

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0007 OF 1995  
(High Court Criminal Case No. 3 of 1993)

BETWEEN:

SHIU SAMI AND SHIU KUMAR  
S/O NARAYAN SAMI

APPELLANT

- and -

THE STATE

RESPONDENT

Mr. T. Fa for the Appellant  
Mrs. N. Shameem for the Respondent

Date and Place of Hearing: Suva, 12 February 1996  
Delivery of Judgment: Suva, 15 February, 1996

JUDGMENT OF THE COURT

Although the appellant, having pleaded guilty, has appealed against sentence only, the record discloses possible irregularities in the committal proceedings and we have found it necessary to consider first whether or not there was a valid committal.

The appellant was originally charged with attempted murder contrary to section 214(a) of the Penal Code. The particulars of offence alleged that on 13 March 1992 at Nasinu he attempted to cause unlawfully the death of one Dharmendra Kumar. He was committed for trial in respect of that offence.

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However, the offence for which he was committed for trial was indictable and triable before the High Court only. It was, therefore, necessary for the magistrate to comply with the procedures laid down for committal proceedings before the appellant could be tried in the High Court for it. The record before us discloses that at the preliminary inquiry on 11 November 1995 the appellant was present in the Magistrates' Court but was unrepresented. On that date Ms L. Laveti appeared on behalf of the Director of Public Prosecutions and the Chief Magistrate received evidence only under section 256(1) of the Criminal Procedure Code (Cap. 21). Mrs Shameem informed us that the prosecutor recorded a note that the Chief Magistrate asked the appellant whether he was willing to have the preliminary inquiry conducted as a "paper committal" and that the appellant agreed. However, the Chief Magistrate did not make any record of that. We need not pursue the matter further as it is immaterial to our decision. Nevertheless, we must make two comments. First, on the assumption that the question was put to the appellant, the Chief Magistrate should have recorded it. Second, if the record which he made was defective, the respondent should have taken appropriate steps to have it corrected before the appeal came on for hearing.

A police officer tendered statements from 26 witnesses and 10 exhibits. He advised the Court that he had

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served the appellant with a copy of each of the statements. The Chief Magistrate then stated as follows:

*"As the Accused is unrepresented, I will adjourn to consider the evidence. Adjourned to 2.12.92. Bail extended."*

There is nothing in the record of the preliminary inquiry to indicate that the witnesses' statements were read aloud to the appellant or that the Chief Magistrate gave any direction that they were not to be read aloud to him. Mrs Shameem did not suggest that either of those things had been done. Then on 2 December 1992 the Chief Magistrate ruled that there was prima facie evidence against the appellant and committed him to the next session of the High Court for trial. There is no record that he asked the appellant whether he wished to give evidence or to call witnesses before he committed him. Having committed the appellant for trial, he admitted him to fresh bail.

On 5 April 1995 the Director of Public Prosecutions laid the information charging the appellant with the offence of attempted murder. To this charge the appellant pleaded 'not guilty'. On 27 April 1995 the Director amended the information and, as stated above, the appellant, who was still unrepresented, pleaded guilty to the amended information.

The facts as outlined by the prosecution were admitted by the appellant and he was convicted of the charge as amended. The gist of the offence was that the appellant had tried to run over the victim with a car he was driving. As a result of the impact the victim was thrown into a drain and broke his leg. According to the appellant, he was in love with the victim's wife, who was his ex-girl friend, and could not bear to see her living with another man. The learned trial judge adjourned the case till the next morning to enable the appellant to make submissions in mitigation. Next day he was represented by Mr Sharma, who made a strong plea in mitigation both orally and in writing; in that plea he admitted the facts stated above.

The trial judge considered the case to be a "very serious and bad" one. He sentenced the appellant to 5 years' imprisonment. The appellant then filed an appeal against severity of sentence.

Preliminary point of law

Before we go further we find it our duty to consider a preliminary point of law which possibly raises the question of jurisdiction.

Section 233 of the Criminal Procedure Code, in so far as it is relevant in this appeal, reads as follows:

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"233.-(1) If the court considers the evidence sufficient to put the accused person on his trial, the court shall commit him for trial to the Supreme Court and shall, until the trial, either admit him to bail or send him to prison for safe-keeping. The warrant of such first-named court shall be sufficient authority to the officer in charge of any prison appointed for the custody of prisoners committed for trial."

