IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Civil Action No. 862 of 1983

Between:

GYANESHWAR PRASAD LALA — Applicant

- and -

SUVA MAGISTRATES COURT — Respondent

JUDGMENT

On 28th July, 1983, the applicant was committed for trial to this court by the Suva Magistrates Court in the person of Mr. J.M. Perera, Resident Magistrate, following a preliminary inquiry conducted by him in pursuance of the provisions of Part VII of the Criminal Procedure Code.

At that stage the charge which had been brought against the applicant read as follows :

" FIRST COUNT

Statement of Offence

CAUSING DEATH BY DANGEROUS DRIVING: Contrary to Section 238(1) of the Penal Code, Cap. 17.

Particulars of Offence

GYANESHWAR PRASAD LALA s/o LALA TOTA RAM on the 12th day of September, 1982 at Navua in the Central Division, drove a motor vehicle on Tokotoko Queens Road in a manner which was dangerous to the public, having regards to all circumstances of the case and caused the death of VIREND SINGH s/o BHAG CHAND.

SECOND COUNT

Statement of Offence

FAIL TO PRODUCE DRIVING LICENCE: Contrary to Section 23(5) and 85 of the Traffic Ordinance, Cap. 152.

Particulars of Offence

GYANESHWAR PRASAD LALA s/o LALA TOTA RAM on the 13th day of September, 1982 at Navua, in the Central Division, being the driver of a motor vehicle, on Tokotoko Queens Road, did fail to produce the driving licence to a police officer ISOA CUENACANGI within 5 days.

THIRD COUNT

Statement of Offence

FAIL TO PRODUCE CERTIFICATE OF INSURANCE: Contrary to Section 20(1) and 28 of the Motor Vehicles (Third Party Insurance) Ordinance, Cap. 153.

Particulars of Offence

GYANESHWAR PRASAD LALA s/o LALA TOTA RAM, on the 13th day of September, 1982 at Navua in the Central Division, being the driver of a motor vehicle on Tokotoko Queens Road, did fail to produce the Certificate of Insurance in respect of the said motor vehicle to a police officer, INSPECTOR ISOA CUENACANGI within 5 days. "

The applicant now moves this court for an order of certiorari to quash that committal which, his counsel argues, was erroneous in law and beyond the magistrate's jurisdiction.

The record of the preliminary inquiry shows that, when all the witnesses called on behalf of the prosecution had been examined, the learned magistrate (addressing his mind, no doubt, to the provisions of section 229 of the Criminal Procedure Code) decided that the evidence as it stood was, in the words of the record, "sufficient to commit accused."

It seems to be common ground that until he made that decision the learned magistrate had jurisdiction to conduct the preliminary inquiry and that he had conducted it properly. For my own part I see no reason to think otherwise.

However, I understand it to be now argued by counsel for the applicant that, because there was in the evidence as it then stood not the slightest indication that the applicant had driven dangerously -

(i) the magistrate erred in deciding that the prosecution evidence was sufficient to commit the applicant;

(ii) his decision was an error of law apparent on the face of the record and

(iii) his decision was beyond his jurisdiction.

If that really was the position in law the learned magistrate appears not to have been aware of it. Having

made that decision, he proceeded to carry out the requirements of sections 229 and 230 of the Code. Those requirements, briefly stated, are that, if he decides that the prosecution evidence has established "sufficient grounds for committing the accused for trial", the magistrate must record any statement, sworn or unsworn, that the accused himself may elect to give as well as the evidence of any witness the accused may elect to call and also allow the accused or his counsel to address the court.

It appears from the record of the preliminary inquiry that the magistrate asked the applicant whether he wished to exercise his rights under sections 229 and 230 and that the applicant, through his counsel, elected not to do either but to "reserve his defence".

Then, as it also appears from the record, the magistrate, in pursuance of the provisions of section 233 of the Code, committed the applicant for trial to this court. That section requires the magistrate to commit the accused for trial to this court if the magistrate considers the evidence (including at this stage any evidence the accused may have adduced under sections 229 and 230) to be "sufficient to put the accused on his trial".

