after such a reference.

The position of criminal appeals in Fiji before and after the replacement of the Privy Council by the Supreme Court of Fiji

[61] Up until 1988 there was a limited right of criminal appeal from decisions of the Court of Appeal of Fiji sitting in its criminal jurisdiction to the Privy Council. As from the rest of the colonies or former colonies, the number of criminal cases raising points of law of public importance which resulted in special leave and substantive hearing in the Privy Council were a minute proportion of the whole. There never was an attempt at a second hearing before the Privy Council in a Fiji criminal appeal. As noted above, there were neither attempts far less any acceptance of a power to rehear substantive criminal appeals in the Privy Council from any of the Colonies or former Colonies.

[62] The flow of civil cases to the Privy Council did not depend on special leave on points of law. If litigants in civil cases had the resources they would take their cases to the Privy Council. The fact that there was no barrier in civil cases provided a situation where the abnormal rule of second or further *"final appeals"* in civil cases might be accepted. The Indian cases involved native rulers and power conspiracies to deprive heirs of their inheritance, their rights and their power. When dynastic circumstances changed, the fact that an earlier "final" civil

judgment relied on lies and conspiracies persuaded the Privy Council to allow rehearings in civil cases after the normal point of finality had been reached. Practically everything relating to its practice in hearing criminal appeals made it impossible for the Privy Council to even contemplate such a rule in criminal appeals.

[63] After 1988 and the severing of the link with the Privy Council, legislative reform rearranged the Courts in Fiji and the new three tier trial and appeal system consisted of the High Court, the Court of Appeal and the Supreme Court as the new court of final appeal was called. Unlike civil appeals that are as of right to the Court of Appeal criminal appeals require leave to advance to the Court of Appeal. While the appeal to the Supreme Court has to be by way of petition in both civil and criminal cases, there is a right to apply for leave and have the issues both on leave and on the substantive case argued before the Supreme Court. There are no special leave hearings as a separate preliminary hearing in criminal cases as there was before the Privy Council. So even if the Supreme Court refuses leave in a criminal case it considers in its judgments the substantive issues.

[64] In no case has the Supreme Court of Fiji ever decided on a second or further occasion to review its earlier judgment or rulings in a criminal case.

[65] There has been a wrong turning in ever deciding that s 8(5) could in an appropriate case apply to validate a second or further final criminal appeal in the Supreme Court. To put matters right is a decision in each such second or further appeal to the Supreme Court that the Supreme Court has no jurisdiction to entertain a second or further appeal.

[66] Unfortunately the Supreme Court Act 1998 does not include power for a Single Judge to finally dismiss a criminal appeal where there is no jurisdiction. In the Court of Appeal Act s 35(2) provides this power. In view of the trend to bring second or further criminal appeals now identified as being beyond jurisdiction and therefore an abuse of process, it would seem be a necessary power to include in the Supreme Court Act.

[67] Until that is done it is for a Supreme Court of three judges to dismiss the petitions as being beyond jurisdiction and therefore an abuse of process because the time of finality in the appellant's criminal litigation has already come and gone. Following this judgment even if a three man court has to do it all that is required is a recounting of the previous proceedings and a simple statement that the second or further petition being beyond jurisdiction is an abuse of process because the time for finality has come and gone.

[68] It is important to note that as the rule of law develops there is an increasing need for a mechanism to review criminal convictions. In many countries there are campaigns to avoid serious miscarriages of justice. The *"new evidence"* may be worthless in some cases; in other cases new scientific or contact evidence may provide a strong prima facie case of wrongful conviction or acquittal.

[69] In paragraphs 59 and 60 above I have described the device of executive direction used in the United Kingdom's Home Secretary's reference procedure and its Australian equivalents. I have noted that it applies in Fiji. As a legal mechanism for dealing with the real problem of real or imaginary later discovered "miscarriages of justice" it is much preferable to a rule that the final court of appeal can revisit its *"final"* decision on a second or further occasion. Its great virtue is that it does not interfere with *"finality"* in the hearing of criminal cases while meeting legitimate social needs in civil society.

[70] In my opinion the orders of this Court should be that the case of *Makario Anisimai* the application should be dismissed *in limine* on the ground of lack of jurisdiction and therefore abuse of process since the point of finality in this case has long come and gone.

[71] **Madigan J.** I agree with the judgment of Justice William Marshall.

Gates P.

ORDER OF THE COURT

[71] The order of the court is:

(1) That on the ground of lack of jurisdiction and therefore abuse of process the petition of Makario Anisimai in Criminal Appeal No. CAV 0006 of 2008S be dismissed and special leave to appeal be refused *in limine*.

Application dismissed.