

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0013 OF 1998S  
 (High Court Criminal Case No. HAC0056D.97S)

BETWEEN:

LAUZI K MUKESH CHAND S/O MUNI DEO

*Appellant*

AND:

THE STATE

*Respondent*

Coram:

The Hon. Sir Moti Tikaram, President  
 The Rt. Hon. Sir Maurice Casey, Justice of Appeal  
 The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing:

Tuesday, 2 February 1999

Counsel:

Dr M.S. Sahu Khan for the Appellant  
 Mr K. Wilkinson for the Respondent

Date of Judgment:

Friday, 12 February 1999

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JUDGMENT OF THE COURT

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This appeal is against a judgment of Pain J. in the High Court in which he allowed an appeal by the respondent. A magistrate in the Suva Magistrates' Court had discharged the appellant ("Chand") pursuant to section 44 of the Penal Code (Cap.17), without convicting him, after he had pleaded guilty to two counts each of forgery, uttering a forged document and attempting to obtain a migration visa by virtue of a forged instrument. They were offences against sections 336(3)(m), 343(1) and 345(a) of the Penal Code respectively. Pain J. set aside the magistrate's orders, convicted Chand of all the offences and sentenced him in respect of each of them to serve a sentence of six months' imprisonment, the sentences to be served concurrently with one another. However, he ordered that none of the sentences was to take effect unless within one year the appellant committed in Fiji another offence punishable with imprisonment.

The powers of this Court in respect of appeals to it against judgments of the High Court in its appellate jurisdiction are conferred by section 22 of the Court of Appeal Act (Cap.12). An appeal can be allowed only on a question of law alone, not on a question of fact or of mixed law and fact. At the hearing in this Court Dr. Sahu Khan stated that he was limiting the appeal to the question whether, in view of the terms of the petition of appeal to the High Court, Pain J. had jurisdiction to entertain that appeal. He submitted that the petition of appeal was in respect of a *sentence* alleged to have been imposed by the magistrate and that, as the magistrate had made an *order* but had not imposed a *sentence*, there was no appeal properly before the High Court for Pain J. to entertain.

The High Court derives its appellate powers from the provisions of Part X of the Criminal Procedure Code (Cap.21). The provision relevant in these proceedings, contained in section 308(1), is as follows:-

“308(1). Save as hereinafter provided, any person 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 ....”

We accept the view, expressed by Mills-Owens C.J. in *Asgar Ali v. R.* (1964) 10 FLR 235, that in that subsection “order” must be read *eiusdem generis* with “judgment” and “sentence,” so that the reference is to “an order in the nature of determining the case.”

Dr. Sahu Khan did not dispute that section 308 empowers the High Court to entertain an appeal against a magistrate’s order discharging a person pursuant to section 44 of the Penal Code without conviction. His submission was simply that in the present instance the respondent appealed against sentence and that none of the orders constituted a sentence, so that there was no appeal against any of the orders and thus High Court had no power to set them aside and convict Chand. He made

a similar submission in the High Court but it was rejected by Pain J. In rejecting it, His Lordship observed that, if he had considered it necessary to do so, he would have allowed amendment of the petition but he was satisfied, for reasons which he set out at some length, that the orders were sentences.

It is necessary at this point to note two significant matters. The first is the use by the magistrate of the word "Sentence" as the heading of his statement of the reasons for his decision to deal with Chand as he did; the orders for discharge were contained within that statement. The second matter is the manner in which paragraphs 3 and 4 of the petition of appeal were worded. They were as follows:-

"3. **THAT** the Magistrate then ordered on the 3<sup>rd</sup> January 1997 that the Respondent be discharged without conviction on condition that-

- (a) he not reoffend within 12 months; and
- (b) he pay \$100 Court costs within 2 weeks, in default 3 months imprisonment.

4. **THAT** THE Appellant desires to appeal against the said sentence upon the following grounds:

- (1) that the sentence is manifestly lenient; and
- (2) that the Magistrate erred in law in imposing the said sentence;
- (3) that the Magistrate erred in law and in fact when he took into account irrelevant considerations in imposing the said sentence."

It is clear that in using the word "sentence" in paragraph 4 the Acting Director of Public Prosecutions was expressly referring to the orders of discharge without conviction.

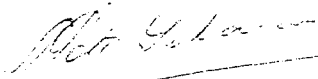
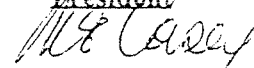
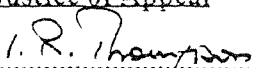
We agree with Dr Sahu Khan that the orders were not sentences for the purposes of section 308 of the Criminal Procedure Code and that Pain J. was wrong in his conclusion that they were. Mr. Wilkinson conceded that but submitted that the use of the word "sentence" in the petition of

appeal was merely a misdescription of the orders and that no one had been misled by it.. In a Magistrates' Court, if an accused person pleads guilty, the court is required to convict him before it passes sentence on him (see section 206(2) of the Criminal Procedure Code). An order of a Magistrates' Court cannot be a sentence unless it is imposed after conviction and accordingly an order of discharge *without conviction* is not a sentence. Any appeal against it by the Director of Public Prosecutions to the High Court must be an appeal against an order and not an appeal against a sentence.

However, as stated above, it is clear from paragraphs 3 and 4 of the petition of appeal that the appeal *was* against the orders; the incorrect use of the word "sentence" to describe them did not alter that. There is nothing to suggest that Chand or his counsel were misled as to what was the subject matter of the appeal or that Chand was prejudiced by the misdescription. We are satisfied that Pain J. had power to entertain the appeal and, upon doing so, to convict Chand and to pass sentence on him, as he did.

Accordingly the appeal must be dismissed.

Order: Appeal dismissed.

  
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Sir Moti Tikaram  
~~President~~  
  
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Sir Maurice Casey  
Justice of Appeal  
  
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Mr Justice I.R. Thompson  
Justice of Appeal

Solicitors:

Messrs. Sahu Khan and Sahu Khan, Ba for the Appellant  
Office of the Director of Public Prosecutions, Suva for the Respondent