It is now argued by counsel for the applicant that the committal was a further error of law on the face of the record and that it was beyond the magistrate's jurisdiction. As no evidence at all had been received in addition to that of the prosecution witnesses on the basis of which the magistrate had erroneously and without jurisdiction decided that the evidence was sufficient to commit the applicant when sections 229 and 230 came into play, he

was, counsel argued, again in error and acting beyond his jurisdiction when he went ahead and committed the applicant at the stage at which section 233 came into play.

It seems to be well established that, in England, "certiorari lies on the application of a person aggrieved to bring the proceedings of an inferior tribunal before the High Court for review so that the court can determine whether they shall be quashed, or to quash such proceedings" and that "it will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice, or where the determination was procured by fraud, collusion or perjury." Vol.1, Hal. 4th edit., para. 147.

As Lord Widgery C.J. said in Reg. v. West Sussex Quarter Sessions (1973) Q.B. 188, at page 194 :

> "The prerogative orders are the great residual jurisdiction whereby this court controls the activities of subordinate tribunals, and it controls them in three main categories: first against excess of jurisdiction; secondly against errors of law on the face of their judgments; and thirdly and perhaps most importantly, against denial of natural justice."

On 21st October last I granted leave for the making of this present application. Before granting that leave, I had to consider the unequivocal statement that has appeared in edition after edition of Halsbury (and is to be found in paragraph 1529 of Vol. XI of the 4th edition) that "certiorari does not lie to remove a decision of justices to commit or refuse to commit a defendant for trial." I decided, for reasons that appear in the record of these present proceedings, that it is not true to say that certiorari never lies to committal proceedings and

that an order of certiorari may be made to quash a committal order when there are grounds for doing so. How, I asked myself, could the Queens Bench Division have granted an application for an order of certiorari to quash a magistrate's committal order in Reg. v. Horseferry Road Magistrates Court ex parte Adams (1978) 1 All E.R. 373 if that unequivocal statement in Halsbury were correct?

Since I granted that leave, Mr. Thorley for the Director of Public Prosecutions has been heard in accordance with R.S.C., O.53, r.9(1).

Mr. Thorley has submitted (if I understood him correctly) that the statement in Halsbury is correct and that a magistrate's decision to commit cannot be attacked by certiorari although the committal proceedings can be so attacked. A distinction must be drawn, argued Mr. Thorley, between the committal proceedings which can be quashed, and the committal order, which cannot be quashed. Having done my best to understand that submission I find myself bound, with all due respect, to reject it. To begin with, it seems to me to be clearly obvious that what the Queens Bench Division quashed in Reg. v. Horseferry Road Magistrates Court ex parte Adams, supra, was a committal order. That seems to be clear from what Lord Widgery, C.J., is reported (on pages 373 and 374) to have said :

> " In these proceedings counsel moves on behalf of the applicant for an order of certiorari addressed to the Horseferry Road Magistrates Court and requiring that there should be brought into this court with a view to its being quashed an order of the magistrates' court which I have mentioned, in the person of Mr. R.J.A. Romain, committing the applicant for trial at Knightsbridge Crown Court in respect of two criminal offences".

and (on page 375)

> "To sum up, therefore, this application should succeed, the committal should be quashed ...".

Moreover, Mr. Thorley's submission seems to me to carry with it the absurd notion that, committal proceedings having been quashed, the committal made in those proceedings may remain alive and effective.

Mr. Thorley went on to submit that, even if certiorari does lie to committal orders, the criminal proceedings against the applicant in this court are so advanced that this court no longer has jurisdiction to make an order of certiorari in respect of the committal order.

Mr. Thorley went so far as to suggest (if I understood him correctly) that the trial of the applicant in this court had commenced. He referred to the appearance of the applicant before this court in the person of the Chief Justice on 3rd October last and suggested (again I must say if I understood him correctly) that the applicant had been arraigned and had pleaded "not guilty".

