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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 52 of 1980

Between:

SHIU RAM s/o Venkataiya — Appellant

and

THE MAGISTRATE'S COURT OF LABASA — Respondent

Mr. V. Parmanandam for the Appellant.
Mr. M. Raza for the Respondent.

Date of Hearing: 19th March 1981.

Delivery of Judgment:

ORDER OF COURT

Gould V.P.

This is an appeal from the dismissal by the Supreme Court of an application for orders of prohibition and certiorari to remove to the Supreme Court and quash a decision by Mr. S.N. Sadal, Labasa Magistrate, whereby he declined to permit the appellant to withdraw a consent which he had given to be tried by the Magistrate's Court.

Section 4(1) of the Criminal Procedure Code (Cap.14) is in point, and it reads:-

> "4.(1) Subject to the other provisions of this Code, any offence under the Penal Code may be tried by the Supreme Court, or by any magistrates' court by which such offence is shown in the fifth column of the First Schedule to be triable:
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> Provided that where so stated in the fifth column of the First Schedule the offence shall not be tried by a magistrate's court unless the consent of the accused to such trial has first been obtained."

The only other section to which reference need be made is section 210:-

> "210. If before or during the course of a trial before a magistrates' court it appears to the magistrate that the case is one which ought to be tried by the Supreme Court or if before the commencement of the trial an application in that behalf is made by a public prosecutor that it shall be so tried, the magistrate shall not proceed with the trial but in lieu thereof he shall hold a preliminary inquiry in accordance with the provisions hereinafter contained, and in such case the provisions of section 225 of this Code shall not apply. "

Section 225, referred to in that section, is not relevant here. The facts may best be set out by quoting at some length from the judgment of the learned Judge in the Supreme Court. He said:

> " The applicant was originally charged together with one Yenktesh s/o Appal Sami with four offences namely, conspiracy to commit a felony, forgery, uttering a forged document and receiving money on a forged document.
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> The applicant did not appear at the Labasa Magistrate's Court on the 10th or 11th March 1980 when the case was called and Mr. A.D. Amstell, the then Resident Magistrate, ordered that a bench warrant be issued to bring the applicant before the Court on the 1st May, 1980.
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> The prosecuting officer was apparently not aware prior to the 1st May, 1980 that the applicant was in prison and had been there since the 3rd April, 1978. He was on the 1st May, 1980 brought before the Labasa Magistrate Mr. S.N. Sadal.
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> Mr. Parshu Ram appeared for Yenktesh, but the applicant was unrepresented and had up to that time no opportunity of briefing counsel. The prosecution withdrew the conspiracy charge and both accused were discharged in respect of that charge.
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> The remaining three charges required the consent

of the two accused to their trial by the Magistrate's Court pursuant to the provisions of Section 4(1) of the Criminal Procedure Code. The Record indicates that the Magistrate obtained such consent of both accused which is recorded as follows:

> 'Both accused elect trial by Magistrate's Court.'

. There is nothing in the Record to indicate that the applicant is very young or suffering from any mental infirmity or that the learned Magistrate did not fully explain to both accused that their consent was required before he could deal with the case.

As I have already stated, the two accused were originally charged with conspiracy which would seem to indicate they knew each other and Yenktesh was represented by counsel. These facts may have influenced the applicant in deciding to be tried by the Magistrate's Court. It is clear he did consent to trial by the Magistrate's Court.

The remaining three charges were then read and explained to both the accused and they pleaded guilty to all three charges.

The prosecution then called its first witness Bhagmani d/o Sital Maharaj whose evidence in chief was very brief. The applicant, being the first accused on the charge sheet, was then asked if he wished to cross-examine the witness. The applicant then pointed out to the learned Magistrate that it was his first appearance before the Court and that he wished to brief counsel. He sought an adjournment.

The Magistrate in granting the adjournment, expressed his view that the case should not have been fixed for hearing that day as it was the applicant's first appearance in Court. He granted the application and the hearing was adjourned until the following day when Mr. Ali of the firm of Messrs. Parmanandam Ali and Company appeared for the applicant.

On that day the prosecution informed the Magistrate that the first prosecution witness could not give evidence as she was ill and Mr. Ali also pointed out that he had in any case only received instructions that morning indicating he also sought an adjournment. The hearing was adjourned until the 26th May, 1980 when Mr. Parmanandam appeared and informed the

Magistrate that he was of the view that the case should be tried by the Supreme Court. He asked the Magistrate to entertain an application by the applicant presumably to change his election, or more correctly withdraw his consent to trial by the Magistrate.

The Magistrate did not accede to this request. He stated that the case was part heard and an adjournment had been granted to the applicant to enable him to brief counsel. He was of the view that the applicant could not change his election at that stage. He also expressed his view that at that stage the case should not be heard by the Supreme Court. "

As the last paragraph of that quotation indicates, the magistrate considered that the appellant could not change his election at that stage, and also that the case should not be heard by the Supreme Court. The latter reference is undoubtedly to section 210, which we have set out above, and to the words - "If.....during the course of a trial.....it appears to the Magistrate that the case is one which ought to be tried by the Supreme Court.....". We will return to this later. When he said that the appellant could not change his election at that stage the Magistrate may have had in mind such cases as R. v. Craske Ex Parte Commissioner of Police of the Metropolis /1957/ 2 All E.R. 772.