Section 255 of the Criminal Procedure Code reads as follows:-

"255.-(1) A magistrate conducting a preliminary inquiry, in this Part hereinafter referred to as committal proceedings, may, notwithstanding the provisions of section 224, if satisfied that all the evidence before the court (whether for the prosecution or the defence) consists of written statements tendered to the court under section 256, with or without exhibits, commit the defendant for trial for the offence without consideration of the contents of those statements, unless-

- (a) the defendant or one of the defendants is not represented by a barrister and solicitor;
  - (b) a barrister and solicitor for the defendant or one of the defendants, as the case may be, has requested the court to consider a submission that the statements disclose insufficient evidence to put that defendant on trial for the offence.
- (2) Sections 225, 226, 227, 229 and 230 shall not apply to a committal for trial under this section."

Section 256(1), (4), (5) and (6) of the Criminal Procedure Code reads as follows:

"256.-(1) In committal proceedings a written statement by any person shall, if the conditions mentioned in subsection (2) are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by that person.

(2) .....

(3) .....

(4) Notwithstanding that a written statement made by any person may be admissible in committal proceedings by virtue of this section, the court before which the proceedings are held may, of its own motion and shall, on the application of any party to the proceedings, require that person to attend before the court and give evidence.

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*(5) So much of any statement as is admitted in evidence by virtue of this section shall, unless the court commits the defendant for trial by virtue of section 255 or the court otherwise directs, be read aloud at the hearing, and where the court so directs an account shall be given orally of so much of any statements as is not read aloud.*

*(6) Any document or object referred to as an exhibit and identified in a written statement tendered in evidence under this section shall be treated as if it had been produced as an exhibit and identified in court by the maker of the statement."*

As we have already noted, the appellant was present at the committal hearing but was not represented. The question, therefore, arises whether he was properly committed for trial in view of the above provisions of the Criminal Procedure Code and the decision of this Court in Kitione Koroilagilagi T. Gaunavinaka v. The State, Criminal Appeal No. AAU0014 OF 1994S delivered on 26 May 1995.

In that case the appellant was not represented at the preliminary inquiry, he reserved his evidence for the High Court and the magistrate committed him for trial. There was nothing on record to suggest that the committing magistrate took time to consider the contents of the statements tendered by the prosecution. The following extract is taken from pages 3 and 4 of the judgment of this Court:

*'....At the committal hearing the accused was present but was not represented by Counsel. As a result the proviso to S.255 of the Criminal Procedure Code Cap 21 applied and a preliminary inquiry pursuant to the provisions of S.224 of the Criminal Procedure Code was necessary. It appears from the record that no such inquiry was held and that the mandatory provisions requiring a hearing prior to committal were not complied with. In effect the learned Magistrate did not hold a preliminary inquiry as he was required to do since the*

*appellant was unrepresented by Counsel but committed him to the High Court for trial on the papers which is a course that may be followed only if the accused person is represented.*

*We are of the view that this was a fundamental flaw in the proceedings. It would appear from the record that the Magistrate did not explain the procedure to be adopted to the appellant nor his rights nor follow any of the other required steps. In our view there was no lawful committal and thus no lawful information in terms of S.248 of the Criminal Procedure Code put before the High Court. In R v Morais (1988) 3 All ER 161 Lord Lane CJ said in relation to the Bill of Indictment that was presented and which had not complied with the statutory procedural requirements at p.165:*

*"Therefore .... there was no valid indictment, there was no valid trial, no valid verdict and no valid sentence".*

*In our view it is clear that the appellant was not validly tried; in effect the trial was a nullity. It follows that the convictions entered against the accused are not valid and must be quashed. Consequently there was no lawful sentence imposed upon the appellant and he must be discharged from custody.*

*The view we have reached has been reinforced in our minds by a consideration of a number of other cases where there were defective committals. See R v Gee & Ors (1936) 2 All ER 89 and R v Phillips & Ors (1938) 3 All ER 674.'*

It was the respondent's primary contention that an inquiry in terms of section 224 of the Code is not necessary if the committing magistrate takes into consideration the contents of the written statements submitted by the prosecution. Counsel for the State submitted that this view can be supported by a proper inference to be drawn from the following words appearing in section 255(1) of the Code - "commit the defendant for trial for the offence *without consideration of the contents of those statements, unless -*

(a) the defendant or one of the defendants is not represented by a barrister and solicitor....."

