

IN THE FIJI COURT OF APPEAL

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU0017 OF 1996

CRIMINAL APPEAL NO. AAU0001 OF 1997

(High Court Criminal Misc No. 26 of 1996)

BETWEEN:

RAMESH PATEL

APPELLANT

-and-

STATE

RESPONDENT

Mr. Gerard McCoy Q.C. and Mr. H. K. Nagin for the Appellant  
Mr. K. Wilkinson and Mr. W. Clarke for the Respondent

Date and Place of Hearing : 27 and 28 May 1997, Suva  
Date of Delivery of Judgment : 18 July 1997

JUDGMENT OF THE COURT

These two appeals are against stay orders made by Townsley J in the High Court at Suva. The first (No. 17/96) is in respect of a trial which was due to be held in the Magistrates Court. In it the appellant faced a count of fraudulent conversion under s.279(1)(c)(ii) of the Penal Code (Cap.17). On 31 October 1996 the Chief Magistrate refused a request by the prosecutor for trial in the High Court. This is provided for in s.220 of the Criminal Procedure Code and s.4 of the Electable Offences Decree. He ordered it to proceed in the Magistrates Court on 28 November. The Director of Public Prosecutions filed a petition of appeal to the High Court against that

refusal on 1 November 1996 and on 27 November applied urgently for a stay of the trial and this was granted by Townsley J. It effectively stays the Magistrates Court proceeding pending the outcome of an appeal in another case involving different parties and said to involve s.220. That appeal has not yet been heard.

The second appeal (No. 1/97) is against the order of Townsley J staying an order made by His Worship Mr Salesi Temo on 29 November for the return of the appellant's passport. It had been surrendered previously as a condition of the bail granted to him earlier. The Director filed a petition of appeal dated 2 December against that order and applied *ex parte* for the stay on 29 November. The stay was granted then, and confirmed on 5 December after a hearing *inter partes*. Meanwhile the appellant had moved on 2 December for dissolution of the stay order and for the return of his passport, but these applications were dismissed by Townsley J on 5 December also.

To complete the narrative, on 2 December 1996 the appellant had filed in this Court the first of the present notices of appeal (No. 17/96) against Townsley J's order staying the hearing in the Magistrates Court. On 9 December he followed it with a motion for an order releasing his passport but this was dismissed by Thompson JA sitting as a single Judge of this Court on 14 February 1997, holding that there was no jurisdiction to entertain it. He added that the applicant was not precluded from presenting further argument to the Full Court at the hearing of an appeal. The latter then applied for an extension of time to appeal against Townsley J's order of 5 December staying the return of his passport. He also sought a stay of that order by His Lordship. On 28 February this Court granted leave to appeal out of time (now brought as No. 1 of 1997), but refused the stay application. It directed that the appeals be heard on 27 May.

Following this Court's decision in *Southwick v The State* (No 20/1996; 14 February 1997 *coram* Barker, Thompson and Dillon JJA), the appellant unsuccessfully moved the High Court for orders seeking to reverse Townsley J's earlier decision of 5 December. His Lordship refused this application in a judgment delivered on 12 March 1997

The foregoing is only a brief summary of the confusing and sometimes inaccurate proceedings giving rise to these appeals. Some relevant information surfaced for the first time only at the hearing before us, and Townsley J's complaints were justified about the absence of records at the time he gave his decision of 5 December 1996, necessitating a different approach in the one he delivered on 12 March 1997. With respect to him, however, we must express our concern about the extravagant language he sometimes used to criticise what he saw as failings by the Magistrates concerned and counsel.

### **The Bail Stay Appeal (No 1/97)**

To recapitulate, this appeal No 1/97 is against the decisions of Townsley J staying, on the State's motion, the order made by His Worship Mr. Salesi Temo for the return of the appellant's passport when renewing his bail. It is brought to this Court under s 22 of the Court of Appeal Act dealing with appeals from the High Court in its appellate criminal jurisdiction. Subsection 1 states that any party to an appeal from a Magistrates Court to the High court may appeal against that Court's decision to this Court on any ground involving a question of law only. The grounds of appeal are essentially (i) that the State's application was not properly before Townsley J so that he had no power to entertain it, and therefore his stay order was a nullity; (ii) that he exceeded his jurisdiction under the Criminal Procedure Code in enhancing the Appellant's bail condition; and (iii) that he erred in holding he had inherent jurisdiction to do so.

