IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 40 of 1986.

Between: DAVID JOHN COLLARD Appellant

- and -

R E G I N A M Respondent

J. R. Reddy for the Appellant
M. D. Scott (Director of Public Prosecutions) for the Respondent.

Date of Hearing : 22nd October, 1986

Delivery of Judgment: 31st October, 1986

JUDGMENT OF THE COURT

Speight, V.P.

On 17th December 1985 the appellant pleaded guilty in the Magistrate's Court at Nadi to one charge of attempting to export notes (Australian and Fijian currency) from Fiji on 17th July 1985 in breach of Section 24(1) of the Exchange Control Act Cap. 186. He was fined $10,000 and the currency was forfeited.

An appeal was filed to the Supreme Court pursuant to Part X of the Criminal Procedure Code Cap. 21. The appeal raised the question whether appellant had indeed pleaded guilty or whether that plea should have been accepted by the Magistrate. There was also an appeal

against severity of sentence and in this it was claimed:-

> "3. (c) That the sentence is harsh and excessive having regard to all the circumstances of the case in as much as the learned trial Magistrate erred in considering facts and circumstances which were not proved and or raised."

This wording is of some relevance, as will be mentioned later.

The appeal was heard on 23rd April 1986 and by a reserved Judgment of 9th May was dismissed.

From that determination there has been a second appeal to this Court, pursuant to Section 22(1) of the Court of Appeal Act Cap. 12. It is desirable to set out that subsection:-

> "22. (1) Any party to an appeal from a magistrate's court to the Supreme Court may appeal, under this Part, against the decision of the Supreme Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only (not including severity of sentence):
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> Provided that no appeal shall lie against the confirmation by the Supreme Court of a verdict of acquittal by a magistrate's court."

Grounds 1 and 6 in the Notice of Appeal in this Court repeated the claim previously advanced that the plea in mitigation in the Magistrates Court had amounted to a plea of not guilty. These grounds found no favour in the Supreme

Court, for they were entirely without merit, and Mr. Reddy, who had not previously appeared as counsel, abandoned them before this Court. The other grounds related to sentence and read:-

> "2. That the Learned Appeal Judge erred in not finding that a finding of fact on whether the Appellant brought all of the monies found in his possession on the 14th of July, 1985 from Australia as claimed by him was an essential pre-requisite to a proper exercise of the trial Courts discretion in imposing sentence including ordering confiscation of the money found in the Appellant's possession.
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> 3. That the Learned Judge erred in proceeding upon the premise that the Appellant's claim that he brought the money with him from Australia was not credible when there was no basis for so proceeding.
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> 4. That the sentence imposed by the Trial Magistrate is unlawful and was imposed without jurisdiction and ought to be vacated.
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> 5. That the Learned Trial magistrate and the Appeal Judge erred in law in not applying correct principles in imposing and confirming the sentence including the order for confiscation against the Appellant."

Now under section 22(1) of the Court of Appeal Act it is generally said that there is no second appeal against severity of sentence and Mr. Reddy has attempted to face up to this difficulty. We propose to postpone discussion of this aspect until we have reviewed the matter in the ordinary way, paying particular regard to the grounds of appeal lodged in each Court.

The case against Appellant in the Magistrate's Court charged that contrary to section 24(1)(a) of the Exchange

Control Act he had attempted to export bank notes ($(A) 18,082 and $(F) 360) on 17th July 1985 without having obtained the permission of the Ministry of Finance. The purpose of the restriction of course is obvious - to prevent the depletion of the stock of currency in Fiji - whether it has been generated locally or brought in from overseas. It is important legislation and the maximum penalty for breach is very high - 3 times the value of the currency, and forfeiture.

The essential facts are simple. Appellant, who is a business man, visits this country frequently, usually in the course of his firm's business here. This generates income and he has frequently paid tax on profits earned and obtained Central Monetary Authority approval to send proceeds to Australia.

On this occasion he had entered the country by air on 14 July, 1985 and he claimed that he brought approximately $(A) 19,000 in notes with him.

