OLE JITOKO v STATE (AAU0011 of 2010)

COURT OF APPEAL — CRIMINAL JURISDICTION

CALANCHINI AP, MARSHALL and GOUNDAR JJA

21 February, 8 March 2012

Criminal law — appeals — jurisdiction — appeal against conviction — whether points of law only — due process points — witness statement — failure to afford right of defence — identification — directions — Court of Appeal Act s 22 — Criminal Procedure Code ss 192(3)(c), 213(2).

The appellant was granted leave to appeal against his conviction, on the basis of two errors in the Magistrates Court. First, a prosecution witness was unavailable to give evidence, so his statement was read and the magistrate considered his evidence. However the notice under s 192(3)(c) of the Criminal Procedure Code had not been given to the appellant. Second, the appellant was not afforded his statutory right to make submissions and therefore did not make any submissions.

Held –

(1) There is no jurisdiction in this Court of Appeal to hear the substantive appeal of the appellant which the grant of leave envisaged. Neither the witness's statement point, nor the failure to afford the right of defence submission are points of law "only". Rather, they are due process points going to possible miscarriage of justice. Further, the identification points are mostly matters of giving correct directions or self-direction, and are not points of law only.

Ilaisa Sousou Cava v State Crim Appl No CAV 0007 of 2010; *R v Hinds* (1962) Crim App R 327, applied.

(2) If a witness sights and identifies the alleged perpetrator in the street, there is no rule compelling a later confirmatory identification parade. This point is conclusive against the identification argument mounted by the appellant.

(3) If the High Court judge satisfactorily performs the task of giving the correct direction, it matters not that in the Magistrates' Court, the magistrate failed to self-direct properly. Where identification is crucial to conviction, it is the duty of the High Court judge to convict if the identification properly examined is safe and to acquit if it is not.

Appeal dismissed in limine.

Cases referred to

Garnett Edwards v The Queen [2006] UKPC 23; *Holland v HM Advocate* (2005) UKPC D1; *R v Turnbull; R v Whitby; R v Roberts* [1977] QB 224, considered.

Appellant in Person.

T. Leweni instructed by *Office of the Director of Public Prosecutions* for the Respondent.

[1] Calanchini AP. I agree with the judgment, the reasons and the proposed orders of William Marshall JA.

[2] Marshall JA. Friday the 6th June 2008 in the evening was drizzly in Nasinu. By 7.30 pm it was dark and drizzly but in Vula Street, Makoi where taxi driver Vijay Kumar resides there were *"enough street lights"* to see by and to make an identification if that were necessary. Vijay Kumar parked his taxi outside the gate because he had to get out and open the gate to his compound. Returning to his vehicle he noticed three Fijian boys coming out from a neighbour's

compound. Vijay hesitated hoping they would pass by. Instead they stood between him and his parked taxi. When he advanced to get into the taxi suddenly one of the three punched him and then held him from behind. One of the three took Vijay's wallet, which had $50 cash in it and a bunch of keys. Another one entered the taxi and took out the taxi meter which was valued at $500.

[3] Vijay had a Fijian neighbour by name of Sakiusa. Vijay yelled for help and Sakiusa came to him immediately. Sakiusa arrived in time to see the latter stages of the robbery. He then suggested they go in the taxi to see if they could see the three robbers. They went in the taxi to a bakery near Hanson's supermarket where Vijay identified the person who had punched and held him. When the identified robber ran off Sakiusa got some Fijian boys to run after him. The identified robber was caught and taken to Nasinu Police Station. Vijay followed and identified the person who had punched him and held him outside his gate and then had been seen and identified by him at the bakery near Hanson's supermarket before he ran off as the person now held by police. He also said that at all times within this short space of time the identified person was wearing a blue T-shirt. That person was Ole Jitoko who was later convicted by Presiding Magistrate Mesake Wakanivonoloa at Nasinu Magistrates Court on 26th March 2009 after a trial. There were two clear identifications after a hot pursuit and they were made when the incident and its details were fresh in his memory.