In his first decision of 5.12.96 Townsley J rejected submissions based on these grounds, holding that the bail matter was incidental to the State's appeal No 17/96 against the Chief Magistrate's refusal of a High Court trial and was correctly brought by Notice of Motion in that appeal; and that the High Court had a general supervisory jurisdiction over what was done in the Magistrates Courts. He concluded that there was a real risk of the appellant absconding to Australia and made the stay order requested. With respect, we cannot see how the Magistrate's decision about bail, which was intended to ensure the accused's attendance at the preliminary enquiry or trial of the charge against him, has any bearing on the State's appeal against the Chief Magistrate's order for trial in that Court. However, this point is no longer of any moment

following Mr. Wilkinson's disclosure during the hearing in this Court that a petition of appeal against the release of the appellant's passport had been presented to the Magistrates Court. As noted above, it was dated 2.12.96. He explained that it was not included in the record because it had not been released by that Court and for the same reason was not served on the present appellant's counsel, to whom its existence came as much of a surprise as it was to this Court. It is plain that Townsley J was unaware of it when delivering his two decisions.

This failure by the Magistrate to send the petition of appeal and record "forthwith" to the High Court (as required by s 312 of the Code), and the even longer delay in forwarding the petition and record in the other appeal (No 17/96), point to severe administrative shortcomings in that Court which we trust will be promptly rectified. As Townsley J made clear in his decisions, he was seriously misled by their absence, and in this Court it was a cause of confusion and delay. We would also recommend that when a petition of appeal is filed there should be routine notification by the appellant to the other party, even though there is no obligation under the Code for a copy to be served.

In his second decision of 12.3.97 His Lordship dismissed the appellant's application to revisit his stay orders in the light of this Court's judgment in Southwick v The State. The appellant in that case had been charged with offences involving dishonesty and corruption and had been granted bail by the Chief Magistrate, who refused a request by the prosecutor for a condition that he surrender his passport. By Notice of Motion to the High Court the Director sought an order revoking the Chief Magistrate's order refusing that request, and an order that the accused surrender his passport to the High Court. That motion was granted by Townsley J. No petition of appeal had been presented against the Magistrate's decision, but he held that the High Court had an inherent jurisdiction in bail matters.

Mr. Southwick appealed and the only ground dealt with in this Court's judgment of 14 February was the claim (substantially repeated in the present appeal) that the Director's application was not properly before His Lordship so that he had no power to entertain it and his

orders were therefore nullities. This Court took the view that the Director's application was essentially one seeking a variation of the Magistrate's bail order by adding to its conditions the surrender of the appellant's passport, but this was contrary to s 108(3) of the Code permitting the High Court to direct only that a person be admitted to bail, or that the bail required by a Magistrates Court or police officer be reduced. Accordingly, s108(3) could not be relied on to justify the revocation order made by Townsley J.

We are satisfied that his present order staying His Worship Mr. Temo's order for the return of the appellant's passport is also in effect a variation of the appellant's bail by increasing its conditions, notwithstanding that the retention of that document was secured by the device of a stay. Accordingly, s108(3) cannot be relied on in this case either, to justify Townsley J's order. In his first decision of 5.12.96 he by-passed a submission based on s108(3) by resorting to what he termed the High Court's "general supervisory jurisdiction over the Magistrates courts, to see that they do justice". However, in *Southwick's* case this Court accepted the statement in *R v Spilsbury* [1898] 2 QB 615 that the High Court's inherent jurisdiction at common law in bail cases was circumscribed by a reluctance to interfere with a Magistrate's refusal of bail where a person was charged with a misdemeanour, as would be the case here; indeed, it was doubted whether a jurisdiction to do so existed at all on remand before committal.

In his second decision Townsley J acknowledged that, following *Southwick*, he could no longer rely on s108(3) or on the Court's inherent jurisdiction to justify his stay order, but he thought it a case for the exercise of the Court's review jurisdiction under ss 323 and 325 of the Code, even though this ground had apparently not been put forward by the State. As pointed out in *Southwick*, neither these provision nor s 114 of the Constitution give power to change an order of the Magistrates Court on the merits, but Townsley J had regard to an affidavit of William Wylie Clarke of the Director's office and concluded that in ordering the return of the appellant's passport the Magistrate revealed "gross partiality and bias", warranting the Court's interference under these sections. The affidavit recorded in a series of brief notes His Worship's remarks when giving his decision. Some may be regarded as unfortunate if taken in isolation, but when

read as a whole they are capable of being fairly understood as expressing a concern that the accused, deemed under the Constitution to be innocent until proved guilty, would be separated from his wife and family in Australia if his passport were surrendered; and a belief that, as a solicitor, he could be expected to act responsibly and answer his bail. The decision to return his passport seems surprising in the circumstances, but it is open to the view that it was one made on the merits within the Magistrate's jurisdiction.