(emphasis added.)

In her written submissions Mrs Shameem argued that the absence of legal representation does not make a 'paper' committal defective provided that the magistrate takes into consideration the written statements tendered by the prosecution before making the committal. She argued that Gaunavinaka's case was distinguishable from the present case because in the former case there was no evidence that the committing magistrate took into consideration the contents of the written statements whereas in the present case there is clear record that the Chief Magistrate adjourned the hearing to consider the evidence before forming the opinion that there was prima facie material to justify committal. She submitted, therefore, that the committal was validly made notwithstanding the absence of legal representation. At the hearing she developed an alternative argument that, even if there were defects or irregularities in the procedure adopted by the Chief Magistrate, the statutory provisions not complied with were directory only and that, in the circumstances of the case; there had been no miscarriage of justice. Mr Fa submitted that the statutory provisions were mandatory and that failure to comply with them resulted in the committal being a nullity.

Mrs Shameem, in her written submissions, drew to our attention a circular memorandum of the Chief Registrar of the High Court addressed to the Chief Magistrate. By its

terms it was sent on the direction of the Chief Justice. It contained advice on the interpretation of section 255 of the Code. Mrs Shameem suggested that it might be an administrative direction and that, as a Magistrate's decision to commit an accused person for trial is a quasi-judicial, not a judicial, act, the direction might be " a valid direction to the magistrates to clarify the meaning of the section." She did not develop that line of reasoning at the hearing; there are a number of reasons why we could not have acceded to the suggestion.

First, the Criminal Procedure Code confers the power of committal on magistrates, not on any other person or officer-holder; it does not authorise a magistrate to delegate the power to anyone else. Section 68 of the Magistrates' Courts Act (Cap. 14) empowers the Chief Justice to make rules of court, but there is no provision for non-statutory directions to be given to magistrates regarding the conduct of proceedings in their Courts. Section 114(1) of the Constitution of Fiji empowers the High Court to supervise any civil or criminal proceedings before any subordinate court, to make orders and to issue directions. That power, however, is vested in the High Court itself, not in its officers. It is not vested in the Chief Justice or any other judge except when he is constituting the Court.

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Second, while rules of court can be made which govern the procedures to be followed in Magistrates' Courts, the interpretation by a magistrate of the provisions of a statute is not a matter of procedure for which rules of court can be made, even though the provision itself prescribes procedure which the magistrate must follow. If rules of court cannot direct magistrates how to interpret the provisions of a statute, even less can any direction not itself authorised by statute do so.

Third, even where a decision is entirely administrative in character, if it is done in pursuance of authority given by a statute no person can give to the decision-maker a legally binding direction to make his decision otherwise than in conformity with the statute. A direction, if given, which is inconsistent with the provisions of the statute has no legal force or effect.

Finally, the circular memorandum does not purport to give a direction to the magistrates; it gives them only advice and guidance. It is not a direction.

### Ruling

The first point which needs to be made is that the Criminal Procedure Code prescribes two alternative procedures for committal of an accused person for trial. The

actual power of committal is contained respectively in sections 233 and 255. There is no other basis on which the Code authorises committal and there is no authority outside the Code for any committal. The second point which has to be made is that section 256 authorises the admission of written statements of witnesses as evidence in a preliminary inquiry whichever of the two alternative procedures is being followed. That is clear from subsections (4) and (5) of the section.

Until 1972 only the procedure prescribed in Part VII of the Code was authorised. In 1972 section 255 (together with the other provisions of Part VIII of the Code) was added. That section was clearly intended to facilitate speedy committal of an accused person where that person was legally represented and the legal representative, having had an opportunity in advance of the inquiry to read and consider the witnesses' written statements, did not wish to cross-examine any of them or to submit that they did not establish a prima facie case against the accused person. In those circumstances - and only in those circumstances - section 255 authorised the magistrate to commit the accused person without considering the written statements. Clearly the legislature considered that he could be absolved from that duty, which otherwise would have been imposed on him by section 233, because the accused person's legal representative was tacitly admitting that the evidence was sufficient to put the accused

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person on his trial. Such provision would have been entirely inappropriate where an accused person was not legally represented as, in most cases, he would lack the legal knowledge and experience to be able to make an informed decision whether to make such an admission.

