

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0020 OF 1996

(High Court Criminal Appeal No.HAM0029 of 1996)

BETWEEN:

GRAHAME BRUCE SOUTHWICK

APPELLANT/APPLICANT

- and -

THE STATE

RESPONDENT

Mr. M. Daubney, Mr.J.Howard and Mr. C.B. Young for the Appellant
Mr. K. Wilkinson and Mr J. Auld for the Respondent

Date and Place of Hearing: : 13 February 1997, Suva

Date of Delivery of Judgement : 14 February 1997

JUDGMENT OF THE COURT

The appellant is charged in Suva Magistrates' Court with 38 offences; they are one of conspiracy to obtain money by false pretences, five of fraudulent conversion of property to a total value of \$335,000 and thirty of official corruption. The offences alleged are very serious. The appellant, whose forebears have apparently resided in Fiji for four generations and who is a citizen of Fiji, is a businessman; through his companies he buys and exports fish from Fiji to various countries and he is a ship broker in respect of fishing vessels. Consequently for the purpose of his business he frequently travels overseas and transfers substantial sums of money into and out of Fiji. When he appeared before the Magistrates' Court

charged with the conspiracy and fraudulent conversion offences, he sought and was granted bail. Some days later he appeared again before the Court charged with the official corruption offences.

Mr Wilkinson appeared for the Director of Public Prosecutions and asked that the bail be subject to a condition that the appellant surrender his passport in order to obviate the risk that he might abscond and not stand trial. After receiving evidence the learned Chief Magistrate reserved his decision for 10 days. During that period the appellant travelled overseas for six days and returned to Fiji the day before the reserved decision was to be given. His Worship decided not to impose the condition. He considered that the risk of the appellant's absconding was small and that the harm to his business interests would be great if he were prevented from travelling overseas.

The Director of Public Prosecutions then commenced proceedings in the High Court by originating notice of motion. The motion was stated to be presented pursuant to section 108(3) of the Criminal Procedure Code (Cap. 21). However, the Director was referred to in it, *passim* except for one place, as "the appellant". She sought an order revoking the Chief Magistrate's order refusing the application that the appellant surrender his passport and an order that he surrender it to the High Court.

After receiving evidence and submissions by counsel Townsley J. made the orders sought.

His Lordship agreed with a submission by Mr Wilkinson that the application was properly made by notice of motion. He held that " the High Court's inherent jurisdiction, i.e. non-statutory jurisdiction in bail matters can be activated by Notice of Motion" He continued:-

"If I am wrong in saying that, and a Petition of Appeal was necessary then I would, and do grant the State leave to file such a Petition, nunc pro tunc, with all necessary abridgements of time."

A petition of appeal was never filed.

A week after His Lordship made the orders the appellant lodged in the registry of this Court a notice of appeal against them. He also lodged a notice of motion seeking an order for a stay of those orders. Although there are 38 substantive grounds of appeal, they can be distilled into two, first that the Director's application was not properly before His Lordship so that he had no power to entertain it and his orders were nullities and second that on the facts before him he should have rejected the application. Because of the conclusion which we have reached in respect of the first of those two matters, it is not necessary for us to consider the second. Mr Wilkinson

submitted that this Court has no jurisdiction to entertain an appeal; Mr Daubney submitted that it has.

The statutory provisions relevant to the jurisdictional questions are sections 3(2) and 18 of the High Court Act (Cap.13), sections 3 (3), 108, 308(1), 310(1), 323 and 325(5) of the Criminal Procedure Code, section 21 (1) of the Court of Appeal Act (Cap. 12) and sections 15(1) and 3(c), 111(1) 114 (1) and 115(1) of the Constitution of Fiji. They are as follows:-

High Court Act

"S.3(2) The Court shall have 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 law for the time being in force."

"S.18. The High Court shall, within Fiji, and subject as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities which are for the time being vested in or capable of being exercised by Her Majesty's High Court of Justice in England."

Criminal Procedure Code

"S.3.(3) Provided, however, and notwithstanding anything in this Code contained, the High Court may, subject to the provisions of any law for the time being in force in Fiji, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise such jurisdiction according to the course of procedure and practice observed by and before Her Majesty's High Court of Justice in England at the commencement of this Code."