[4] At the Magistrates Court hearing Ole Jitoko was sentenced to 2 years imprisonment to be served consecutively to the term for another offence already being served, by Ms Makereta Mua on 2nd November 2009. He appealed and his appeal was heard in the High Court by Justice Priyantha Fernando on 7th January 2010 with judgment on 18th January 2010.

[5] At the Magistrates Court two things went wrong. Both are matters of procedure. Firstly Mr Sakiusa had migrated and was not available to give evidence for the prosecution. His statement was read and the Magistrate considered Mr Sakiusa's evidence as well as that of driver Vijay Kumar. But the Notice under s 192(3)(c) of the Criminal Procedure Code had not been given to Ole Jitoko. The second matter is basic to all criminal trials. The accused has a right to submit on fact and law to the tribunal of fact before it considers its verdict. Section 213(2) of the Criminal Procedure Code affords this right to accused persons and gives the accused or his lawyer *"the last word"* before the trial moves into the stage of obtaining a verdict. This was not done by Magistrate Mesake Wakanivonoloa. Ole Jitoko was not afforded his statutory right to make submissions and therefore did not make any submissions. Even if he had been minded to decline the invitation, it is a statutory requirement that an invitation be given.

[6] Considering the above facts I heard an application by Ole Jitoko for leave to appeal on 2nd February 2011. By a ruling of 27th May 2011 I gave leave to appeal against conviction to the Full Court of Appeal saying that the two errors in the Magistrates Court might be irremediable. Justice Priyantha Fernando had dismissed the appeal and upheld the conviction and sentence on 18th January 2010.

[7] However the Court of Appeal can only give leave to appeal usually by a hearing before the Single Judge, if the Court of Appeal Act affords jurisdiction. I had sat as Justice of the Supreme Court in a petition for special leave to appeal by *Ilaisa Sousou Cava* on 15th October 2010. When I heard the leave application in this case and later when I ruled that leave be given in this present case, the

judgment in ***Ilaisa Sousou Cava*** was pending. It was given on 14 November 2011. That judgment is dispositive of this appeal because it is clear that there is no jurisdiction in this Court of Appeal to hear the substantive appeal of Ole Jitoko which the grant of leave envisaged. I shall explain.

[8] The case of ***Ilaisa Sousou Cava*** Criminal Appeal No. CAV0007 of 2010 with judgment on 14th November 2011 is binding on the Court of Appeal where the legal point or points on which that decision turned (the *ratio decidendi*) arises in the case which is under consideration by the Court of Appeal. What is said *"obiter dicta"* in the Supreme Court, while not binding may be influential authority and may be followed by a Court of Appeal as a correct statement of the law governing their decision in a case.

[9] In ***Ilaisa Sousou Cava*** I explained the jurisdiction of the Court of Appeal and the Supreme Court as it relates to appeals from a decision of the Magistrates Court exercising summary jurisdiction. That is to say as it relates to the rules of jurisdiction that apply where a convicted person, having failed in his statutory appeal to a Justice of the High Court, desires to appeal to the Court of Appeal.

[10] At paragraph 7 through 11 in my judgment in Ilaisa Sousou Cava I said:

"7. I am surprised that this case was given leave to appeal to the Court of Appeal. I am surprised, that it was substantially heard by the Court of Appeal rather than dismissed on the ground that there was no jurisdiction. Given that history, there had to be no way of stopping the petition for special leave to the Supreme Court of which this court is now seized.

8. If this arises in another case consideration should be given at the leave stage to an order under s 35(2) of the Court of Appeal Act which says:

'(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.'

9. The avenue of appeal against conviction by a Magistrates Court is by way of rehearing to a High Court Judge. 'Rehearing' means that in Fiji, unlike England, the witnesses do not give their evidence all over again. It means that the High Court Judge takes the evidence and what happened at trial from the record in the Magistrates Court. This process is assisted by written rulings and judgments made by the Magistrate.