There is some force, therefore, in the respondent's argument that the magistrate should be able to commit the accused person if he himself considers the evidence constituted by the written statements and the exhibits and satisfies himself that the evidence establishes a prima facie case. However, section 255 does not expressly authorise committal in those circumstances and, being legislation which directly affects the liberty of the accused person, should not be construed as authorising it implicitly. If the magistrate commits in those circumstances, his authority for doing so is section 233 of the Code. Further, save in so far as the provisions of section 256 of the Code are inconsistent with and, being more recent legislation, prevail over the provisions of Part VII, the procedure prescribed in Part VII must be followed.

The Chief Magistrate recorded compliance with section 225 of the Code, i.e. reading over and explaining the charge to the accused person, on the first day when the appellant appeared before him. Section 226 is now overridden by section 256 where written statements of the witnesses are

admitted as evidence, as occurred in the present case. The Chief Magistrate, however, did not comply with section 229 which requires that the accused person be asked whether he understands the charge and whether he wishes to make a statement in his defence; nor is there any record of compliance with section 230(1), i.e. asking the accused person whether he desires to call witnesses on his own behalf. Finally - and most important - there is no record that the Chief Magistrate complied with section 256(5).

As stated above, he adjourned the preliminary inquiry in order to consider the evidence. By virtue of section 256(1) the witnesses' statements were evidence that had been admitted. Consequently the Chief Magistrate did, according to the record he made, comply with section 233. Prima facie, therefore, he was acting within his authority when he committed the appellant for trial. What is in issue is whether his failure to comply with sections 229, 230(1) and 256(5) vitiated his decision so that it must be treated as null and void. If those provisions, or any of them, were mandatory, it did so. If they were all only directory, however, it did not necessarily do so and it becomes necessary to decide whether it caused a miscarriage of justice or whether as a matter of principle the need to discourage such non-compliance with so many statutory requirements necessitates that it be treated as having done so.

So far as the second of those matters is concerned, there is nothing on the record to suggest that the Chief Magistrate consciously bypassed any of the statutory requirements. It appears that he erroneously thought that he was acting in accordance with section 255 and that that section could be construed as authorising the committal if he satisfied himself about the evidence, notwithstanding that the appellant was not legally represented and had no opportunity to question it.

In the passage from Gaunavinaka's case which we have set out above, this Court referred to the "mandatory provisions requiring a hearing prior to committal". However, in that case there was no prima facie compliance with section 233 of the Code; the magistrate committed without considering the evidence. Quite clearly section 233 is mandatory in its requirement that the magistrate should consider the evidence sufficient to put the accused person on trial before he can commit him. That does not mean, however, that all the statutory requirements for the conduct of the preliminary inquiry were necessarily mandatory. In R v Morais, cited in Gaunavinaka's case, the statutory requirement that the bill of indictment be signed by the proper officer was held to be mandatory after the English Court of Appeal had examined the reason why the statute required the signature. In the present

case all the statutory requirements with which the Chief Magistrate failed to comply are designed to protect the rights of the accused person and prevent a miscarriage of justice but are entirely procedural (Cf. R. v Prince [1981] 1 NZLR 47). To treat any of them as mandatory, so that non-compliance with it would invalidate the committal, would not necessarily promote the interests of justice; on occasions it could frustrate them.

We consider it appropriate, therefore, to regard the provisions of the sections concerned as directory and not mandatory. The interests of accused persons are adequately protected by doing so as, if the non-compliance has resulted in a miscarriage of justice, the committal can still be held to have been invalid. In the present case, in view of the appellant's plea of guilty in the High Court and the admissions made on his behalf by Mr. Sharma in presenting the plea in mitigation, there is no reason at all to believe that there was any miscarriage of justice. Accordingly we are satisfied that the committal was valid and effective. The conviction on the plea of guilty should stand.

