

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0016 OF 1996
(High Court Criminal Appeal No. HAA0057 of 1996)

IN CHAMBERS

BETWEEN:

SHAMSHER ALI s/o SHER ALI

Appellant

and

STATE

Respondent

Mr A. Singh Counsel for the Appellant
Ms Razia Shafiq Counsel for the Respondent

Date and Place of Hearing: 3 December, 1996, Suva

Date of Decision: 6 December 1996

DECISION

(Whether a single judge has jurisdiction to grant leave
to appeal against a second appeal
against severity of sentence)

This is an application seeking leave to appeal against a sentence of 5 years imprisonment imposed on the Appellant by the Suva Magistrates' Court for the offence of robbery with violence to which he (and another accused) had pleaded guilty. The two accused

appealed to the High Court against the severity of the sentence which included 5 strokes of corporal punishment.

On 28 October 1996 Fatiaki J. dismissed the appeal against the 5-year imprisonment sentence as being of no merit. However, he held that the provisions of Section 34(3)(f)(ii) of the Penal Code (Cap.17) had effectively overtaken the Appellants' sentence of corporal punishment thereby rendering them incapable of being lawfully carried out. He, therefore, formally quashed the Order of corporal punishment. In dealing with the appeal he noted the sentencing magistrate's observations and also considered a fifteen page written submission in which Counsel for the Appellants canvassed at length every conceivable matter that could be raised in their favour, including the 'guilty' pleas.

Brief facts show that this was a case of a planned robbery of a branch of the ANZ Bank, in which lethal weapons were used to threaten the Bank staff and rob the branch of a sum in excess of 1/4 million dollars.

Appellant Shamsher Ali (the 2nd named Appellant in the Court below) now wishes to appeal against the dismissal of his appeal on the following grounds:

- “1. ***THAT** the Learned Judge and/or the Learned Magistrate erred in law and in fact when he failed to take into consideration, the Appellant plea of guilty.*
2. ***THAT** the Learned Judge and/or the Learned Magistrate had failed to take into consideration the personal circumstances of the Appellant such as that in terms of recognised sentencing principles the sentence will neither :-*

- (i) *Rehabilitates,*
- (ii) *punish nor*
- (iii) *deter them*

3. ***THAT** the Learned Judge and/or the Learned Magistrate has failed to take into consideration the need to protect the public that can be adequately met by a sentence other than the one of five (5) years imprisonment.*
4. ***THAT** the Learned Judge and/or the Learned Magistrate has failed to take into consideration that the imprisonment of five (5) years in the case of the Appellant is counter productive to :-*
 - (i) *Any prospect that might exist for this rehabilitation.*
 - (ii) *Their need for supervision and "maintenance" for, effectively, the rest of their life.*
5. ***THE** sentence of five (5) years imprisonment immediate custodial is manifestly harsh and excessive."*

The State has submitted that since this is a 2nd appeal and as it is against severity of sentence only this Court has no jurisdiction to hear the proposed appeal and consequently has no jurisdiction to grant leave. It relies on Section 22(1) of the Court of Appeal Act Cap.12 for its contention. Subsection (1) reads as follows:

"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):

Provided that no appeal shall lie against the confirmation by the Supreme Court of a verdict of acquittal by a magistrate's court."

[Note: For 'Supreme Court' now read 'High Court' wherever Supreme Court appears in this Decision.]

Ms Shafiq concedes that if the sentence passed on the Appellant was beyond the powers of the Magistrate and the error was not rectified by the High Court then an appeal would lie. Both Counsel agreed with Court that in that case there would be no need to seek leave to appeal against sentence. Mr Singh also agreed that a 5-year sentence was within the competence of the Magistrates' Court to impose and that ordering of 5 strokes was now no

longer relevant. However, he submitted that the alleged failure to apply the accepted principles of sentencing constituted an error of law and as such there was a right of appeal. Asked why then seek leave he answered that it was done as a matter of precaution. He agreed that application of principles of sentencing cannot be done in vacuo but must relate to the facts established. In fact the very first ground of the proposed appeal states that the "Learned Magistrate erred in law and in fact when he failed to take into consideration, the Appellant plea of guilty".

He further submitted that as a single judge I had general powers under Section 35 of the Court of Appeal Act to grant leave.

In considering the written submissions submitted by both sides I have also taken into account the following paragraphs from the judgment of the Fiji Court of Appeal in *David John Collard v Reginam* 32 FLR (1986) 55, appearing at pages 61 and 62 :-

" *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.* H

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

- A *(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.

- B *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"?*

C 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.

D 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."

In criminal matters a second appeal is governed by statutory provisions namely Section 22 of the Court of Appeal Act Cap.12. Subsection (1) is relevant to the present application.

In my view the question of granting or refusing leave does not arise here. Either the Appellant has a right of appeal or he has not. If he has a right of appeal then there is no question of granting him leave. If he has no right of appeal then the Court cannot create a right of appeal by granting him leave to appeal. A single judge's power to grant leave to appeal is a general power and must be read subject to Section 22 of the Act, which makes specific provisions governing second appeals. It would be useful to note here that under Section 21(1)(c) (as amended) a person convicted on trial before the High Court needs leave of the Court of Appeal to appeal against sentence unless sentence is fixed by law.

The first issue to determine is the nature of the proposed appeal. It is clear that the Appellant is aggrieved with the severity of sentence imposed on him. He says it is harsh and excessive (Ground 5). I, therefore, hold that the proposed appeal is against severity of sentence.

The 2nd question is whether the Court of Appeal has jurisdiction to entertain an appeal against quantum or extent of sentence even if a question of law is involved. In my opinion the answer is no because the legislation has specifically prohibited a second appeal against severity of sentence. See *Prem Chand & Another v Reginam* 22 FLR (1976) 100 where at p.104 the Fiji Court of Appeal stated -

"We read section 22(1) as meaning that there is no jurisdiction to entertain an appeal against sentence which goes to the quantum or extent of a sentence even if a question of law is involved."

Section 22(1) not only limits a second appeal to "a question of law only" but places a further restriction by the use of the words "(not including severity of sentence)".

The third question which requires determination is whether the Appellant has no right of redress even if on the face of it the sentencing Court exceeded its competence or jurisdiction, i.e. imposed a sentence it had no power to impose or exceeded its powers by imposing a sentence longer than permitted by law. The answer is to be found, again, in the following words of the Fiji Court of Appeal in *Prem Chand's Case* already cited -

"We do not think so. Such a sentence would be illegal and without jurisdiction; as such it would be a nullity and could impose no degree of severity at all, which would result in there being a question of law to be resolved on the second appeal the result of which would determine the existence or otherwise of the sentence." (See p.104 paragraph B.)

In *Semesa Rokoduguni v Reginam* Criminal Appeal No. 93 of 1985 the Fiji Court of Appeal (per Speight V.P.) observed -

"This court has previously considered a sentence appeal in such circumstances but only on the ground that the period was in excess of the original jurisdiction conferred on a magistrate, and hence on appeal to the Supreme Court. That was clearly a point of law."

In the present case the sentence of 5 years was within the powers of the Magistrates' Court.

In the outcome I uphold the State's objection and rule that the Court of Appeal has no jurisdiction to entertain the proposed appeal and therefore a single judge has no power to grant leave to appeal.

This application is, therefore, dismissed as being misconceived.

Sir Moti Tikaram
President, Fiji Court of Appeal