There is a petition of appeal to the High Court in the present case, and if it was properly brought, it is accepted that there was an inherent jurisdiction in that Court to grant a stay pending its determination. Although there was no petition in **Southwick's** case, this Court accepted (in a passage which must be regarded as obiter) that an appeal to the High Court under s 308(1) of the Code could be brought against only a final order of the Magistrates Court. That section states:

(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 Supreme 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.

It approved the view of Mills-Owen CJ in **Asgar Ali v R** (1964) 10 FLR 235 that "order" had to be read *eiusdem generis* with "judgment" and "sentence"- i.e. a final order in the nature of the determination of the case. However, Townsley J drew attention to an earlier decision of this Court (**Tuiqaqa v R** (CA 2/86; 21.3.86)) in which a contrary view to that expressed in **Southwick** had been taken - namely, that "order" in s 308(1) meant any order in a criminal cause or matter. That case involved an application under s224 of the code to transfer a trial to the then Supreme Court, and had obviously not been cited to this Court in **Southwick**, or to Thompson JA when dealing with the present matter as a single Judge of this Court.

We were informed by Mr. Wilkinson that **Southwick** is now under appeal to the Supreme Court. He submitted that it is not appropriate for us to revisit **Tuiqaqa** in the light of the comments made in that later judgment. Nevertheless, if we are persuaded that **Tuiqaqa** was wrongly decided, we see it as our duty to resolve the matter now, rather than perpetuate a mistaken statement of the law for appeals of this nature.

In support of the views expressed in **Southwick**, Mr McCoy referred to the practical difficulties in accepting that any order made in the course of a Magistrates Court trial, no matter how trivial, can be the subject of an appeal. He emphasised the desirability of securing the speedy disposal of business in those Courts, leaving disputed matters arising during trial for decision on appeal after the final determination of the case. This is consistent with the approach taken by appellate Courts in other jurisdictions and he cited a number of cases including **Atkinson v U S Government** [1971]AC 197, **Streames v Copping** [1985] 1QB 920 and others usefully summarised in a Hong Kong Court of Appeal decision **R v Yeung Wai Hung** [1990] 2 HKC 86. They express a firm consensus in respect of provisions similar to those in the Code that it could not have been the intention to permit appeals from decisions of the Magistrates Court until after determination of the case. Comments in reported cases of the Fiji High Court since **Tuiqqa** also highlight the problems of allowing appeals from matters arising in the course of trial. We refer in particular to the following criticism by Tuivaga CJ in **Mohammed Khalil v The State** (Crim App 4/91;5/9/91):

“Interlocutory appeals in criminal proceedings are inappropriate and ought not to be encouraged because of their disruptive and procrastinating effect on criminal trials. Indeed interlocutory appeals in criminal trials must be regarded as inimical to the criminal process”

**Tuiqqa** was an exceptional case, in which a Senior Magistrate who had shared chambers with the Magistrate presiding at the appellant’s trial on a charge of robbery was to be called as a defence witness. When the prosecutor discovered this, he asked the Magistrate to exercise his power under s 224 to order that the trial proceed in the High Court, but the latter refused peremptorily. The Chief Justice allowed an appeal against that refusal and on appeal to this Court the question of his jurisdiction to hear that appeal under s 308 was raised, on the basis that the Magistrate’s decision was not a final one. This Court saw no assistance in **Asgar Ali** without any discussion of its reasoning, and referred to a New Zealand Court of Appeal decision **Police v S** (1977) NZLR 1 to the effect that an appeal provision in respect of orders made in the Magistrates Court should be given a liberal interpretation “so far as is reasonably possible” because it confers rights on individual citizens in criminal proceedings. However, that decision appears to be only of marginal relevance in deciding whether an order under s308(1) is meant to be final, it was

concerned with the question of whether an order refusing name suppression was one made "on the determination" by a Magistrates Court of an information or complaint. The Court in *Tuiqaqa* also saw confirmation of the fact that an order is also a decision in the requirement of s 310(1) that a petition of appeal from the decision be presented within 28 days. The significance of this point escapes us. The use of "decision" in that section seems simply a convenient way of referring to the "judgment, sentence or order" against which the appeal lies, but says nothing about the nature of the order itself.