"S.108(1) Subject to the provisions of section 26, where any person, other than a person accused of

murder or treason, is arrested or detained without warrant by a police officer or appears or is brought before a court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person may in the discretion of the officer or court be admitted to bail with or without a surety or sureties and, in the case of a court, subject to such conditions and limitations as the court may think it fit to impose.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(3) Notwithstanding anything contained in subsection (1), the High Court may in any case direct that any person be admitted to bail or that the bail required by a magistrates' court or police officer be reduced."

"S.308(1) Save as hereinafter provided, any person who is dissatisfied with any judgment, sentence or order of a magistrates' court in any criminal cause or matter to which he is a party may appeal to the High Court against such judgment, sentence or order:

Provided that no appeal shall lie against an order of acquittal except, by, or with the sanction in writing of, the Director of Public Prosecutions."

"S.310(1) Every appeal shall be in the form of a petition in writing signed by the appellant or his barrister and solicitor and shall be presented to the magistrates' court from the decision of which the appeal is lodged within twenty-eight days of the date of the decision appealed against:

Provided that the magistrates' court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section."

"S.323 The High Court may call for and examine the record of any criminal proceedings before any magistrates' court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such magistrates' court."

"S.325(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no

proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

Court of Appeal Act

"S.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."

The Constitution

"S.15(1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Fiji, the right to reside in any part of Fiji, the right to enter Fiji, the right to leave Fiji and immunity from expulsion from Fiji."

"S. 15(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(c) for imposing restrictions, by order of a court, on the movement or residence within Fiji of any person or on any person's right to leave Fiji either in consequence of his having been found guilty of a criminal offence or for the purpose of ensuring that he appears before a court at a later date for trial for such a criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or lawful removal from Fiji;"

"S.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."

"S.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."

"S.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;
- (b) as of right from final decisions given in exercise of the original jurisdiction conferred on the High Court by sections 19 and 111 of this Constitution;
- (c) as of right from final decisions given in exercise of jurisdiction conferred on the High Court in pursuance of section 9(1) of this Constitution; and
- (d) in such other cases as may be prescribed."

We turn first to section 108 of the Criminal Procedure Code. Sub-sections (1) and (3) provide *inter alia*, for the Magistrates' Court and the High Court to have concurrent jurisdiction to admit a person to bail. Sub-section (3) also empowers the High Court to "reduce" any "bail" required by a Magistrates' Court. Mr Wilkinson submitted that, because of the concurrent jurisdiction, the State could apply to the High Court for that court to admit to bail a person already admitted to bail by the Magistrates' Court and to make the admission to bail subject to conditions to which the Magistrates' Court had not made

it subject. It is to be noted, however, that the notice of motion by which application was made to the High Court sought not the granting of bail but the revocation of the Chief Magistrate's order refusing to require the appellant to surrender his passport and the making of an order requiring him to surrender it. Essentially, therefore, what was sought was not the grant of bail but variation of the Chief Magistrate's order in respect of bail. Whatever may be the breadth of meaning of the expressions to "reduce" and "bail" in section 108(3), the imposition of a restrictive condition as a term of bail already granted does not come within them. Section 108(3), therefore, does not empower the High Court to vary in that way bail already granted by a Magistrates' Court.

In England section 22(1) of the Criminal Justice Act 1967 provides that the High Court may vary the conditions of bail granted by a magistrates' court. Mr Wilkinson did not suggest that section 18 of the High Court Act had the effect of applying that provision of the English statute to Fiji. In our view he was right not to do so because of the provision of section 24 of the High Court Act which effectively prevents the application of an English statutory provision which is inconsistent with the provisions of a Fiji statute. Section 22(1) of the Criminal Justice Act is inconsistent with section 108(3) of the Criminal Procedure Code.

We are satisfied that section 108(3) should not be construed as providing for the High Court to have power to admit to bail a person who is already on bail, having been admitted to it by a Magistrates' Court, and that it provides only for an application for bail where it has been refused by a Magistrates' Court and for an application for making the terms of bail already granted less burdensome. Both such applications will, normally be made by or on behalf of an accused person. We are fortified in our conclusion by the following observation of a highly respected judge, Mills-Owens C.J., in *Asgar Ali v. Reginam* (1964) 10 F.L.R. 235 at 239 :-

"Clearly, a right in the prosecution to appeal against the grant of bail would be a most unusual provision; one for which, in my view, express provision in no uncertain terms would be sought."

Shortly before that passage His Lordship had stressed that the statutory provision for admission to bail was a matter affecting the liberty of the subject. So, we would add, is the power to impose conditions for such admission.