On 17th July he was departing - from Nadi Airport - apparently sooner than he had originally intended for personal reasons. He was stopped by Customs inspectors during the departure process and the notes were in his possession - either in his pockets, or wallet, or a carry bag. He said both then, and at latter interview that he had brought the notes with him when he arrived a few days earlier, for the purpose of buying a gold ingot(s) for his wife's

birthday; he said he had not had time to do so and believed he was entitled to take the money out.

He was represented by counsel. A plea of guilty was entered and this explanation was the basis of a plea in mitigation on his behalf.

In imposing sentence the learned Magistrate treated the matter on the basis that the claim of bringing the money in was accepted, but he did not accept that this experienced business man could be unaware of the need to obtain export permission - especially in the light of his frequent visits to and transactions in Fiji. In discussing the course of events the magistrate said that defendant had failed to declare to Customs when he arrived that he had this money with him. Mr. Scott for the Respondent concedes there is no legal requirement for an arriving passenger to declare this particular currency. Section 23(1) does require declarations for certain funds - viz those which are specified by the Minister and published in Legal Notices - which are apparently varied or amended from time to time.

In the event, having reviewed the facts and the importance of the legislation, the Magistrate imposed a fine of $10,000 and ordered forfeiture of the money.

An appeal (of rather complicated wording and ambit) was made unsuccessfully to the Supreme Court. In dismissing certain legal issues raised, the learned Judge dealt with facts and, like the learned Magistrate wrongly assumed that section 23(1) required a declaration of Australian money being brought in and noted that no such declaration had been made. It is clear that both the Magistrate and the Judge believed that the appellant had been in breach of section 23(1) although he had not been so charged. Counsel on appeal should have been aware of the Magistrate's erroneous statement, but did not correct it. We think that as the Magistrate had mentioned this matter in his judgment counsel for both appellant and respondent should have drawn the attention of the learned Judge to the slip. A Judge is entitled to rely on counsel to have ascertained the correct position.

It was not suggested by Mr. Reddy in this court and we are sure that he did not mean us to infer that a professional magistrate, in passing sentence, would have imposed a higher sentence for exporting the money because he believed that earlier the defendant had committed an importing offence and so was sentencing for two offences. Similarly no such suggestion was made in respect of the Supreme Court proceedings.

The question which was relevant to the gravamen of the offence was not whether an importing offence had been

committed - but whether failure to declare was proof that there had not been an importing as claimed. Obviously it is less blameworthy to take out money which one has just brought in, than to take out money which is of Fijian origin - thereby evading tax and depleting existing monetary stocks.

It is clear that the learned Magistrate, in referring to the defendant's claim that he had brought the money in, commented that he "failed to declare (it) to Customs" and thereby misstated the law, for we are now told that there is no ministerial prohibition on the bringing in of Australian currency.

But a reading of the decision as a whole shows that the sentence was passed on the basis that the defendant's claim as to the origin of the money was accepted or at least was not shown to be untrue. Apart from what the Magistrate said we think the quantum of the fine reflects the same approach. The maximum fine, in addition to forfeiture, would be in excess of $50,000 - disregarding minor exchange rate differences. Had this been approached on the basis that the money had its origin in Fiji, with the defendant being a regular exporter of currency thoroughly familiar with the appropriate procedures, then it would have been a flagrant case of large scale smuggling and the fine would have been much higher than one-fifth of the maximum. In our view there is nothing to show that the Magistrate's

remark that no declaration had been made on arrival played any part in the sentence imposed.

A similar situation obtained on appeal. The case there was clouded by the facts being discussed in support of an attempt made by appellant's then counsel (not Mr. Reddy) to have the plea of guilty set aside on the basis of his state of mind at the time of attempted export. It was in this context that the learned Appeal Judge was obliged to discuss the appellant's conduct, but the matters he spoke of are relevant to show that he too, like the Magistrate, was concentrating primarily on the facts leading up to departure.

He mentioned the provisions of section 24(1); the appellant's knowledge of his possession of the money; his frequent trips as a businessman to and from Fiji; and the high probability that he would be aware of governmental exchange controls in many countries.

