

10

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0002 OF 1998S
(Suva High Court Criminal Case No. 81 of 1997)

IN CHAMBERS

BETWEEN:

APISAI SULUA
PENIASI VUNIYACAWA

Appellants/Applicants

and

THE STATE

Respondent

Mr Kelemedi R. Bulewa for both Applicants

Mr William W. Clarke (Counsel in DPP's Office) for the Respondent

Date and Place of Hearing: 16 February 1998, Suva

Date of Decision: 24 February 1998

DECISION

(Whether bail application can be considered if it is held that Applicants have no right of appeal against severity of sentence)

This is an application for bail "pending appeal" against sentence.

Preliminary issue

Mr Kelemedi Bulewa the learned Counsel for the Applicants clarified to the Court at the outset that the proposed appeal is not an appeal against conviction.

The consideration of the bail application depends on the answer to preliminary legal question : **“Can the Court of Appeal entertain the Notice of Appeal having regard to the provisions of 22(1) of the Court of Appeal Act which debars a second appeal against severity of sentence?”**

If this Court comes to the conclusion that the proposed appeal is against severity of sentence then there is an absolute bar to a second appeal unless it can be shown that the High Court acted in excess of jurisdiction or acted without jurisdiction.

This means that if the High Court acted within jurisdiction in the matter of assessing sentence in its appellate jurisdiction then the question of granting bail cannot arise because there cannot in law be any “pending appeal” against the High Court's decision.

Chronology of events

Both Applicants were charged in the Magistrates' Court, Suva with the offence of robbery.

Both pleaded guilty to the charge.

On 21 March 1997 the first Applicant (Apisai Sulua) was sentenced to 9 months imprisonment suspended for 18 months, and the second Applicant was conditionally discharged under Section 44 of the Penal Code Cap. 17.

The State appealed against the sentence to the High Court as being manifestly lenient and wrong in law.

On 5 December 1997 the High Court (Surman J.) allowed the appeal against sentences imposed. He sentenced the first Applicant to 15 months imprisonment and the second Applicant to 12 months imprisonment.

On 30 January 1998 Mr Bulewa filed a Notice of Appeal against “conviction and sentence” on behalf of both the Applicants on the following grounds -

“(a) That the learned Judge was wrong in law in revoking the suspended sentences and imposing immediate custodial sentences;

- (b) *That the phrase "severity of sentence" under Section 22(1) of the Court of Appeal Act Cap. 12 should be construed in its plain and ordinary meaning and that the decision of the Fiji Court of Appeal in Prem Chand & Another -v- Reginam 22 FLR 100 has limited applications."*

He also filed a motion for bail pending appeal on behalf of the two Applicants. This motion was supported by the affidavit of Onesimo Sulua father of the first Applicant and the affidavit of Moses Vuniyacawa the father of the second Applicant.

Submissions

Both parties have filed written submissions. Each Counsel also made brief oral submissions.

It is the State's preliminary contention that since this is a second appeal against severity of sentence the bail application cannot be entertained because the Applicants have no right of appeal.

In support of its contention that the Applicants have no right of appeal the State relies primarily on the decision of the Fiji Court of Appeal in Prem Chand & Anor. v Reginam 22 FLR 100 wherein Section 22(1) of the Court of Appeal Act was interpreted and applied.

Section 22(1) of the Court of Appeal Act reads as follows:-

*" Appeals from Supreme Court in its appellate, etc., jurisdiction in criminal cases
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."

The ratio of the Court of Appeal's decision in Prem Chand's Case is manifest from the head notes appearing at page 100 of the Report already cited. They read as follows:-

" When the appellants appeared before the Magistrate's Court charged with wounding with intent to cause grievous bodily harm, they were sentenced to two years imprisonment suspended for three years. The Director of Public Prosecutions being dissatisfied with the sentence

appealed to the Supreme Court where the judge removed the suspension and so imposed an immediate term of imprisonment of two years. Further appeal to the Court of Appeal could not be entertained against severity of sentence, but counsel for the appellants argued that the appeal was not against the sentence of two years imprisonment, but against the decision of the Supreme Court to remove the order suspending the sentence.

E

Held: The phrase "severity of sentence" could not be so restricted to questions of the actual length of the term imposed.

Per curiam: 1. It might seem an apparent injustice that no further appeal lay at the suit of the prisoner where the first appeal had been brought by the Director of Public Prosecutions, but this was a matter for the legislature to remedy if it thought fit.

F

2. Although by Court of Appeal Ordinance s.22(1), there was no jurisdiction to entertain an appeal against sentence which went to the quantum, even if a question of law was involved, this did not prevent an appeal if the sentence was beyond the power of the Magistrate's or Supreme Court. A question of law would be involved which would need to be resolved to determine the existence or otherwise of the sentence."

G

Respondent's arguments

In its written submissions the State has argued the preliminary issue as follows: -

- "2. *Of primary importance before any argument can be had regarding the granting of bail, is the issue of whether the appellants can appeal to the Court of Appeal on the grounds which they rely on. In relation to section 22(1) Court of Appeal Act, the State submits the effect of this section is that there is no right of appeal to the Court of Appeal on matters relating to severity of sentence. This is clear from the wording of the section. Authority for this proposition can be found in the cases of Prem Chand and Anor v Reginam (Criminal Appeal No.5 of 1976) 22 FLR 100 and Semesa Rokoduguni (Criminal Appeal No.93 of 1985). Further authorities include Shamsheer Ali v State (Criminal Appeal AAU0016 of 1996, John Collard v Reginam 32 FLR 55.*

What emerges clearly from the above cases is the strong underlying public policy that requires a restriction on rights to lodge second appeals. This applies with equal rigour to the need to ensure an efficient and non prolonged administration of justice.