That case dealt with the withdrawal of a consent to be tried summarily on a charge for an indictable offence, after the accused had pleaded not guilty. The court had to consider sections 19 and 24 of the English Magistrates' Courts Act, 1952, which are quoted in the following passage at p. 774 of the report:-

" The words of s. 19(5) are that the court shall ask the accused whether he wishes to be tried by jury or consents to be tried summarily and, if he consents, shall proceed to the summary trial of the information. So, after the consent has been given the court is to proceed to trial. Then s. 24 provides:

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' Except as provided in s.18(5) of this Act, a magistrates' court, having begun to try an information for any indictable offence summarily, shall not thereafter proceed to inquire into the information as examining justices. '

In my opinion the magistrate, having got no further then hearing that the accused elects to be tried summarily and pleads not guilty, can allow him to withdraw his consent and to elect instead to go for trial by jury. The words of s.24 are:

'.....a magistrates' court, having begun to try an information for any indictable offence summarily, shall not thereafter proceed to inquire into the information as examining justices. '

Once the court has begun to try the case, the magistrate must go on to try the case; he cannot then sit as examining justice and commit the accused for trial. "

Plainly the question was governed by the particular legislation. After the consent is given the Court "shall" proceed to the summary trial, and "having begun to try" the case summarily, shall not thereafter proceed as in a preliminary inquiry. There are other cases on the same point. In R. v. Bennett Ex parte R. /1960/ 1 All E.R. 335, it was held that where a trial had commenced summarily, to the extent that one woman police officer had given some evidence of a rather formal nature, the magistrate had begun to try an information within the meaning of section 24 of the same Act. There was therefore no power to allow the applicant to change her election.

The facts of R. v. Bennett are very close to those of the present case and it appears clear enough there would in the like manner be no power to allow the withdrawal of consent, if the same legislation applied in Fiji.

As has been seen, it does not. Section 4 in effect gives jurisdiction to the Magistrate's Court to try certain offences with the consent of the accused first obtained. It is purely a matter of jurisdiction: there are no such words as

"shall proceed to the summary trial of the information", but that of course is what the jurisdiction is intended for.

Section 210, unlike section 24 of the English Act, does not prohibit a change to the preliminary inquiry procedure in as many words. It is a matter of common sense that in normal circumstances at least, the trial will commence and continue summarily. Section 210 does, however, provide (and this would apply to summary trials whether jurisdiction depends on the consent of the accused or not) that the summary trial shall discontinue and be replaced by a preliminary inquiry, in two cases. One, if (at any stage) it appears to the magistrate that the case is one which ought to be tried by the Supreme Court and two, if an application is made before the commencement of the trial by a public prosecutor.

It is manifest that the question given importance in the English cases, namely whether the taking of evidence has commenced, has no relevance to section 210. The discretion implicit in the words "which ought to be tried" is one which can be exercised at any time. We think it is also clear that, once an accused person's consent to summary trial has been given nothing in the Criminal Procedure Code specifically gives him any right to withdraw that consent. Nor do we think any such right can be implied; it would be an absurdity to allow such a withdrawal to take place at the mere whim of the accused or because he thought the evidence was going against him.

The next question is whether although the accused person is not given a <u>right</u> of retraction, the magistrate has a discretion to permit the withdrawal of a consent. If he has, it is not negatived by whether the taking of evidence has commenced, though indeed the extent to which evidence had been taken might well be a factor to be considered by the magistrate in coming to a decision.

In our opinion the magistrate has such a discretion - if he has not the accused would be rigidly bound from the moment he gave his consent. The discretion could arise as one element of the decision of the magistrate under s. 210 that the case is one which ought to be tried by the Supreme Court; there appears to be no compelling reason to exclude from consideration of that topic reasons which are personal to the accused; in other words the reasons leading to such a decision need not necessarily be limited to such matters as the gravity or the circumstances of the offence.

The second source of the discretion is, we consider, the power of the magistrate so to order matters in the cases before him as to serve the interests of justice, provided no statutory prohibition or provision is contravened. We think this was accepted in Craske's case up to the point where the statute became paramount. At p. 774 Lord Goddard CJ said:-

> "The plea joined issue, and once issue is joined the court has to start to try the case; but the magistrate had not started to try the case. He could only have proceeded to try the case, it seems to me, as a summary offence so long as the election stood, but it would not be a correct reading of these sections to say that once the election has been given, it has been given for all time, so that although his consent might have been given by a mistake or although the prisoner would have been advised (if his advocate had been present) to refuse summary trial, and although the magistrate had not embarked on it, he would not be allowed when his advocate did arrive, to elect to go for trial before a jury. For my part I am content to rely on s. 24, to which I have already referred. "

Devlin J (as he then was) said, at p.776 -

> "I can find nothing in the words which would deprive a magistrates' court of the ordinary right, which the court must have in the interests of justice, that if on a full consideration of the matter, it thinks that a man has given his consent ill-advisedly to abandoning his right to a trial by

jury, he should be given the opportunity of reconsidering the matter. "

We are satisfied that the learned Magistrate had a judicial discretion. The learned Judge in the Supreme Court came to the same conclusion though on a somewhat narrower basis. He said :-

" There is no provision in the Criminal Procedure Code allowing an accused to withdraw his consent but a magistrate has power to allow an accused, who has given his consent to being tried summarily to reconsider the matter before the Court proceeds to trial (so held in Craske's case referred to earlier).