In Asgar Ali (supra) the question before the Court was whether an appeal by the prosecutor to the Supreme Court (the predecessor of the present High Court) lay pursuant to what is now section 308 of the Criminal Procedure Code against an order

of a Magistrates' Court refusing bail. The Code provided for the Magistrates' Court and the Supreme Court (as the High Court was then called) to have concurrent jurisdiction to grant bail pending appeal. In *Isad Ali v. Reginam* (1958) 6 F.L.R.1 Lowe C.J. had decided that an appeal lay. In a carefully reasoned judgment Mills-Owens C.J. held that in what is now section 308 "order" had to be read *eiusdem generis* with "judgment" and "sentence" and refused to follow that decision; in our respectful view his reasoning was sound and his decision correct. In any event, as stated above, Mr. Wilkinson declined to accept Townsley J.'s invitation to file a petition of appeal; so His Lordship did not derive from section 308 of the Criminal Code any power to entertain the Director's application.

Townsley J. did not base his acceptance of jurisdiction on section 108 of the Criminal Procedure Code. He referred to the application as being "akin to" an application to the High Court under that section for grant of bail or reduction of bail; he agreed with the State's submission that on that basis the application was correctly made by notice of motion. However, as noted above, he held that the High Court had an inherent, non-statutory, jurisdiction in bail matters. He cited no authority for that and did not discuss the nature of the jurisdiction. A little earlier in his judgment he had observed that Mr. Howard "accepted that in proper circumstances the High Court has a

general jurisdiction to ensure justice is done by the inferior courts, i.e. the inherent jurisdiction, but it could not be exercised in a vacuum."

By inherent jurisdiction we take His Lordship to mean jurisdiction at common law, independently of any statutory authority. The judgment of Lord Russell C.J. in *R. V. Spilsbury* [1898] 2 Q.B. 615 is instructive as to the extent of the common law jurisdiction of the Queens Bench Division of the High Court in the last decade of the nineteenth century. At page 620 he held that the Court had a common law jurisdiction to admit to bail. However, at pages 622-623 he noted that judges usually declined to interfere with a magistrate's refusal of bail where the person was charged only with a misdemeanour. He observed that it had been suggested, incorrectly in his view, that, because the discretion to grant bail in such cases had been exercised so infrequently, it did not exist.

Mr. Wilkinson submitted that, if His Lordship was not exercising power conferred on the High Court by section 108(3) of the Criminal Procedure Code, he was exercising power derived from section 114 of the Constitution. No doubt that section confers an original jurisdiction on the High Court; but it is not an appellate jurisdiction which enables the High Court to consider the merits of a decision of a Magistrates' Court. In

our view the jurisdiction is limited to consideration of the legality and propriety of such a decision. In particular it confers the jurisdiction exercised by the High Court in judicial review proceedings in respect of the Magistrates' Courts. There is no suggestion that the learned Chief Magistrate did not have the power to grant bail to the appellant or that he acted with any impropriety in deciding what conditions, if any, to set in respect of his bail. His Lordship disagreed with his decision on the merits. We are satisfied, that section 114 was not the source of power Townsley J. exercised when he dealt with the application made to him. He did not purport to be exercising the High Court's revisional jurisdiction conferred by sections 323, 325, 326 and 327 of the Criminal Procedure Code; in any event they give no power to change an order of a Magistrates' Court on the merits.

We have come to the conclusion, therefore, that His Lordship did not have jurisdiction to entertain the Director's application or to make the decision which he did in respect of it, and we so find.

We turn then to the second jurisdictional question, namely, whether this Court has jurisdiction to entertain an appeal against that decision. Section 21 of the Court of Appeal Act provides for appeals in original criminal proceedings to lie

to this Court only where there has been a conviction or an acquittal. That is not the case here. Townsley J. did not purport to exercise the High Court's appellate jurisdiction; so an appeal cannot lie pursuant to section 22 of that Act. It is necessary therefore to consider section 115(1) of the Constitution.

Clearly paragraphs (a) and (c) of section 115(1) afford no basis for this Court to entertain the appeal. We are not aware of any "other cases" prescribed which would make paragraph (d) the basis. We have discussed above the provisions of the Criminal Procedure Code; insofar as they are "other cases", we are satisfied that they are inapplicable. If there is any basis, it must be found in paragraph (b). That paragraph confers a right of appeal against final decisions "given in exercise of the original jurisdiction conferred on the High Court by sections 19 and 111" of the Constitution.