I have seen the record of what happened on that occasion. It was made by His Lordship himself and it reads as follows :

> "Mr. Fatiaki for the Prosecution.
> Mr. Patel for the Accused.
>
> Information read and explained.
>
> Mr. Patel: Accused understands charge. We seek adjournment. We have filed a writ of certiorari in which we complain generally of P.I. Case comes up on 14.10.83 for leave to be obtained.

Mr. Fatiaki: First time I have learned of application. Not received papers yet.

(Sgd) T.U. Tuivaga
Chief Justice

Mr. Patel: Accused is not pleading guilty.

Court: Admitted to bail - in the sum of $500 in his own recognisance.

Stand down until late in sessions.

(Sgd) T.U. Tuivaga
Chief Justice "

In the light of that record it does not appear to me that the applicant has pleaded at all. It seems to me that all that has happened is that the information has been read and explained to the applicant and his counsel has informed this court that he does not intend to plead guilty or, perhaps, that he intends to plead "not guilty".

In any case, I very much doubt that a criminal trial in this court commences when the accused person pleads "not guilty". Section 282 of the Code requires that, after the accused has pleaded "not guilty" (or that plea has been entered in the event of his refusal or inability to plead) "the court shall proceed to choos assessors, as hereinafter directed, and to try the case." Section 287 requires that "when the assessors have been chosen and sworn the barrister and solicitor for the prosecution shall open the case against the accused person." Reading those two sections together I think it is quite clear that, in the contemplation of the legislature, the trial does not commence until counsel for the prosecution opens his case. In my mind, it stands to

reason, even without reference to those two sections, that a trial in this court does not commence until after the assessors have been chosen and sworn. As the Court of Appeal has more than once declared, they are an integral part of the court and it seems to me to be patently false to say that a trial in which assessors serve may commence before they have been chosen and sworn.

The prescribed order of events is : first the accused person is arraigned and is required to plead under section 273; next, if he pleads "not guilty" or that plea is entered on his behalf in the event of his refusing or being unable to plead, the assessors are chosen as required by section 282; then, the assessors having been chosen and sworn, counsel for the prosecution opens his case in accordance with section 287. In my view it is at that stage, when counsel for the prosecution opens his case, that the trial begins and, as that stage has not been reached, the trial has not begun.

I think it follows that anything in Mr. Thorley's submissions to the effect that, because the trial has commenced, this court does not have jurisdiction to make an order of certiorari to quash the committal is of no relevance.

However, it is common ground that on 7th September last, the Director of Public Prosecutions, having received the record of the preliminary inquiry in accordance with the provisions of section 244, and having formed the opinion that the case was one which should be tried upon information before this court, filed an information in this court in pursuance of the provisions of section 248.

Mr. Thorley submits that the filing of that information alone had the effect of depriving this court

of any jurisdiction it may have had to make the order of certiorari which the applicant now seeks. In support of that submission he has cited the following obiter dicta of Laskin J.A., of the Ontario Court of Appeal in Reg. v. Botting (1966) D.L.R. 25 at page 33 :

> "Moreover, there is no appeal from an order for committal for trial and once an indictment is preferred an accused can no longer challenge his committal but must proceed by motion before the trial judge to quash the indictment: See Re Shumiatcher (1961) 131 C.C.C. 112 ...".

That statement, as I have said, was obiter dicta. Moreover, I feel bound to say with great respect that Re Shumiatcher, the case cited in support of it, does not really support it at all. In that case, the accused person having been committed for trial, an indictment founded on that committal having been preferred in the Saskatchewan Court of Queens Bench and an application to quash the indictment based on the illegality of the committal having been dismissed by that court, the accused person made application to the Saskatchewan Court of Appeal by way of certiorari to quash the committal. The Court of Appeal held that it could not entertain that application to quash the committal as that would involve its reviewing the decision of the Court of Queens Bench not to grant an application based on the illegality of the committal. As Culliton J.A., said at the end of his judgment :

> "... nor do I think that when the motion to quash the indictments under s.510 had been dismissed, this court should indirectly exercise an appellate jurisdiction by entertaining a certiorari application to quash the committals upon which the questioned indictments were founded."

So, it seems to me, it was because an application to quash the indictment had been refused by the trial court, not because an indictment had been filed in the trial court, that certiorari to quash the committal for trial was refused.