However, we stress that the provisions of Part VII and section 256 of the Code are important, that they are intended to safeguard the rights of accused persons and that non-compliance with them that causes a miscarriage of justice will vitiate the committal.

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A magistrate conducting a preliminary inquiry where the accused person is not represented must comply with the provisions of Part VII of the Code and, if written statements of witnesses are to be received as evidence, with section 256. A written statement of a witness must not be accepted as evidence unless the requirements of sub-sections (2) and (3) of section 256 are met. When a written statement is received in evidence the accused person must be asked whether he wishes the witness to attend before the Court and give evidence (section 256 (4)). Then, unless the magistrate satisfies himself that he can properly direct that the written statement need not be read aloud to the accused person (e.g. because he has ascertained from the accused person that he fully understands its contents) or that an account of only part of the statement needs to be given to the accused person (e.g. because he has said that he understands the rest of the statement), the statement must be read aloud to the accused person. If the accused person does not understand the language in which the written statement is recorded, it must be interpreted to him as it is read out.

At a preliminary inquiry written statements of some of the witnesses may be tendered as evidence in pursuance of section 256(1), while other witnesses attend before the Court and give their evidence orally. When any witness gives

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evidence orally, the magistrate must comply with section 226 of the Code. Whether or not all or any of the evidence is received in the form of written statements of witnesses, the magistrate must comply with sections 229 and 230. Finally, before he can lawfully commit the accused person for trial, he must consider the evidence and be satisfied that it is sufficient to put the accused person on his trial.

It is most important that the magistrate should record in writing his compliance with each requirement of the provisions of the Code relating to the preliminary inquiry and that he should do so at the time when he actually complies with that requirement. Otherwise, his record of the preliminary inquiry proceedings will be defective and there will be doubts whether he did in fact comply with each and every provision with which he should have complied.

### Sentence

The maximum sentence for an offence contrary to section 224 of the Penal Code is life imprisonment. Nevertheless the appellant submits that the sentence of five years' imprisonment imposed on him is harsh and excessive. He asks that the sentence be suspended because -

- (a) he is a first offender,

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(b) his two children aged 9 years are suffering and are without proper care and attention as their mother has eloped with another person, and

(c) the facts and circumstances of the offence did not warrant an immediate custodial sentence.

The thrust of the appellant's plea both in the High Court and this Court was, and is, that the prison sentence ought to have been suspended. We note that in the Court below the situation of the appellant's twin children was not referred to by his counsel. Whilst we deeply sympathise with the possible plight of the appellant's children (and direct the Registrar of the Court to ensure that a Social Welfare Officer visits them to give any necessary assistance) we cannot see our way clear to agreeing that an immediate custodial sentence should have been avoided.

Counsel for the State has rightly drawn our attention to a number of aggravating factors. Some of these are -

(i) the possession of a knife by the appellant;

- (ii) the use of a motor car (in itself a potentially dangerous 'weapon') to knock down the victim;
- (iii) the fact of a previous warning to the appellant;
- (iv) the serious nature of the injury inflicted on the victim;
- (v) the high degree of pre-planning on the part of the appellant.

We note that the learned trial judge took all relevant factors into account including the fact that the appellant had pleaded guilty to the reduced charge.

In our view a five-year sentence on the particular facts of this case cannot be seen as harsh and excessive. This was not a case in which a suspended prison sentence would have been justified; only where there were the most exceptional extenuating circumstances would it be appropriate to suspend a sentence of imprisonment imposed for a serious premeditated wounding. There are no such circumstances in the present case. In any event, the sentence of five years' imprisonment, which we have decided was not harsh or excessive, could not have been lawfully suspended. Section 29(1) of the Penal Code (Cap.17) authorises the suspension of

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a sentence only if it is of no more than two years' imprisonment. So the question of suspension of the sentence in this case does not arise.

Consequently the appeal against sentence is dismissed.

*Moti Tikaram*  
.....  
Sir Moti Tikaram  
President, Fiji Court of Appeal

*Gordon Ward*  
.....  
Mr Justice G. Ward  
A Judge of Appeal

*I.R. Thompson*  
.....  
Mr Justice I.R. Thompson  
A Judge of Appeal