It is true that the Judge had reservations about the truth of the appellant's claim of having brought the money in, but his expressed reason for so doing was the unlikely nature of the claim of intended purchase of gold ingot(s) in such quantity. We might observe that his reservations were justified - for there had been ample opportunity between apprehension and Magistrate's Court hearing, and again before the appeal hearing for confirmation to be

obtained from Australia or else where - and no such material was put forward - even though experienced counsel was acting throughout. In this regard some editorial notes to Newton (1983) Criminal Law Review 198 at page 200 suggest that a defendant who has proof of mitigating circumstances within his own power and does not produce it may only have himself to blame if his mitigation is not unreservedly accepted. It hardly lies in the mouth of the appellant to blame the Court for not resolving this point - see Ground 2 of Notice of Appeal.

Be that as it may, this appeal was not dealt with on the footing that his explanation was rejected. It is true that the learned Judge said, as had the Magistrate, that the notes came within the ambit of prohibition under section 23(1), but he did so in a passage where he twice said "even if his story is true". Neither judicial officer relied upon the mistaken belief of the state of the law concerning non-declaration as disproof of the appellant's claim, but rather as a comment that an earlier offence than the one before the court may have been committed - and as we have said Mr. Reddy has not suggested that any part of the penalty was imposed for such supposed offence.

The learned Appeal Judge again referred to a possible infringement of section 23(1), but this time in a different context - namely the difficulty which appellant might or might not have had in persuading the exchange control

officers to allow the money out had he made application - as he had on all previous occasions of remittance.

The judgment then deals at length with other matters not pursued before this Court.

From this discussion it is clear that an error was made in both courts when it was said that a declaration of importation would have been required; but for reasons discussed, that error does not appear to have led either Court to deal with the matter on any basis other than the relevant ones - namely the quantum of the money, the offenders knowledge of the requirements and the deliberate nature of his actions.

On an appeal against sentence one looks to see whether a relevant matter has been overlooked, or an irrelevant matter has been taken into account - that is what the grounds of appeal against sentence specifically recited [See ground 3(c) (supra)]. In our view this has not occurred.

In the Magistrate's Court it was accepted that the appellant had in fact brought the money in. In the Supreme Court it was accepted as possibly being true - the offender was not treated in either court on the basis which has been held to be wrong in principle in the reported cases referred to us - namely of sentencing on a less favourable, but unproved interpretation of equivocal facts.

Thus far the matter has been considered without regard to the Provisions of section 22(1) of the Court of Appeal Act.

We have concluded that even if there was an unrestricted second right of appeal against severity of sentence (as distinct from legality of sentence) it would not succeed in this case because the matter was not dealt with on the basis that the money had not been brought in i.e. the error of law was not a factor in leading to the more unfavourable view of appellant's conduct being adopted.

No question of law therefore arises and no appeal lies however broadly one interprets section 22(1). However the following observations may encourage more detailed submissions than were made in this case, in future appeals where the point becomes relevant.

The limitation on second appeal is expressed in two separate phrases:

(i) on any ground of appeal which involves a question of law only.

(ii) (not including severity of sentence).

Let us first consider (i) alone. Of course a sentence passed in excess of jurisdiction gives rise to a point of law. In addition a situation might arise, as was submitted here, that in reaching a decision on quantum of penalty a mistaken view of the law had been taken but a penalty

had been fixed which was within jurisdiction.

If the subsection contained only those words in (i) it could be argued, as Mr. Reddy submitted, that a sentence which is influenced by a mistake of law, or by wrong application of sentencing principles gives rise to a question of law. Certainly such a sentence might in part at least be founded on a mistaken belief on a point of law - but is it a decision "involving a point of law only"?

But the subsection does not end there. One must attach a meaning to the words in (ii) especially if to do so helps resolve an uncertainty. It may well be the case if the quantum of sentence is lawful - and an appeal against severity is an appeal against quantum - that an error of law which possibly played a part in the assessment has been specifically excluded from the ambit of appeal powers. The power to err within jurisdiction is not unknown in other fields.

However the point was not the subject of full submissions and in our view its solution is not

necessary for the determination of the present appeal, so we express no concluded view.

Appeal dismissed.

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Vice-President

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Judge of Appeal

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Judge of Appeal