His Lordship purported to exercise the original common law jurisdiction of the High Court. That jurisdiction is derived from the provisions of section 18 of the High Court Act. Those provisions, which were part of the Act before the Constitution came into force, were continued in force by section 168 of the Constitution. The jurisdiction comes, therefore, within the description of "such other jurisdictions and powers as may be

conferred on [the High Court] by this Constitution or any other law" in section 111(1) of the Constitution.. The common law jurisdiction of the High Court of Justice in England in respect of bail is an original jurisdiction (R. v. Spilsbury (supra)). We have no doubt, therefore, that His Lordship was purporting to exercise an original jurisdiction of the High Court. We have found above that that jurisdiction did not in fact give him the power to make the orders which he decided to make.

In Ah Yick v. Lehmer (1905) 2 C.L.R. 593 at 601

Griffith C.J. observed:

"When there is a general appeal from an inferior Court to another Court, the Court of Appeal can entertain any matter, however arising, which shows that the decision of the Court appealed from is erroneous. The error may consist in a wrong determination of a matter properly before the Court for its decision, or it may consist in an assertion by that Court of a jurisdiction which it does not possess, or it may consist in a refusal of the Court to exercise a jurisdiction which it possesses. In all these cases the Court of Appeal can exercise its appellate jurisdiction in order to set the error right."

We respectfully accept that as a correct statement of the common law, which is applicable in Fiji by virtue of section 22 of the High Court Act. We are satisfied that, as Townsley J. made a decision and did so in purported exercise of the High Court's original common law jurisdiction, section 115(1)(b) of the Constitution confers on this Court jurisdiction to entertain

an appeal against that decision, provided that it was a final decision.

After anxious consideration we have come to the conclusion that it was a final decision. The proceedings in which it was made were commenced by an originating notice of motion. Although the application made by that motion was for variation of a Magistrates' Court order which was itself only an interim order, the decision made by His Lordship disposed finally of the application before him. In Fred Wehrenberg and Another v. The State (Criminal Appeal No. 16 of 1995: 17 May 1996) this Court held that a decision by a judge of the High Court refusing to entertain an application to the Court by originating notice of motion for an order for the police to conduct investigations into three criminal cases in a Magistrates' Court was a final decision in an original criminal proceeding. It was held to be a final decision because it brought to an end the proceedings on the application.

The decision of Townsley J. similarly brought to an end the proceedings on the application before him. If instead of granting the application, he had decided to refuse it, that also would have brought the proceedings to an end. We are satisfied, therefore, that the decision which he made was a final decision, as required by section 115(1)(b).

These proceedings come to us by way of referral by a single judge of an application for a stay of Townsley J.'s order. During the course of the hearing Mr Daubney and Mr Wilkinson agreed that, if we were satisfied that His Lordship exceeded his powers in making his decision and that this Court has jurisdiction to entertain the appeal, we should give judgment in respect of the appeal. As we are satisfied as to both those matters, we have decided to allow the appeal and to quash Townsley J.'s orders. It is doubtful whether we have power to order the payment of costs as these are criminal proceedings; in any case Mr Daubney informed us that the appellant was not seeking an order as to costs.

Mr Wilkinson was clearly most concerned that there should be some way in which inappropriate exercise by magistrates of their powers in respect of bail could be rectified by the High Court. We express no opinion on the exercise of the discretion by the learned Chief Magistrate in this case, save to say that the longer the period likely to elapse before an accused person is tried and found guilty or not guilty, the less reasonable it becomes to deprive him of the rights conferred by the fundamental rights and freedoms provisions in Chapter II of the Constitution.

In many other countries, including England and New Zealand, a need has been seen for the High Court to have power to set aside or vary bail granted by a subordinate court and for appeal rights to be granted to both prosecution and accused persons in bail matters. If that need is considered to exist in Fiji, there are, therefore, many precedents available for the draftsman to utilise. Whether the need exists or not is not for us to say; we can only observe that, if it does and if it is as urgent as Mr Wilkinson appeared to consider, urgent attention should be given to making the required statutory provision.

Decision: Appeal allowed. Orders of Townsley J. quashed. No order as to costs.

..... *R. I. Barker J.A.*
 Sir Ian Barker
Judge of Appeal

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

..... *J. D. Dillon*
 Mr Justice J.D. Dillon
Judge of Appeal