10. At the 'rehearing' as so understood, the facts are at large. So the High Court Judge can take a view of the facts which differs from the Magistrate and where appropriate can order an acquittal. This situation must be distinguished from an appeal of fact when it is an appeal from a High Court judge assisted by the opinion of assessors. Then it is an appeal by way of rehearing but the appeal on fact is a limited one. It is limited by s 23(1)(a) of the Court of Appeal Act, in the same terms as s 4 of the Criminal Appeal Act 1907 in England. See the recent judgment in Mahendra Motibhai Patel and Tevita Peni Mau v FICAC Criminal Appeals Nos. AAU 39 and AAU 40 of 2011, judgment of 28th October 2011 citing *Aladesuru v R* [1956] AC 49.

11. By ordinance 37 of 1965 a new power of appeal was created to the Court of Appeal in criminal matters by what is now s 22 of the Court of Appeal Act. This is the appeal on a point of law only from the High Court's criminal appellate jurisdiction hearing appeals from the magistracy. Section 22 as material states:

'22.-(1) Any party to an appeal from a magistrate's court to the High Court may appeal, under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only.

(Amended by 38 of 1998)

Provided that no appeal shall lie against the confirmation by the High Court of a verdict of acquittal by a magistrate's court.

(1A) No appeal under subsection (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground–

(a) that the sentence was an unlawful one or was passed in consequence of an error of law; or

(b) that the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence. (Added by 38 of 1998)."

[11] In my Supreme Court judgment in ***Ilaisa Sousou Cava*** I went on to consider *"what is 'a question of law … only?"* I considered the policy of limiting second or further appeals. I then considered the leading case of *R v Hinds* (1962) 46 Crim App R 327. I said at paragraphs 12 through 21:

"12. Under the original 1907 Act scheme relating to appeal from verdicts of juries or High Court judges assisted by assessors, the section limiting the right of appeal says that leave is not required on any ground of appeal which involves a question of "law alone". I have no doubt that in this context there is no difference between a "question of law only" and a "question of law alone".

13. I also have no doubt that the word "only" is deliberately used in the appeal from an appellate decision of the High Court. That is because of the comprehensive right of appeal against summary conviction enjoyed by appellants in the first instance appeal to the High Court judge. In such an appeal not only is there a full appeal on fact, but the High Court judge on the rehearing also may deal questions of law alone, questions of mixed law and fact and questions of miscarriage of justice.

14. The higher courts and in context, I mean the Court of Appeal and the Supreme Court, must be protected by having a limited jurisdiction in criminal matters. So the higher up the pyramid of appeals one goes, it is found that criminal appeals must be on questions of "law only" or (in the Supreme Court) matters that may be described generally as "matters of law of general public importance" or that "involve the possibility of a substantial and grave injustice". In all appeals finality is important. Where there is already a sufficient appeal to a High Court judge on fact, mixed law and fact, and miscarriage of justice, these grounds reach finality at the High Court level. As is explained below points of appeal on law only are relatively rare. But when this rarity arises, if "the question of law only" fails in the Court of Appeal, finality is reached unless it can be said to be a point of law of "general legal importance".

15. Alfred George Hinds was the most litigious criminal appellant of his day in England. When he was convicted in December 1953 before Lord Goddard and a jury of breaking into a fashionable West End department store and stealing very valuable property being cash and jewellery, he applied to a full court on May 1954 for leave involving one ground said to be "a question of law alone". This was that the security guard at the store had given evidence against Hinds before being sentenced. It was said that his evidence was hearsay evidence.

16. On 10 May 1954, Mr Justice Hilbery gave the judgment of the Court of Criminal Appeal:

"In the opinion of this court – and I may say that this court has not only listened to and considered the objections raised by counsel in support of the application, but the court has also read the evidence, the summing-up and the matters that passed before judgment was delivered in the case – there is no point of law raised by this application at all, and there is no substance in any of the objections made. The application for leave to appeal against conviction is therefore refused."