If that dicta of Laskin J.A. in Reg. v. Botting, supra, really were authority for Mr. Thorley's proposition that the Director of Public Prosecutions, by filing an information in this court has placed the committal order beyond judicial review by this court, then there is, in my view, cause for great concern about the state of the law. Mr. Thorley's proposition seems to come to this : however faulty the committal proceedings, however great a magistrate's want of jurisdiction, however outrageous his denial of natural justice to the accused person and however shocking his errors of law, the Director of Public Prosecutions can cut off "the great residual jurisdiction" of this court to which Lord Widgery referred in Reg. v. West Sussex Quarter Sessions (supra) whereby committal proceedings may be reviewed.

Let no one suppose that a preliminary inquiry is merely a matter of recording evidence or that a committal for trial is an empty formality performed as a traditional prelude to a trial. I respectfully endorse the following statement by Rosenberry J., of the Supreme Court of Wisconsin in Thies v. State 189 N.W. 539 at p. 541 :

> "The object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based."

For reasons which I trust I have made clear, I prefer the view, and hold accordingly, that the filing by the Director of Public Prosecutions of an information in accordance with section 248 of the Criminal Procedure Code does not to any extent deprive this court of its jurisdiction to review committal proceedings by prerogative order.

By that I do not mean to exclude the fact that the Director of Public Prosecutions has filed an information from the circumstances which this court may weigh in the balance in deciding whether or not, as a matter of discretion, it ought in all the circumstances to make the order sought.

Having carefully examined the record of the preliminary inquiry which is annexed to the applicant's affidavit of 28th September last, I have no hesitation in saying that, if I were the magistrate, I would not have committed the applicant for trial. I would have discharged him.

Section 231 of the Code requires that the accused be discharged if the magistrate considers the evidence "not sufficient to put him on his trial". Section 233, on the other hand, requires that he be committed for trial if the magistrate considers the evidence "sufficient to put the accused person on his trial".

Clearly, the test the magistrate is bound to apply under our Criminal Procedure Code is whether the evidence is "sufficient to put the accused person on his trial".

In England today, the statutory requirement is that if the justices are of the opinion that there is "sufficient evidence to put him upon trial by jury for an indictable offence" they must commit the accused person for trial. If they are not of that opinion, they must discharge him. See para. 156 Vol.11, Hal., 4th edit. In my view the English statutory requirement and the Fijian statutory requirement are, in effect, exactly the same. The following comment on the English requirement appears in footnote 6 on page 105, Vol.11, Hal., 4th edition.

> "The function of committal proceedings is to ensure that no one stands trial unless a prima facie case has been made out against him ... The duty of the justices is to decide whether there is a presumption of guilt ... Their duty is not to assess whether a reasonably minded jury might convict but whether they (i.e. the justices) believe there to be a strong and probable presumption of guilt: Amah v. Government of Ghana (1968) A.C. 192 at 208, (1966) 3 All E.R. 177, H.L."

As I have said, I would not have committed the applicant for trial on the evidence which was presented to the magistrate. In my opinion that evidence was, in common parlance, a shambles. To my mind it is quite unreasonable to say that it established a "prima facie case", or a "presumption of guilt", let alone a "strong and probable presumption of guilt", in relation to the charge of causing death by dangerous driving; and no one, I think, would suggest that the applicant might have been properly committed to this court for trial on the two minor charges of failing to produce a driving licence and failing to produce a certificate of insurance.

RK

Does it follow that I should grant the order sought?

There is no doubt that the magistrate had jurisdiction to conduct the preliminary inquiry. He was a Resident Magistrate, and section 233 of the Code empowers any magistrate to conduct a preliminary inquiry. It is clear that Mr. Perera had jurisdiction to decide, after the prosecution witnesses had been examined, whether there were "sufficient grounds for committing the accused for trial" (vide section 229) and to decide whether the evidence was "sufficient to put the accused person on his trial" (vide sections 233 and 231).