With respect, we find the reasoning in *Tuiqaqa* less than convincing and feel that if the Court had received the benefit of the authorities Mr. McCoy placed before us, its conclusion on this point would have been different. The experience reflected in the comments of High Court judges since then supports the desirability of revisiting it and accepting that an appeal to that Court in criminal matters can only be taken against a final order or determination of the Magistrates Court. The remedy of judicial review will continue to be available when warranted by exceptional circumstances.

In *Asgar Ali Mills-Owen* CJ was faced with a decision by a previous Chief Justice (*Isad Ali v R* (1958) 6 FLR 1) holding that an order refusing bail was final, "not one merely collateral to substantive proceedings" so that an appeal lay by an accused or convicted person to the then Supreme Court. The problem was to reconcile this with that Court's concurrent original jurisdiction to entertain a bail application. Mills-Owen CJ observed at p328 that

"In the absence of express provision, in my view, it would be difficult to justify a conclusion which resulted in the finding of both a concurrent and an appellate jurisdiction in the same cause or matter"

and he expanded on the practical difficulties, leading him to conclude that no right of appeal exists from a refusal of bail to a convicted person pending appeal, or to one pending trial. In each case that person has what His Lordship regarded as the more effective recourse to the High Court's original jurisdiction under the Code. It is that right which leads us to the view that, so far as an applicant is concerned, a bail order made in the Magistrates Court is not final and is accordingly

not appealable. Though this was not expressly stated in his judgment, it may be inferred from His Lordship's discussion of finality in relation to "order" in the then equivalent of s 308(1).

The fundamental question in the present appeal is whether the prosecution has any right of appeal at all to the High Court against an order granting bail. Section 108(1) of the Code provides that where a person arrested appears before a court and is prepared at any stage of the proceedings to give bail, he or she may be admitted to bail subject to such conditions and limitations as the court may see fit to impose. That is what happened with the appellant in the present case. As noted above, s 108(3) reads:

"Notwithstanding anything contained in subsection (1), the Supreme [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."

This indicates a limited concurrent jurisdiction in the High Court, in practice in favour of the accused, to review a Magistrate's bail order. Because a prosecutor has no effective recourse to this jurisdiction of the High Court (in contrast to the accused's ability), a bail order may be regarded as a final one insofar as he or she is concerned.

Mills-Owen CJ was satisfied that a prosecutor has no right of appeal from an order granting bail, although this must be regarded as obiter since he was dealing with an application for bail pending appeal by a convicted person. (The Court in *Southwick* mistakenly described it as a prosecutor's bail application.) The question of whether prosecutors had a right of appeal against a bail order was not argued before us, although Mr. McCoy abandoned a submission that they had no right of appeal generally under s308(1). The question is one which may be capable of argument in the High Court at the hearing of the present appeal and the parties should be given the opportunity to do so. Nevertheless it might not be out of place for us to make some observations on the topic.

Before the enactment of special bail appeal provisions in England culminating in the Bail Act of 1993, the intervention of the High Court was sought originally by application for a writ of Habeas Corpus on behalf of an accused who had been refused bail, and more recently for the issue of a summons to the Magistrate or Justices refusing bail, to show cause why it should not be

granted. There was never any suggestion of the prosecutor having the ability to challenge a bail order by way of appeal or otherwise, and there is nothing in the earlier editions of Archbold to indicate that such a right ever existed until it was granted subject to the conditions laid down in the legislation referred to above. The former English practice was followed in New Zealand (see *R v Vincent* [1950] NZLR 653) until it in turn gave statutory authority to prosecutors to appeal. This suggests that bail matters have always been regarded as being in a separate category in the nature of ministerial decisions by the Justices or Magistrates Court, with the prosecutor having a right to be heard, but not to challenge the decisions which must, however, be made judicially. On this approach, s 308(1) would have to be understood as excluding prosecutors from having a right of appeal against bail orders.

At p 9 of its judgment in *Southwick* this Court cited with approval the following statement by Mills-Owens CJ in *Asgar Ali* at p 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.”

and this Court concluded its judgment with this comment at p 9:

“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 for the draftsman to utilise.”

