

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO.16 OF 1995
(High Court Criminal Case No.2 of 1995)

BETWEEN

FRED WEHREBERG
WALBURGA WEHREBERG

APPELLANTS

- and -

THE STATE

RESPONDENT

Appellants present unrepresented
Mr. D. Wilkinson for the Respondent

Date and Place of Hearing : 7 May 1996, Suva
Date of Delivery of Judgment : 17 May 1996, Suva

JUDGMENT OF THE COURT

The appellants, husband and wife, were jointly charged in the Rakiraki Magistrates' Court with affray. The male appellant was also charged separately with common assault and assault occasioning actual bodily harm. By notice of motion they applied to the High Court "for an order that thorough investigations into [the three criminal cases] be conducted by a police station other than Rakiraki, prior to the hearing in the Magistrates' Court." They made the State the respondent in that proceeding. A judge of the High Court found that he had no power to direct the police or the Director of Public Prosecutions to carry out further investigations and that the application was misconceived. He ordered that it be "struck off". The appellants appealed to this Court against that order on the ground that the

learned judge "erred in fact and in law when he ruled" that he had no jurisdiction to grant the orders sought. They also filed an application to a single judge for leave to appeal on the understanding that leave to appeal might be required. Further, they also sought an interim stay order in respect of the three criminal cases pending against them in Rakiraki. When the matter came before the President in chambers, the question of jurisdiction arose; the President considered that the matter should be adjudicated upon by the Court constituted by three judges. Consequently the matter is now before us.

The hearing before us proceeded on the basis that if we found we had jurisdiction we would deal with the appeal on the merits.

Counsel for the respondent has submitted that this Court has no jurisdiction to hear the appeal. His argument is essentially that the powers of this Court are fixed by the provisions of the Court of Appeal Act (Cap. 12) ("the Act"), that the appeal in this instance is an appeal in a criminal case and that, as the applicants have not been convicted, they cannot appeal against the learned judge's order.

Section 12 of the Act relates to an appeal "in any cause or matter, not being a criminal proceeding." If, therefore, the appeal is in a criminal proceeding, the provisions of that section are not applicable.

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Section 21 reads:

"21 (1) A person convicted on a trial held before the High Court may appeal under this Part to the Court of Appeal -

- (a) against his conviction on any ground of appeal which involves a question of law alone;
- (b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and
- (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

Counsel for the respondent also made submissions regarding the provisions of sections 111, 114(1) and 115 (1) of the Constitution of Fiji to which the appellants had drawn attention. Section 115 (1), so far as is relevant in these proceedings, reads:

"115. - (1) An appeal to the Fiji Court of Appeal shall lie from decisions of the High Court in the following cases, that is to say -

- (a) as of right from final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution;

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- (b) as of right from final decisions given in exercise of the original jurisdiction conferred on the High Court by section 19 and 111 of this Constitution;
- (c)
- (d) in such other cases as may be prescribed.

Section 111 of the Constitution reads:

"111.--(1) - The High Court shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

(2) - The High Court shall have jurisdiction to hear and determine appeals in both civil and criminal matters from courts subordinate to it as may be conferred on it by this Constitution or any other law."

Section 114 (1) reads:

"114 (1) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court."

Counsel for the respondent submitted that there was no question as to the interpretation of the Constitution in the proceedings in the High Court and that the decision against which the applicants are appealing was not given in the exercise of the

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High Court's original jurisdiction. The appellants, however, say that it was a final decision given in the exercise of that jurisdiction. They say further that it was given in a civil proceeding.

Counsel for the respondent also submitted that, even if this Court has jurisdiction to hear the appeal, it should dismiss it. He referred to section 95(4) of the Constitution which, so far as is relevant, reads:

"95(4) -the Commissioner of Police shall be responsible for determining the use and controlling the operations of the Force and, except as provided in the preceding subsection, the Commissioner shall not in the exercise of his responsibilities and powers with respect to the use and operational control of the Force, be subject to the direction or control of any person or authority."