17. In a further ingenious but futile piece of litigation, Hinds took his grievances to the Divisional Court. On the point in issue on 20th December 1960 Lord Justice Parker as he then was for the Court said:

"The prisoner cannot of course get a right of appeal by merely saying that there is a point of law alone, but must satisfy the court that there is such a point."

18. Hinds made another application for leave to appeal on a point of law alone and it was heard by Winn J, Lawton J and Widgery J on 9th July 1962. This Court considered s 3 of the 1907 Act and said:

"The court is very clearly of the opinion that the proper construction of those words is that there must be, in order that the right given by that subsection can be claimed, a ground of appeal raised which is a question of law, and that the section cannot be effectively invoked merely by raising a ground which the grounds of appeal or the submissions of counsel at any later stage describe as a ground of law."

19. As to the issue of whether some evidence at trial was hearsay the 1962 Court said:

"Whether or not such a ground so stated is to be regarded as a question of law alone or whether it is a ground of law mixed with fact or of mixed law and fact may, in any particular case, not be an easy question to determine. It is in part, as it seems to the court, a question of emphasis in the form of statement adopted....

It is, however, clear to the court, and the court holds and determines that before a right of appeal can be demanded and asserted in law a question of law alone must have arisen in the appellate proceedings and have remained undetermined."

20. The 1962 Court disposed of the renewed application as follows:

"When the application came before the Court of Criminal Appeal on May 10, 1954, it is clear that the whole of the grounds raised by the notice of December 1953 and the subsequent supplementary grounds were before the court, and one of the questions which that court then had to determine was whether there was any ground of law alone raised by that application. If there had been, it would necessarily have been the duty of the court to order that the case be re-listed as an appeal. Whether or not it should have been so re-listed as an appeal depended upon the determination of the question: Was there a question of law alone to be determined by and upon the hearing of an appeal? That court decided that there was no such point of law alone. That decision, being a decision of the Court of Criminal Appeal, is final, and this court could not review that decision or come to any different conclusion."

21. The earlier proceedings as well as the judgment of 9th July 1962 are contained in the report at (1962) 46 Crim App R 327."

Is the appeal within the jurisdiction of this Court? Does this case raise a point of law only?

[12] There are three points able to be taken against this conviction and its upholding in the High Court. I have recited two of them in paragraph 5 above. The third point is that both the magistrate and the High Court Judge (in his rehearing) should have found the identification unsafe and acquitted because there was no identification parade and there was a dock identification.

[13] Neither the Sakiusa statement point nor the failure to afford the right of defence submission are points of law *"only"*. They are due process points going to possible miscarriage of justice. Identification points are mostly matters of giving the correct directions or self direction. That is so when it is explaining ***Turnbull*** as it applies to the facts to the tribunal of fact whether that is to oneself as the ultimate judge of fact or to a jury or (in Fiji) assessors. Likewise if there are grounds for directing the tribunal of fact on dock identification points. So while I would accept that such identification points are issues of mixed fact and law they are very clearly not *"points of law only"*.

[14] There are clearly no *"points of law … only"* in the present appeal. In the context of s 22 of the Court of Appeal Act that means that this Court of Appeal has no jurisdiction to entertain an appeal from the judgment and orders of Mr Justice Priyantha Fernando in the High Court. This Court of Appeal in my opinion must apply the law laid down in ***Ilaisa Sousou Cava*** and act on the authority of *R v Hinds* (1962) 46 Crim App R 327 as to what is and what is not a*"point of law only"*.

Identification evidence in the Magistrates Court

[15] It so happens that the issue taken by Ilaisa Sousou Cava in the Magistrates Court and before the High Court Judge on appeal was a point in relating to dock identification. The identifying witness Mrs Nirmala Shankar had been sitting in a stationary car when five Fijians invaded it with a view to using it in a supermarket robbery planned for later in the day. Mrs Shankar had been in the front passenger seat. Ilaisa Sousou Cava she said was clearly the person who had entered and taken over the front driving seat. Before she was removed from the vehicle by the invaders she had been eyeball to eyeball with Ilaisa Sousou Cava for a long enough time to have his features imprinted on her memory. There was no identification whether by her sighting and identifying Ilaisa Sousou Cava prior to trial and there was no identification parade held by investigators. It was therefore *"a dock identification"* in the true sense.