In relation to Semesa Rokodugani, an appeal on the severity of sentence to the High Court from a Magistrate's Court order was dismissed. An appeal was thereupon filed in the Fiji Court of Appeal. That appeal was dismissed because it was found that section 22 Fiji Court of Appeal Act did not confer a right of appeal to the Appellant on a matter dealing with sentence. Of interest, however, was the fact that the Court did state that an error of law in relation to this area would arise where the sentence imposed was in excess of a conferred jurisdiction. There is no such ground forwarded in this appeal and nothing of that nature in the judgement of the Learned Judge in the High Court when this appeal was heard there.

Of greater importance is the case of Prem Chand (supra). That case is almost exactly identical in its circumstances to this before the court. The State submits that this case is correct in law. Here the Fiji Court of Appeal held that it is not possible to restrict the meaning of the operative words in that section- "severity of sentence". As stated in that case, '(t)he difference between the severity of a suspended sentence of two years imprisonment and one which is not so suspended is manifest.' (at 201). The State submits that the exact same reasoning is operative here.

It is further stated, most persuasively, that section 22(1) does not confer a right of appeal where severity of sentence is an issue even though a question of law is involved (at p201).

Upon examination of the petition filed in this honourable court, it is clear that the law regarding this matter dictates, with respect, that the appellants have no right of appeal. The petition demonstrates that the one issue here is as to severity of sentence. Although the petition is headed "Appeal against conviction and sentence", examination of the grounds raised clearly show that the matter is one regarding sentence. In this case, to paraphrase the words in Prem Chand, the difference between a suspended sentence and a custodial one is manifest.

This appeal is clearly one in relation to severity of sentence, it is not one of law. As made clear in Prem Chand, even if there were an issue of law involved in this matter, which does the State submits there is not, there is still is no right of appeal.

3. *In this respect, therefore, the State submits that because no right of appeal exists for the Appellants, leave cannot be granted to appeal the order; John Collard (supra), nor a fortiori grant bail. Further, a single judge of the Fiji Court of Appeal is able to make this order; Shamsher Ali (supra). Bail cannot be an issue and cannot be granted because the first requisite limb, an existing right to appeal, does not exist. As was stated by the Learned President of the Fiji Court of Appeal (at 5),*

In my view the question of granting or refusing leave does not exist here. Either the appellant has a right of appeal or he has not. If he has no right of appeal then the court cannot create a right of appeal by granting him to leave to appeal. A single judge's power to grant leave to appeal is a general power subject to section 22 of the Act which makes specific provisions governing second appeals...

This leaves no uncertainty that this appeal cannot proceed and bail cannot be granted."

Applicants' contention

Mr Bulewa agrees that if Prem Chand's Case was correctly decided then his clients have no right of appeal. He also agrees that a single judge cannot overrule or bypass a relevant decision of the full Court.

However, he qualified his concession by submitting that the failure of the High Court Judge to consider the question of rehabilitation of the offenders was a question of law. Later he advanced it further by submitting that such alleged failure actually went to the issue of jurisdiction and as such the Applicants were entitled to appeal as of right.

He argued that Prem Chand's appeal was wrongly decided because the Court "*failed to consider the cardinal rule of statutory interpretation namely:-*

- (i) *that where ambiguity exist the plain and ordinary meaning rule must firstly be applied and*
- (ii) *Where the statute and in particular the ambiguous provision deals with penal matters a strict and narrow approach is required. Both these fundamental rules of construction seems to have been overlooked in Prem Chand's case (supra). If Prem Chand's case is wrongly decided, the appellants have a right of appeal as a matter of law.*

Furthermore, the learned judge's failure to address his mind to the question of rehabilitation, a crucial element in the view of the circumstances before him is an error law which fatally affect his decision. This entitles the appellants to appeal on a question of law irrespective of their first submission.

Both appellants have outlined compelling reasons why bail should be granted. The likelihood of the hearing of this appeal after the expiry of their sentence or release is also a possibility. In the circumstance bail ought to be granted pending hearing of the appeal."

Court's conclusions

Having considered the submissions of both sides in the light of the facts of this case I have come to the following conclusions:-

- (a) That the proposed appeal is against severity and/or quantum of sentence. As was said in Prem Chand's Case at p.104 "*---the question of severity is not eliminated by the substitution of one category of punishment for another.*"
- (b) That the doctrine of precedent (*stare decisis*) obliges a single judge to follow the full Court's decision if it is applicable to the case in hand. In my view the interpretation placed on S.22(1) of the Act by the Fiji Court of Appeal in Prem Chand's Case and the observations made therein are also applicable to the present case.
- (c) That the alleged failure on the part of the High Court Judge "to address his mind to the question of rehabilitation" of the Applicants does not constitute a question of law alone going to the jurisdiction of the High Court. Even if a question of law alone is raised an appeal against severity of sentence cannot be entertained unless the alleged error vitiated the sentencing Court's jurisdiction.
- (d) That in any case there is no question that the sentences passed by the High Court (Surman J.) were within its jurisdiction. Therefore the sentences were neither illegal nor a nullity.
- (e) It therefore follows that by virtue of the provisions of Section 22(1) of the Court of Appeal Act neither Applicant has any right of appeal to the Court of Appeal against severity of sentence and therefore the Notice of Appeal cannot be entertained.
- (f) Consequently this Court has no power to grant bail or even consider granting bail because there is no appeal pending in law.

Ruling

In the outcome therefore the State's preliminary submission is upheld and the bail application of both Applicants is dismissed for want of jurisdiction.


Sir Moti Tikaram
President, Fiji Court of Appeal