We shall consider first the question of jurisdiction. In Rutten v. The State (Criminal Appeal No. 1 of 1992: 20 August 1993) this Court held that a decision of the High Court in "an action for redress of the right to personal liberty" brought by a person who had been committed to custody pursuant to section 9 of the Extradition Act (Cap. 23) was made in criminal proceedings.

In our view the order under appeal in these proceedings was similarly made in a criminal proceeding. In Amand v. Home Secretary [1943] A.C.147 the House of Lords held that the decision of the High Court on an application for an order of

habeas corpus which was made to prevent the applicant being handed over to the Netherlands authorities for trial for desertion was made in criminal proceedings. Viscount Simon L.C. at page 156 expressed the test as follows:

"If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal."

In The Government of the United States of America v. Bowes [1990] A.C. 501 the Privy Council followed the decision in Amand in respect of an application for certiorari and prohibition. Although the English Court of Appeal has on several occasions held that the nature of the proceedings on application for any order should depend on the character of the order sought, which must be distinguished from the character of the underlying proceedings (e.g. R. v. Southampton Justices ex p. Green [1976] QB 11), Sir John Donaldson M.R. and May L.J. in R. v. Lambeth Metropolitan Stipendiary Magistrate ex. p. McComb [1983] Q.B. 551, although considering themselves bound by those decisions, both expressed doubt whether they were consistent with Amand. May L.J. observed at page 567 that the approach which should be taken was to ascertain "what is the nature of the underlying proceedings." In Rutten (supra) this Court accepted that the principles set out in Amand and Bowe should be applied. We should, we believe, follow that decision and apply those

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principales not only for the sake of consistency but, more importantly, because in our view it is correct.

We note in passing that the application in the High Court was entitled as being "Miscellaneous Proceedings" but that the appellants, in spite of their oral submission that the proceedings in the High Court were in its civil jurisdiction, entitled their appeal to this Court as being in its criminal jurisdiction.

There is no doubt that the appeal is not made under the provisions of section 21 of the Act, as neither of the appellants has been convicted. In Rutten that was regarded as fatal; however, Kapi J.A. observed that the submissions of the parties had rested on the Act and had not referred to the powers of the High Court and Court of Appeal under the provisions of sections 111 and 115 of the Constitution. He drew attention to them "for future cases". In these proceedings the appellants have expressly placed reliance on section 115.

Section 3(2) of the Act is as follows:

"3(2) The Court shall have -

- (a) power and jurisdiction to hear and determine all appeals which lie to the Court by virtue of the Constitution, this Act or of any other law for the time being in force;

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(b) *all such powers and jurisdiction as are or may from time to time be vested in the Court under or by virtue of the Constitution, this Act or any other law for the time being in force."*

The Fiji Existing Laws Decree 1987 (Interim Military Government of Fiji Decree No. 2) continued the Act in force notwithstanding the revocation of the 1970 Constitution of Fiji. The Act has been amended since the 1990 Constitution came into force by Decree No. 30 of 1990. There is, therefore, no doubt that it is still in force, with section 3 unamended.

In our view the words "the Constitution" in section 3(2) must be given an ambulatory construction. Section 111 of the 1990 Constitution confers on the High Court unlimited original jurisdiction to hear and determine criminal proceedings. Consequently, by virtue of section 115(1)(b) a person aggrieved by a final decision of the High Court in the exercise of its original jurisdiction to hear and determine a criminal proceeding has a right of appeal to this Court, whether or not he has been convicted in that proceeding. Section 3 of the Act then empowers this Court - and, as the appeal is made as of right, implicitly requires it - to hear and determine the appeal.

We have found that the decision under appeal was made in criminal proceedings. We have now to consider whether it was a final decision in the exercise of the High Court's original jurisdiction. The order which His Lordship made on the appellants' application to the High Court undoubtedly brought to

an end the proceedings on that application. It was, therefore, a final order so far as the exercise of the Court's jurisdiction to hear that application was concerned, notwithstanding that, whatever order had been made, it would not have brought the underlying proceedings in the Magistrates' Court to an end.