[16] Against that background I gave the following guidance in ***Ilaisa Sousou Cava***.

> *"23. I have no doubt that the evidence of Nirmala Shankar is strong evidence that Ilaisa Sousou Cava committed the taking of the motor vehicle offence and the robbery with violence at the supermarket. That evidence is highly relevant and wholly admissible. Where that is the case, the court must hear it.*
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> *24. In summary trial "dock identification" continues in England in other mainstream common law jurisdictions and in Fiji. If on the other hand it is trial by High Court judge with assessors or jury trial key identifying witnesses usually are invited to an ID parade at a police station. …*
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> *25. … it is simply up to the tribunal of fact (in this case Magistrate Khan) to assess the identification made. He sees the demeanour and the signs of positivity or negativity which inform as to whether the witness has a good or bad memory for faces and is or is not a good observer of detail with a retentive memory of what he or she has seen. The tribunal of fact is also able to consider the **Turnbull** criteria. How close was the person when seen? How long was there a view of the person seen? Was the face visible? Was it daylight and if not was there good lighting?*
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> *26. In this case Magistrate Khan assessed Mrs Nirmala Shankar as a "positive and forthright witness". Given that the person had entered where she was sitting, she had a good opportunity from close range to imprint the entering person on her mind. That she was a person who could remember faces and detail is obvious from her positive evidence generally. It is strengthened by the fact that she was also able to identify another of the group who invaded and took over the vehicle who was sitting in the gallery of the Court.…*
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> *28. But when it comes to identifications whether of the prisoner in the dock or otherwise the issue for the tribunal of fact is not so much admissibility but weight. What will make or destroy on identifying witness in terms of the weight to be given to his or her evidence are the matters discussed at paragraph 25 above.*

[17] A relatively recent case in the Privy Council on appeal from Jamaica is ***Garnett*** *Edwards v The Queen* [2006] UKPC 23 (25 April 2006). The Defendant's nickname was "*Manbug*". A police sergeant Donovan Bailey in the Mango Tree Bar in Kingston was off-duty and with a friend Dougal Wright. They were facing the bar when Sergeant Bailey was held up by a man demanding money. He turned round and was staring the man down when a shot discharged by the would be robber went through Bailey's body, and then killed his friend Dougal Wright. Sergeant Bailey was taken to hospital and when discharged was in a vehicle near the Mango Tree when he spotted the perpetrator. This was about four weeks later. He called other officers who arrested Garnett *"Manbug"* Edwards. Later at the High Court a jury convicted and the Jamaica Court of

Appeal upheld the conviction. It was a trial on indictment and Jamaica does not have either the Police and Criminal Evidence Act 1984 (England) or Code D made it under it, which in England governs identification of suspects where trial on indictment is intended. Their Lordships merely said that the principles in Code D *"may in appropriate cases give some guidance to Jamaican Courts."* Fiji does not have Code D and the same point is appropriate in trials on information in Fiji.

[18] However what is important from Edwards v The Queen is the explanation that if a witness sights and identifies the alleged perpetrator in the street, there is no rule compelling a later confirmatory identification parade. As Lord Carswell said at paragraph 21 for the Board:

> *"No identification parade was held, the reason, as given by DS Ebanks, being that as Bailey had purported to identify the suspect in the street on the afternoon of 14 April 1999, there was little or no value in holding a parade. If one were held in these circumstances, the defence would criticize an identification made at it on the ground that the identity of the suspect seen recently would be imprinted on the mind of the identifier, who would not truly be identifying by recollection the person whom he saw at time when the crime was committed. There is substance in this view, which the judge adopted and retailed in fairly robust terms to the jury."*

[19] This point is conclusive against the identification argument as mounted by Ole Jitoko in the Magistrates Court; likewise in his appeal to Priyantha Fernando J.

