IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No. 72 of 1984

Between:

OSEA PALAGI Appellant

- and -

R E G I N A M Respondent

A. Tikaram for the Appellant
A. Gates for the Respondent

Date of Hearing : 7th March, 1985.
Delivery of Judgment : [illegible] March, 1985.

JUDGMENT OF THE COURT

Roper, J.A.

On the 7th March, 1984, the Appellant was convicted by Mr. J.R.M. Perera, Resident Magistrate, in the Magistrates' Court at Suva on a charge of rape and sentenced to three years' imprisonment. He appealed unsuccessfully to the Supreme Court against both conviction and sentence and now has a similar appeal before this Court. As the appeal is from the Supreme Court in its appellate jurisdiction an appeal against sentence does not lie, but that is by the way; and on the appeal against conviction this Court can only consider grounds which involve pure questions of law.

The Appellant filed his own notice of appeal and on a benevolent reading it could perhaps be said that pure questions of law are raised, but he is now represented by Counsel, Mr. A. Tikaram, who has applied for leave to be heard in support of a new ground of appeal, which, incidentally, was not raised on the appeal before the Supreme Court. It is in effect an allegation that the learned Magistrate at a very early stage in the trial closed his mind to the possibility of the Appellant's innocence. It is an allegation of bias, which Mr. Gates accepted raised a question of law. Mr. Tikaram has abandoned all other grounds of appeal.

According to the Appellant's affidavit filed in support of the application for leave to advance the fresh ground this was the course of events. As the complainant, who was the first witness, was giving evidence, and describing how the Appellant had threatened to punch her, the Magistrate, according to the Appellant, "said something to the effect that if I was to change my plea I could expect a lighter sentence". This indicated to the Appellant that the Magistrate had already made up his mind as to guilt. At the conclusion of the first days hearing the Appellant sought advice from clerks of the Court and was apparently advised to raise the issue with the Magistrate the next day. The Appellant has deposed that the next day he asked to be tried by the Supreme Court and referred to the Magistrate's comment the previous day. His affidavit continues :-

> "10. THAT upon my request for trial by the Supreme Court the Trial Magistrate became very annoyed and the following exchange took place between us and this was the first and the only time during my trial I spoke directly to the Court in English :-

Trial Magistrote : 'You are lying when you say that'.

Myself : 'Sir, I can bring 10 witnesses who heard you say that'.

Trial Magistrate : 'Prosecutor, do you recall me having said that?'

Prosecutor : 'No Sir'.

11. THAT at this point the Trial Magistrate rejected my application as per the Order on page 19 of the Trial Record."

It is clear from the record that the Appellant did indeed seek, unsuccessfully, to chonge his election and be tried by the Supreme Court, but according to the Magistrate's notes the Appellant's ground for seeking that chonge was that he had not understood the difference between a summary and Supreme Court trial. There is no reference in the Magistrate's notes to any allegation of bias or dissatisfaction with the Mogistrate's approach to the cose. We also have before us a supporting affidavit by Kevueli Tunidau, who was the Court Interpreter in the Magistrate's Court during the trial. That affidavit goes rather further than mere support for the Appellant's story. It strengthens it. According to Mr. Tunidau he was called to the Magistrate's Chambers at the morning adjournment on the first day of the trial, after the complainant had given her evidence-in-chief, and was asked to inform Palagi that the evidence against him was strong and that if he changed his plea he could expect a lighter sentence. Mr. Tunidau passed the message to Palagi who became very angry. His affidavit continues :-

"4. THAT when the Court resumed after the adjournment the Trial Magistrate asked the accused if

he still maintained his not guilty plea and it was at this stage the accused asked me to say to the Trial Magistrate and I quote 'I don't want this Magistrate to hear my case because it is my view this Magistrate has already made up his mind that I am guilty'.

5. THAT when I interpreted this to the Court, the Trial Magistrate informed the accused that as evidence of two witnesses had already been taken the accused could not now change his election.

6. THAT I was again the Court Interpreter on the adjourned continuation of this trial and recall that the accused spoke directly to the Magistrate in English and again requested that he be tried by the Supreme Court and not by the Trial Magistrate and there were heated words exchanged which I cannot exactly recall except that I rebuked the accused from speaking directly with the Trial Magistrate when he himself had requested that the proceedings be interpreted to him."

One of the unfortunate features of this case is that Mr. Perera is presently on leave and out of the country so that it is not possible to put this allegation of bias to him for comment. An allegation of bias is a serious one, not to be lightly mode, but we have decided that justice requires that we decide this issue now on the information available to us. In the light of Mr. Tunidau's affidavit, the very fair stand taken by Mr. Gates who offered no objection to the admission of the fresh ground, and the time that has elapsed since the trial, we feel justified in so doing. We therefore grant leave to the Appellant to argue the fresh ground.

Although we are satisfied that an allegation of bias raises a question of law, as Mr. Gates accepted, the question remains whether we have jurisdiction to deal with

the matter on the basis of a ground not raised in the Supreme Court, and divorced from that Court's consideration of the matter.

An appeal pursuant to Section 22 of the Court of Appeal Act (Cap. 12) such as the present, is prima facie an appeal against the decision of the Supreme Court but in our opinion Section 22(3) provides the necessary extended jurisdiction to deal with the present situation.

> "22.-(3) On any appeal brought under the provisions of this section, the Court of Appeal may, if it thinks that the decision of the magistrate's court or of the Supreme Court should be set aside or varied on the ground of a wrong decision of any question of law, make any order which the magistrate's court or the Supreme Court could have made, or may remit the case, together with its judgment or order thereon, to the magistrate's court or to the Supreme Court for determination whether or not by way of trial de novo or re-hearing, with such directions as the Court of Appeal may think necessary."

We see that as a provision giving this Court jurisdiction to go behind the Supreme Court decision appealed from and consider the conduct of the case in the Magistrate's Court. We stress however that it is a jurisdiction which would be exercised only in the most exceptional circumstances. We see this as such a case, and are satisfied that there was a very real danger that a miscarriage of justice resulted.

We therefore allow the appeal and direct a hearing de novo in the Magistrate's Court before a different

Magistrate.

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Vice President

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Judge of Appeal

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Judge of Appeal