Counsel for the respondent has submitted that the High Court was not exercising its original jurisdiction, because the underlying criminal proceedings were still extant in the Magistrates' Court. We do not accept that the nature of the jurisdiction can be determined in that manner. The High Court's jurisdiction in any matter is distinct from the jurisdiction of a Magistrates' Court. Generally the expression "original jurisdiction" is used in statutes in contrast to "appellate jurisdiction". In view of the terms in which section 111 of the Constitution is couched, we are satisfied that that is how the expression is to be understood in section 115.

Although the appellants submitted that the application which they made to the High Court was for it to exercise the supervisory jurisdiction over the Magistrates' Court conferred on it by section 114 (1) of the Constitution, the order which they were seeking was on its face to be directed to whoever had power to assign duties to police officers. The appellants told us that they were seeking an order of mandamus. By virtue of section 95 (4) of the Constitution that person is the Commissioner of Police. Section 114 does not confer on the High Court any

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supervisory power in respect of the Commissioner. The power to make an order of mandamus is an exercise of the High Court's original jurisdiction. In this case, for the reasons stated above, it would have been an exercise of its original criminal jurisdiction. Section 115 (1) (b) gave the appellants a right to appeal to this Court against the order made upon their application. Accordingly, by virtue of section 3 (2) (a) of the Act, this Court has power and jurisdiction to hear and determine the appeal.

Having found that we had jurisdiction to entertain the appeal we afforded the appellants an opportunity to argue why the appeal should be allowed, bearing in mind in particular the provisions of section 95 of the Constitution. In support of their case the appellants referred us to the dicta of Lord Denning M.R. and Roskill L.J. in R.v. Metropolitan Police Commissioner, ex parte Blackburn (No.3) [1973] 1 All E.R. 324 (C.A.). At page 331 Lord Denning M.R. said:-

"[In R. v. Metropolitan Police Commissioner, ex parte Blackburn [1968] 2 Q.B. 118 at 136] we made it clear that, in the carrying out of their duty of enforcing the law, the police have a discretion with which the courts will not interfere. There might, however, be extreme cases in which he was not carrying out his duty. And then we would."

At page 335 Roskill L.J. said:-

"[In R.v. Metropolitan Police Commissioner, ex parte Blackburn [1968] 2 Q.B. 118] this court held that the respondent owed a duty to the public to enforce the law which he could be compelled to perform and that while he had a discretion not to prosecute in particular cases, his discretion was not an absolute discretion, for as Salmon L.J. said [in that case]: 'In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the court would not be powerless to intervene'."

They also quoted paragraph 331 of Halsbury's Laws of England (4th Ed.) Vol. 36 in support of their contention that the High Court had power to grant an order of mandamus directed to the Commissioner of Police. That paragraph reads:-

"Although it is the duty of every chief officer of police to enforce the law of the land, in any particular case it is for him to decide whether or not there shall be a criminal prosecution nevertheless, it were necessary for the purpose of securing that a chief officer properly carried out his duty, it would seem that a court might grant an order of mandamus to an applicant with sufficient interest."

Consequently they urged this Court to allow the appeal and make the orders sought i.e. mandamus and stay orders.

However, there can be no doubt that, although the High Court has generally power to make orders of mandamus directed inter alia to the holders of public office, by reason of section

95 (4) of the Constitution it does not have that power in respect of the Commissioner of Police in relation to the use and operational control of the police force and its officers. Consequently the learned judge was right to hold that the High Court had no power to make the order of mandamus sought. In our view, the order which he made should have been expressed in terms of dismissing the appellant's application rather than in terms of "striking [it] off." However, that is not a matter of substance requiring any decision or order of this Court.