[20] Before leaving identification it is useful to digest another Privy Council case. The case is *Holland v HM Advocate* (2005) UKPC D1. It was an appeal from the premier Scottish appeal court to the Privy Council. The Board upheld the view that *"dock identification"* was not*per se* contrary to Article 6(1) of the ECHR and FF. This was in relation to the jury trials in the High Court. On that basis the focus moves to what actually happened at each stage in respect of identification and to whether taken overall, it can be said that all the facts including dock identifications where relied upon by the prosecution and the directions of the trial judge to the jury, result in an unfair trial. If so it will be contrary to the Article 6 Convention right.

[21] In ***Ilaisa Sousou Cava*** in the passage set out at paragraph 16 above, I explained that dock identification in the Magistrates Court was in accordance with Fiji law. I went on to say that the focus is on the safety of such an identification in accordance with the rules in *R v Turnbull; R v Whitby; R v Roberts* [1977] QB 224. As Lord Carswell said at paragraph 1 of Edwards v The Queen (Jamaica):

> *"The **Turnbull** judgment has led to the adoption of a substantially more critical evaluation of the testimony of witnesses who purport to identify suspects as the perpetrators of offences and the acceptance by trial judges and appellate courts of the need for abundant care in dealing with that testimony, most particularly where it is not corroborated by independent evidence."*

[22] Therefore in magistracy appeals there must be direction in line with the above guidance by the Magistrate is his decision. Since the statutory appeal is by way of re hearing to a High Court judge, it is the duty of the judge to self direct on identification. If the High Court judge performs that task satisfactorily, it matters not that in the Magistrates Court, the magistrate has failed to self-direct properly. Where identification is crucial to conviction, it is the duty of the High Court judge to convict if the identification properly examined is safe and to acquit if it is not.

The Sakiusa statement point and failure to afford Ole Jitoko a final submission

[23] In respect of the Sakiusa witness statement, Justice Priyantha Fernando concluded:

> *"the learned Magistrate has erred in admitting the statement of Sakiusa in evidence"*.

[24] Justice Priyantha Fernando concluded on the point of Ole Jitoko's not being invited to make a closing submission.

> *"I find that the learned Magistrate erred by not informing the said right to the accused"*.

[25] At the end of his judgment on an appeal by way of rehearing Justice Priyantha Fernando said in conclusion:

> *"I see no other conclusion the Learned Magistrate could have come into other than convicting the accused of the charge."*
>
> My conclusion is that Justice Priyantha Fernando, in convicting Ole Jitoko cast aside Sakiusa's statement. The question then is whether the evidence of Bijay Kumar without the evidence of Sakiusa can found a conviction. Justice Priyantha Fernando was positive that it could. Given that there was a hot pursuit by Bijay Kumar and Sakiusa and two identifications of Ole Jitoko by Bijay Kumar, both shortly after the crime occurred, I have no doubt this conclusion was appropriate.

[26] Since it was an appeal by way of rehearing, the opportunity on the rehearing was taken to afford Ole Jitoko every right of submission including the last word to the appellant by way of closing submission.

[27] I therefore conclude that the rehearing did not include either error. So it matters not that the original hearing before the learned Magistrate contained these two errors.

[28] I have explained the law on the appeal in order to assist those who adjudicate trials in the Magistrates Court and those who hear appeals. However, the point on which this case is decided is the jurisdictional matter arising from failure to raise as a ground of appeal *"a point of law … only"*.

[29] **Goundar JA.** I agree with the judgment, the reasons and the proposed orders of William Marshall JA.

[30] **Calanchini AP.** This Court orders

(1) that this appeal of Ole Jitoko be dismissed *in limine* on account of lack of jurisdiction in this Court to hear and consider any of the grounds relied on.

Appeal dismissed.