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

CRIMINAL APPEAL NO.AAU0007 OF 1997S
(High Court Criminal Action No. HAA002 of 1997)

BETWEEN:

SAYED MUKHTAR SHAH

Appellant

AND:

ELIZABETH RICE
SAMISONI KAKAIVALU
YUNUS RASHID
DHARMEND PRASAD

Respondents

Coram: The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Sir Ian Barker, Justice of Appeal

Hearing: Thursday, 11 November 1999, Suva

Counsel: Mr. V. J. Maharaj for the Appellant
Mr. J. Naigulevu for the 1st Respondent
Mr. R.K. Naidu for the 2nd, 3rd, and 4th Respondents

Date of Judgment: Friday, 12 November 1999

JUDGMENT OF THE COURT

These appeals are from part of the decision of Townsley J, given in the High Court on 29th July 1997. The Judge had heard appeals brought by the respondents against a decision of the appellant Syed Mukhtar Shah, ('the Magistrate'). The Magistrate had himself issued summonses requiring the respondents to appear before him on 13 November 1996 to show cause why they should not be dealt with by him for contempt of court pursuant to s.136(1) of the Penal Code Cap.17.

The Magistrate had issued summonses to the respondents because he had considered that the respondents had been guilty of contempt in certain criminal proceedings which were being conducted before him. The Prosecutor in those proceedings, the first

respondent, Ms Rice, was then a member of the staff of the Director of Public Prosecutions ('DPP'). The other respondents were journalists employed by the 'Fiji Times' newspaper. All respondents sought to defend the contempt charges and to call witnesses in support of their defence. After a number of appearances, the Magistrate found the contempt charges (which he himself had initiated) proved against all the respondents. However, he recorded no convictions and discharged each respondent under s.44 of the Penal Code on conditions that each respondent –

(a) not to re-offend within 6 months or be recalled and dealt with and

(b) pay $25 court costs with 2 weeks to pay, in default, "2 weeks" (presumably imprisonment.)

All respondents appealed to the High Court against these decisions. In a lengthy reserved decision delivered on 29 July 1997, Townsley J. allowed their appeals and quashed all the orders made by the Magistrate. He also ordered the Magistrate as the respondent to the appeals to pay the full indemnity costs of each appellant.

Counsel agreed that

(a) Nothing was said about costs (other then the $25 per respondent penalty order) either in the petitions of appeal or in the submissions of any counsel before Townsley J. and

(b) The Judge did not give the Magistrate's counsel an opportunity to make submissions to the High Court on costs either of the appeal or of the lower court hearing; Nor did he give any indication that he was minded to make an indemnity costs order.

The Magistrate has appealed to this Court against the costs order only. At the commencement of the hearing before us, counsel for the respondent Ms. Rice, advised that she was no long interested in the appeal. She had finished her contract with the DPP and had left Fiji. The costs of the firm of solicitors who had represented her separately at both the hearing before the Magistrate and on the appeal had been paid out of public funds. Consequently, counsel on her behalf sought and was granted leave to withdraw. Ms Rice is therefore dismissed as a party.

Counsel for the Magistrate submitted that no costs at all should have been ordered against the Magistrate let alone indemnity costs. After the High Court judgment had been delivered, the solicitors for the respondents' other than Ms Rice advised the Magistrate's solicitors that the solicitor-and-client costs as charged to those respondents for the whole saga in both courts amounted to some $33,900. A demand for payment of this sum was made. No copy of the bill of costs was offered to the Magistrate's solicitors. There was no break-down supplied to differentiate between costs incurred before the Magistrate and costs incurred on the appeal to the High Court. There was no indication of how much of the bill included disbursements or VAT. In our view, the respondent's solicitors should have been more forthcoming and produced a reasonably detailed bill to support their claim. It is no answer for counel to say that they awaited a request for this from the Magistrate's solicitors. Even if the latter had been prepared to pay full indemnity costs, one could not reasonably have expected

payment of such a large amount to have been made meekly without any information that might justify the reasonableness of the bill.

The fact that the Magistrate is appealing only against the costs order indicates that the balance of Townsley J's judgment is unchallenged. We do not repeat the history of this unsatisfactory and sorry litigation. Townsley J. held, in forceful language, that the action of the Magistrates in initiating contempt proceedings on his own motion was wholly unjustified. He was also highly critical of the conduct of the Magistrate and his treatment of Ms. Rice in particular at the various hearings before him. Clearly this was a case where the Magistrate should not have initiated contempt proceedings. These should be used sparingly and only in serious cases. Izuora v. The Queen [1953] A.C. 329. Parashuram Dettaram Shamdasani v. King Emperor [1945] A.C. 264, 270 lay down describe the need for wisdom and restraint in exercising the contempt power.

Jurisdiction to Order Costs against appellant

Counsel agreed that at the hearing of an appeal under s.306 of the Criminal Procedure Code Cap. 21 ('CPC') the High Court had jurisdiction under s.317 to **"make such order as to the costs to be paid by either party to an appeal as may seem just."** We cannot read this section as conferring any jurisdiction on the Court to award costs other than for the preparation for and the argument of the appeal. Costs awards are relatively rare in criminal appeals to the High Court from a Magistrates Court. When they are made, they are usually of modest dimension.