It seems to me that there is a conflict of authority on the question whether a tribunal has jurisdiction to arrive at a decision without any supporting evidence at all, given that it initially has jurisdiction to enter on the enquiry. However, when there is some evidence on which the tribunal may base its decision then, it seems, the decision may not be quashed by prerogative order, however absurd it is. In R. v. Smith (1800) 8 T.R. 588, at page 590, Lord Kenyon said :

> "If indeed there had been any evidence whatever, however slight, to establish this point and the magistrate who convicted the defendant had drawn his conclusion from that evidence, we would not have examined the propriety of his conclusion; for the magistrate is the sole judge of the weight of the evidence. And for this reason I think there is no foundation for the first objection ... There was some evidence from which he might draw the conclusion."

RK.

That dicta was quoted with approval by Lord Sumner, delivering the judgment of the Privy Council in R. v. Nat Bell Liquors Ltd. (1922) A.C. 128 in which appeal the central question was whether want of evidence or of sufficient evidence made a conviction one pronounced without jurisdiction. Lord Sumner said (at page 144) :

> "On certiorari, so far as the presence or absence of evidence becomes material, the question can at most be whether any evidence at all was given on the essential point referred to."

In Amah v. Government of Ghana and Another (1966) 3 All E.R., an appeal decided in the House of Lords, Lord Reid said (at page 187) :

> "If a magistrate or any other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right, he has jurisdiction to go wrong."

In Anisminic Ltd. v. The Foreign Compensation Commission and Another (1969) 1 All E.R. 208, at pages 213 and 214, Lord Reid said :

> "But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good

M.A.K.

> faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in Armah v. Government of Ghana that, if a tribunal has jurisdiction to go right, it has jurisdiction to go wrong. So it has if one uses 'jurisdiction' in the narrow original sense. If it is entitled to enter on the enquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law."

It seems to follow that in cases like R. v. Horseferry Road Magistrates Court ex parte Adams, supra, when the Queens Bench Division quashes a tribunal's decision although the tribunal undoubtedly has jurisdiction to "enter on the enquiry", it does so either on the ground that the tribunal has, in Lord Reid's words, "done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity" or "in certain circumstances to correct an error of law."

In the present case the magistrate did not do or fail to do anything to render his decision a nullity. Nor did he commit any error of law as far as I can see; and there was some evidence before him on which to base

his decision.

The evidence to which I refer was given by the first and second prosecution witnesses, Umesh Datt Sharma and Mahendra Singh both of whom swore, in effect, that the applicant's car had bumped into the deceased's car when the latter vehicle was overtaking the former vehicle or immediately thereafter. Their evidence in that regard was for a number of reasons unsatisfactory in the extreme and it was contradicted by the evidence of the third prosecution witness that the vehicle which was overtaken by the deceased's vehicle and which struck the deceased's vehicle from behind was "Mazda 929" which, it appears from other evidence, was not the accused's vehicle the number of which was 295.

Nevertheless, there was some evidence on which to base a decision to commit the applicant for trial and I therefore find myself bound by the compelling authorities I have cited ~~and by which I am, I think, bound~~ to refuse the application for an order of certiorari to quash that committal.

The applicant also asks for the following declarations.

> "A declaration that the charge upon which the learned Resident Magistrate proceeded to commit the Applicant did not discluse an offence known to law.
>
> A declaration that the indictment presented against the Applicant on 3rd day of October, 1983, did not disclose an offence known to law."

Section 274(2) of the Criminal Procedure Code provides as follows :

> "(2) Where, before a trial upon information or at any stage of such trial, it appears to the court that the information is defective, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice. All such amendments shall be made upon such terms as to the court shall seem just."

It seems to me to be quite clear that it is the proper function of the trial judge to decide whether or not the information is defective in any way. It therefore follows, in my view, that it would be quite inappropriate for me to express any view as to whether or not the information is defective. I would be making a declaration on a question which it would, in the course of the trial, be the trial judge's function to decide. It would, I am sure, be an incorrect exercise of my discretion if I were to do so.

I therefore decline to make either of the declarations sought by the applicant.

(R.A. Kearsley)
JUDGE

Suva,
4th January, 1984.