We have considered whether, because the appellants sought not only the order directed to the Commissioner of Police but also an order staying the proceedings in the Magistrates' Court, the application for the second of those orders was made to the Court in its supervisory jurisdiction. We have concluded that, as the second order was sought as an adjunct to the first order, the application must be treated as made entirely in the High Court's original jurisdiction. Further, as the second order was sought consequentially on the making of the first order, the learned judge was correct in dismissing the whole application because the High Court had no power to make the first order sought by it.

Even if section 95 (4) of the Constitution had not prevented the High Court from making the order sought by the appellants, it is our view that, on the merits of the application, the order should not have been made.

The appellants have stated that the police officers who carried out the investigations leading to the charges being laid in the Magistrates' Court were biased against them and influenced by persons who had set out to injure them. Affidavit evidence by the male appellant in respect of those allegations was before His Lordship when he made his order. Counsel for the respondent has informed us that at the appellants' request the Director of Public Prosecutions reviewed the evidence in respect of the criminal charges with the object of deciding whether she should take over the prosecution and discontinue it but, having done so, decided not to intervene; there is reference to that in the male appellant's affidavit. Counsel for the respondent informed us also that the appellants sought an order for the transfer of the cases to the Suva Magistrates' Court for hearing and that the learned Chief Magistrate directed that they be tried in Rakiraki but by a magistrate sent from Suva for the purpose. He said that that order was now the subject of an appeal to the High Court in Lautoka.

It appears that the alleged offences were part of a dispute between neighbours. A number of charges have been laid in the Rakiraki Magistrates' Court against some of those neighbours; none have yet been tried. The appellants do not dispute that incidents giving rise to the charges against them did occur but say that they were themselves the victims of assaults and were acting in self-defence. Although trial for a criminal offence is an ordeal to which persons should not be

subjected without sound reasons, it is clear that in this case there are issues which can best be decided by an impartial court.

Where allegations of bad faith and impropriety on the part of the persons who have laid a criminal charge are made, as in the present case, it is particularly important that the impartiality of the court trying the person charged should be demonstrable and that the prosecution should be clearly seen to be in the hands of a person concerned with attaining justice rather than merely seeking a conviction. As the learned Chief Magistrate's order is under appeal, we make no comment in respect of it, save to express the hope that the High Court will be able to hear and determine the appeal expeditiously. So far as the prosecution is concerned, we welcome Mr Wilkinson's response to the Court's suggestion that the Director of Public Prosecutions arrange for one of her officers to conduct it and to take over the criminal proceedings in which persons are charged with offences against the appellants. We consider that those persons should be tried by the same magistrate as tries the appellants, that all the trials should take place as far as possible immediately following one after the other in the order of the dates of the alleged commission of the offences. In that way consistency and even-handedness in the adjudication in the respective cases should be facilitated. It is also most important that all the cases be both heard and determined without any further delay.

Finally, it is important that the appropriate authorities take proper steps urgently to deal effectively with the apparently increasing threat to law and order on Manu-i-ra island resulting from the ill-feelings between the appellants and some of the other residents.

For the reasons we have stated above the question of leave to appeal no longer needs to be considered. We are satisfied that this Court has power and jurisdiction to hear and determine the appeal but we dismiss it. Similarly the stay application made to us is also refused because it would be inconsistent and futile to make such an order in the light of the decision we have reached on the substantive issue in the appeal. As this is an appeal in the Court's criminal jurisdiction, there will be no order as to costs.

We summarise our judgment as follows:-

- (i) this Court has jurisdiction to hear this appeal by virtue of section 3(2) of the Court of Appeal Act read together with section 115 of the Constitution;
- (ii) the application for leave to appeal, therefore, need not be considered as the appellants have a right of appeal;

- (iii) the appeal is dismissed;
- (iv) the application for the stay order is refused; and
- (v) no order is made as to costs as the appeal is in the Court's criminal jurisdiction.

Moti Tikaram

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Sir Moti Tikaram
President, Fiji Court of Appeal

I. R. Thompson

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Justice I. R. Thompson
Judge of Appeal

J. D. Dillon

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Justice J. D. Dillon
Judge of Appeal