It is plain from these extracts that this Court considered then (although obiter) that prosecutors had no right of appeal in bail matters and that the High Court had no general power to set aside or vary bail granted in the Magistrates Court. The Court - presumably the one that granted bail - has power under s112 to require new sureties if those accepted proved to be insufficient. There must also be an inherent jurisdiction to revoke bail should there be a material change of circumstances, or a failure to comply with any conditions imposed. *R v Hill* [1967] VR 556 affords an example of a court revoking bail where the accused went on a crime spree after it had been granted. None of these considerations applies to the present case. Even if s 308(1) could be construed as granting a prosecutor a right of appeal to the High Court in bail

matters, it may have to be read as subject to the limitations imposed on that Court by s 108(3).

In this appeal we are faced with a stay order made to preserve the current position with regard to the appellant's passport. At the time that order was made by Townsley J he was, as noted earlier in this judgment, unaware that a petition of appeal dated 2 December 1996 had been filed by the prosecutor in respect of the bail variation. However, it is plain one had been filed so we are proceeding on the basis that we are dealing with a stay order preserving the position until that appeal is dealt with by the High Court. In passing we record our sympathy with the frustration of Appellant's counsel when, during the course of the hearing, he was informed for the first time (as indeed were we, as noted earlier) of the existence of that petition of appeal. It was called 28 May and adjourned by the Chief Justice until the outcome of the hearing in this Court. Whether the prosecutor has a right of appeal against a bail order may be arguable in the High Court and we think the parties should have the opportunity to test it there. His Lordship may also wish to exercise whatever review powers are available to him in respect of His Worship Mr Temo's bail decision, in the light of Townsley J's criticism when referring to ss 323 and 325 of the Code.

Accordingly we are satisfied that the stay order made in respect of appeal No 1/97 should remain until the further order of the High Court and that appeal is dismissed.

**The Trial Order Stay Appeal (No 17/96)**

This appeal is against the stay order made by Townsley J of the Chief Magistrate's order refusing the prosecutor's request that the appellant's trial take place in the High Court. The relevant provisions are s 220 of the Code and s 4 of the Electable Offences Decree 1988. The former reads:

If before or during the course of a trial before a magistrates' court it appears to the magistrate that the case is one which ought to be tried by the Supreme [High] Court or if before the commencement of the trial an application in that behalf is made by a public prosecutor that it shall be so tried, the magistrate shall not proceed with the trial but in lieu thereof he shall hold a preliminary inquiry in accordance with the provisions hereinafter contained, and in such case the provisions of section 235 shall not apply.

Section 4 of the Decree states:

Notwithstanding the provisions of the preceding section the Director of Public Prosecutions or any counsel instructed by him may request the Magistrates' Court before which an accused person is charged with a non-electable offence to proceed in the case by way of committal for trial before the High Court and in any such case the presiding magistrate shall deal with the offence as if it is an electable offence under this Decree:

Provided that no request shall be granted under this section except where it appears that the non-electable offence is likely to raise serious or difficult issues of law or fact or both.

The Director's petition of appeal filed on 1 November 1996 recited that when the accused was charged and pleaded not guilty in the Magistrates Court on 21 October, the prosecution applied for High Court trial under s 4 of the Electable Offences Decree, but the request was refused by the learned Chief Magistrate. That petition was not before the High Court when Townsley J heard the Director's application for a stay, and he was under the impression that the prosecutor's request had been made under s 220 of the Code, as recited in the Motion and supporting affidavit for stay, which he granted on 23 November. On that basis the obligation on the Chief Magistrate to proceed with a preliminary enquiry in lieu of a trial was absolute and His Lordship's stay order was fully justified, if there was jurisdiction in the High Court to entertain the Director's appeal.

Following this Court's decision in *Southwick*, the appellant asked Townsley J to revisit his earlier decision on this point as well as on the passport matter dealt with above, on the ground that the order made in the Magistrates Court was not a final one and accordingly not appealable. In his decision of 12 March rejecting the appellant's application to review his stay decisions, His Lordship relied on *Tuiqaqa v R* (above) as conferring jurisdiction on the High Court for the Director's appeal (We have concluded earlier in this judgment that an appeal lies to the High Court only against final orders, and refused to follow *Tuiqaqa*). He then learned for the first time that the prosecutor's request was said to be based on s 4 of the Electable Offences Decree, the

grounds in the Director's petition of appeal being that the learned Chief Magistrate had erred in finding that there were no matters of seriousness or complexity warranting a High Court trial, and in finding the need for an expeditious trial was a ground for refusing the application. Townsley J was fully justified in his complaint that he had been misled earlier by the absence of this record from the Magistrates Court and the lack of information by counsel.