Once the trial has begun, however, it is the Magistrate's duty to continue with it unless he can invoke Section 210 of the Criminal Procedure Code or the Director of Public Prosecutions terminates the prosecution. "

We have indicated our view that the commencement of the trial is not a barrier in Fiji, but that is not strictly material in the circumstances as the learned Judge appeared to accept that the magistrate had a discretion. He held however that it had not been shown to have been wrongly exercised within the meaning of those words as expressed in the case of Zardin quoted in R. v. Lambeth Metropolitan Stipendiary Magistrate, ex parte Wright (1974) Crim. L.R. 444, 446 - they read -

".....that is to say, exercised on a wrong principle or exercised having regard to factors which ought to have been ignored or exercised without reference to factors which ought to have been included, or indeed not exercised at all. "

It was submitted in the Supreme Court and accepted by the learned Judge that there was no breach of natural justice in the way the case of the appellant was dealt with. He had been given the necessary adjournment to obtain the services of counsel. The only question to be decided, so the learned Judge

held, related to the refusal to exercise discretion in favour of granting the application to withdraw consent. This is briefly dealt with by the learned Judge as follows:-

> " The applicant is no stranger to a Court of Law and his two years in prison is evidence of that. He and his co-accused, who was represented by counsel, both elected to be tried by the Magistrate. Although not entitled to an adjournment after the trial commenced he sought and was granted an adjournment to enable him to consult a solicitor.
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> It is significant also that Mr. Ali when he appeared for the applicant on the adjourned hearing did not raise the question of his client seeking to change his election. The Record discloses that Mr. Ali by his conduct acknowledged the Magistrate's jurisdiction. "

There is also the earlier statement, which we have quoted, that there is nothing to indicate that the appellant is very young, or that the magistrate did not explain the situation fully.

With respect, we fail to follow the statement that Mr. Ali, by his conduct acknowledged the magistrate's jurisdiction. Mr. Ali certainly did not apply on the occasion of his first appearance for the appellant to be allowed to withdraw his consent but he had only been instructed that morning and sought adjournment. The application was made as soon as the case next came up for hearing.

The question now arises whether the magistrate misdirected himself in any way which bore on the exercise of his discretion. There appears to be at least a danger that he may have done so. He is quoted by the learned Judge as saying that the case was part heard and that in his view the applicant could not change his election at that stage. If by that he meant he could not permit him to do so, because evidence had been taken, in our opinion that is a misdirection for the reasons we have given above. The magistrate also said that an

adjournment had been granted to enable the appellant to brief counsel - so far as it goes that was a perfectly proper consideration.

There is little guidance to be gleaned from authority on judicial discretion on this particular matter. The passage we have quoted from the judgment of Lord Goddard CJ in the Craske case may have some relevance and a little earlier he said - "One should not lightly deprive persons of their right to be tried by a jury." In R. v. Southampton City Justices ex parte Briggs [1972] 1 All E.R. 573 the Divisional Court directed justices to determine an accused person's application to withdraw his consent in their discretion. Lord Widgery CJ said, at p. 575 -

> "We have been pressed by counsel for the applicant to give some kind of indication or guidelines as to how such a discretion should be exercised. For my part I think it would be dangerous, and I decline to give any such direction. I think it suffices to tell the justices that, as in all their undertakings, they must endeavour to do justice, and whether or not they exercise their discretion in favour of the applicant's request will depend on how they see the broad justice of the whole situation. "

Mr. Parmanandam called attention to the Fiji Constitution Article 10(1)(c) and (d) providing that an accused person shall have adequate time and facilities for the preparation of his defence and a right to legal representation. It does appear that in the present case, though by adjournment he was able to obtain legal representation, he did not have it, owing to a procedural misunderstanding which was no fault of his own, at the important initial stages of the trial. It may possibly appear to the appellant, in the circumstances (and not without reason) that he has been deprived of the possibility of retracting his consent by this slip, resulting in the early taking of evidence, in which case justice would

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not appear to him to have been done.

The question is what order this Court should make. It is a case in which there is an inference, too strong to be disregarded, that the learned magistrate may well have exercised his discretion on a wrong legal basis, but not a case in which this Court can substitute its own discretion. The application is for certiorari to quash the decision of the magistrate declining to permit the appellant to elect to be tried before the Supreme Court. The application is granted to this extent, that the order as made is quashed but the matter is remitted to the Magistrate's Court to reconsider and to exercise the discretion of the magistrate afresh in the light of this judgment.

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Vice President

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Judge of Appeal

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Judge of Appeal

SUVA.