Nor do we think that the High Court could, in this case, have awarded costs to the respondents for the hearing in Magistrate's Court. Section 158(2) of the CPC authorises a

Magistrate to order the prosecutor, whether public or private, to pay to an accused person who has been acquitted or discharged **"such reasonable costs as to such..... magistrate may seem fit."** There is a proviso to the subsection to the effect that no such order shall be made unless the prosecutor **"either had no reasonable grounds for bringing the proceedings or has unreasonably prolonged the same."**

S.158(4) states that 'private prosecutor' means any prosecutor other than a public prosecutor. In the unusual circumstances of this case, the Magistrate who issued the summons against the respondent, must arguably be deemed to be a 'private prosecutor' since he does not fit within the definition of 'public prosecutor' in the CPC.

Counsel for the respondents submitted that the High Court on hearing an appeal may, under s.319(1) of the CPC, **"make such any other order as may seem just and may by such order exercise any power that the Magistrate's Court might have exercised."** Accordingly under this argument, the High Court could have made the order under s.158(2) that the Magistrate should have made i.e. an order that he pay costs himself as a private prosecutor for bringing contempt proceedings against the respondents without reasonable grounds for bringing them.

Such an argument seems rather removed from reality. However theoretically viable it may be, it cannot be sustained. The question of a costs order under s.158(2) was never raised before the Judge on appeal either in the petition of appeal or in the submissions: nor was s.158(2) referred to by Townsley J. as justification for his 'full indemnity' costs order; one

which is unique in a criminal case in the experience of all members of this Court. It is too late for the respondent to raise any an argument under s.158(2) and s.319(6). for the first time before this Court.

Indemnity Costs

We consider that an order for indemnity costs in a criminal appeal is not possible. The Court can fix a sum in the words of s.317 'as may seem just.' But before setting a sum which would go beyond the usual three - figure sum, the Court would have to have been given some idea of the actual costs incurred by the party in favour of whom an award was contemplated. The Judge here had no such information. Nor did he seek it. Nor did either counsel at the appeal hearing ever raise the question of costs, let alone the quantum of costs.

Clearly the conduct of the Magistrate was the major factor which the Judge used to justify what can only be described as an extremely punitive and unusual costs order in a criminal appeal. We do not doubt that, in criminal appeals, as in civil cases, unreasonable conduct by the unsuccessful party might increase a usual award. Because there is no challenge to the Judge's numerous criticisms of the Magistrate, we take this conduct into account in assessing, as we must ultimately do, what is a proper costs order.

Indemnity costs are not available in criminal appeals. No authority or precedent for such an order was cited. S.317 has always been interpreted as requiring the Judge to set a finite figure. Any party against whom an indemnity costs order has been made, must be entitled to test the reasonableness of the bill that he or she is called upon to pay. There is no jurisdiction to import into the criminal process all the paraphenalia of the civil jurisdiction about

costs such as presentation of a bill in taxable form to the Registrar and the other party, the time-consuming taxation hearing before the Registrar and the right of a party dissatisfied with the ruling of the Registrar to appeal to a Judge. All of these processes are authorised by the Rules of Court for civil cases not criminal cases.

There is also another reason which operates against an award of indemnity costs in this case. A party against whom an indemnity costs order is sought is entitled to notice of the order sought. See Hunstman Chemical Company Australia Limited v. International Cools Australia Ltd. (1995) NSWLR 242, 247-9. Although that was a civil case, the principle of elementary justice that it establishes must apply to a criminal case. The Magistrate's counsel received no warning from opposing counsel that an indemnity costs order was to be sought. In fact no costs order was sought. The Judge took it upon himself to make such an unusual order without hearing the parties and without considering the jurisdictional problems to which we have adverted.

Decision

It follows that the indemnity costs order cannot stand and must be quashed. The respondents were entitled to a costs order in their favour on the appeal. The amount should be greater than might normally be expected in a successful criminal appeal because of

(a) the length of the hearing, (2 days) plus necessary preparation and

(b) the conduct of the Magistrate as described in Townsley J's judgment.

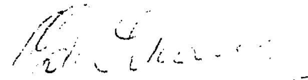
We have had the opportunity of hearing counsel on the quantum of costs. We think that the figure should be $1,500 and order accordingly. There can be no order for costs on this Court, (See s.32(1) of the Court of Appeal Act Cap.12.)

Decision

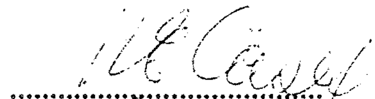
(1) Appeal against costs order allowed.

(2) Order of Townsley J. for full indèmnity costs of respondents against appellant quashed.

(3) Appellant to pay respondents the sum of $1,500 for costs of the appeal before Townsley J. under s.319 of the CPC.



Sir Moti Tikaram
President



Sir Maurice Casey
Justice of Appeal

Sir Ian Barker
Justice of Appeal

Solicitors:

Messrs. Maharaj Chandra and Associates, Suva for the Appellant
Office of the Director of Public Prosecutions Office, Suva for the 1st Respondent
Messrs. Munro Leys and Company, Suva for the 2nd, 3rd and 4th Respondents

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