The appellant advanced a number of grounds in support of the appeal to this court against His Lordship's decision granting the stay, but the only one of any merit was that based on error of law, effectively a claim that he had no jurisdiction to do so since there was no valid appeal to the High Court. During the hearing Mr Wilkinson informed us that the petition of appeal was mistaken in its reference to only s 4 of the Decree; it should also have cited s 220 of the Code as well, as a basis for the prosecutor's request for a High Court trial. He stated that an amended petition to this effect had been filed and this was also before the Chief Justice when the matter was called on 28 May and also adjourned pending the outcome of this present appeal. This is hopefully the last of the unexpected revelations in the convoluted course these two matters have taken through the Courts.

According to Mr. Wilkinson, the application to the Chief Magistrate had been made under s 220, but defence counsel submitted that it should have been advanced under s 4 of the Decree, in which case His Worship had a discretion under the proviso to transfer the trial. We called for the Magistrates Court record which confirms Mr. Wilkinson's account of the way the matter was argued, and indicates that in reply to defence counsel's submissions he maintained that the trial should proceed in the High Court under s 4 as well. In his decision of 31 October refusing the application the learned Chief Magistrate described it as having been made under both s 220 and the Electable Offences Decree.

If the prosecutor's application had been solely under s 220, the learned Chief Magistrate had no option and the trial should have been transferred. We agree with Mr. McCoy that the proper course in that event would have been an application for judicial review to compel this

action. On the other hand, an appeal would be the appropriate means of challenging an order made in the exercise of the discretion under s 4 of the Decree, if it was final in the sense envisaged by the word "order" in s 308(1). In line with what we have said on this point in Appeal 1/97 above, there is a distinction to be drawn between orders made during the course of trial which do not finally determine the case (and in respect of which there is no appeal); and those which are made collaterally to the substantive proceedings, finally determining their particular subject-matter. An order made under s 4 before trial would clearly come within the latter category and is to be regarded as a final one capable of supporting an appeal. We might add that in the present case one matter calling for resolution by the High Court is the confusion evident in the documents about the basis of the prosecutor's application.

Once an appeal is validly before the High Court, the latter can exercise a variety of powers, as contemplated in the following extract from the judgment of Griffiths CJ in *Ah Yick v Lehmer* (1905) 2 CLR 593, 601 cited with approval in *Southwick*:

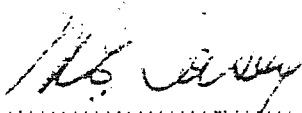
"When there is a general appeal from an inferior Court to another Court, the Court of Appeal can entertain any matter, however arising, which shows that the decision of the Court appealed from is erroneous. The error may consist in a wrong determination of a matter properly before the Court for its decision, 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."

This suggests a power in the High Court in its appellate jurisdiction to make an appropriate order in respect of s 220 notwithstanding the absence of judicial review proceedings, if it decides that the prosecutor's application should have been determined under that section.

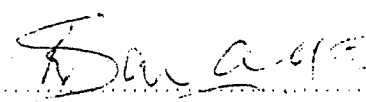
For these reasons we are satisfied that the appeal to the High Court was validly brought and that the order made by the learned Chief Magistrate can be appropriately dealt with under it. It follows that the stay order made by Townsley J was justified, although it should have been granted only until the further order of the High Court pending disposal of that appeal, and not

made dependent on the outcome of the appeal in the other case he referred to. Subject to that amendment Appeal 17.96 is also dismissed.

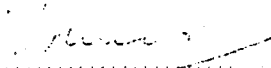
Before departing from this matter we must express our concern at the state of the records filed in this Court. Not to put too fine a point on it, they were a shambles. It was quite unacceptable to expect the Registrar and his staff to sort out the almost unintelligible mass of material in the numerous applications and affidavits placed before the High Court in these two matters, let alone to fill in the gaps caused by the absence of records which should have come from the Magistrates Court. It clearly called for a substantial input by counsel, who presumably were familiar with what had taken place and could have assisted in compiling a record focussing on relevancy, instead of which members of this Court spent many hours attempting to grasp the real questions in the cases. We hope the practice will be changed in future to ensure that what comes to this Court is only what is needed to understand the issues, and is presented in an intelligible fashion.



Sir Maurice Casey  
Judge of Appeal



Mr Justice R.C. Savage  
Judge of Appeal



Mr Justice J.D. Dillon  
Judge of Appeal