

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

**CRIMINAL APPEAL NO.AAU0001 OF 1999S**  
**CRIMINAL APPEAL NO.AAU0003 OF 1999S**  
**(High Court Criminal Case No.32 of 1998/S)**

**BETWEEN:**

**RATU OVINLBOKINI**

*Appellant*

**AND:**

**THE STATE**

*Respondent*

**AND:**

**CHIEF MAGISTRATE, SALESI TEMO ESQUIRE of Suva**

*Proposed Interested Party*

**Coram:**

The Hon. Sir Moti Tikaram, President  
The Hon. Sir Ian Barker, Justice of Appeal

**Hearing:**

Friday, 5 November 1999, Suva

**Counsel:**

Dr. M. S. Sahu Khan for the Appellant  
Mr. K. Wilkinson for the Respondent  
Mr. R. Matebalavu for the Proposed Interested Party

**Date of Decision:**

Friday, 5 November 1999

**Date of Delivery of Reasons for Decision:** Friday, 12 November 1999

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**REASONS FOR DECISION OF THE COURT**

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This application was heard by a Court of two Judges pursuant to s.6 of the Court of Appeal Act Cap. 12

Counsel for the Chief Magistrate, whose decision was the subject of further appeal to this Court, sought leave to appear as an interested party and to be heard at the at the hearing of the consolidated appeals.

After considering the submissions of counsel for the Chief Magistrate, we refused the application, noting that we would give our reasons later. Neither counsel for the appellant or the respondent in the appeal wished to make submissions.

As will be seen in our decision in the substantive appeal, the Director of Public Prosecutions ('DPP') had appealed to the High Court against the Chief Magistrate's decisions:

- a) to stay the Preliminary Inquiry relating to certain criminal charges brought by the DPP against the appellant and
- b) to refuse to disqualify himself from continuing to conduct the Preliminary Inquiry.

Byrne J allowed the DPP's appeal. His essential finding was that, using the usual test for bias, in all the circumstances, including the conduct of the proceeding, the reasonable observer would conclude that the Chief Magistrate was biased against the prosecution. Byrne J. was not required to hold nor did he hold that the Chief Magistrate was actually biased. In his affidavit in support of his application, the Chief Magistrate expressed concern at some unfavourable comments about him found in the judgment of Byrne J. The Chief Magistrate wished to provide this Court with his personal recollection, impression and assessment of counsel's demeanour during the preliminary inquiry. He claimed that the record (tapes and written record) did not capture counsel's demeanour. He claimed that public confidence in him and his office was eroded and that he should have an opportunity to place his situation before this Court.

The Chief Magistrate's conduct at the inquiry has been the subject of a complaint

to the Judicial Service Commission ('JSC') which in terms of s.131(2) of the 1998 Constitution has the power to investigate complainants against judicial officers of Courts subordinate to the High Court and may take disciplinary action against them. The Chief Magistrate has provided the JSC with an explanation: the JSC has deferred further action until the appeal to this Court has been determined.

Obviously, one of the matters which will be of interest to the JSC is an allegation that the Chief Magistrate had deliberately omitted relevant exchanges, recorded on tape, from the official written record. We intend to say nothing about this allegation which is clearly within the JSC's jurisdiction. We heard the appeal on the basis of what was revealed on the record and the tapes. We were assured by the counsel for the Chief Magistrate and for the parties that together, the transcript and tapes contain the whole of the relevant record. We applied the legal test as to bias purely on what was revealed by that record.

No case was cited to us where an appellate Court has granted the Court appealed from to appear as a party to the appeal. The normal parties to any appeal are the litigants in a civil case or the prosecution and the accused in a criminal case. That is not to say that an appellate Court will not in unusual circumstances appoint an amicus or allow public interest parties to be heard. For example, see *Z v Z* [1997] 2 NZLR 257 where the New Zealand Court of Appeal appointed amici curiae and allowed special interest groups to be heard on an appeal in a matrimonial property dispute where the issues involved transcended in public importance the mere personal interests of the litigants.

In judicial review proceedings, as distinct from an appeal, the judicial officer or

tribunal whose decision is being attacked is usually joined as a defendant. Usually, that defendant has an obligation to provide any record to the reviewing Court, but it is not expected to enter the fray on the merits, especially where there are parties who can be expected to provide the reviewing Court with opposing arguments. See Engineers' Union v Court of Arbitration [1976] 2 N.Z.L.R 283, 284-5.

A judicial officer has to accept that not all his or her decisions will be accepted meekly by litigants; it is part of the legal system that there will be inevitable appeals. Sometimes appellate Courts will criticise lower Court Judges quite severely. The English Court of Appeal decision in *Jones v National Coal Board* [1957] 2 Q.B.55 is a well-known example. Often a lower Court judge, criticised by a higher Court, may feel indignation at what he or she sees as unjustified criticism of a course of conduct adopted or a decision made in the course of a difficult judicial proceeding. But, usually, the lower Court Judge has to put up with the appellate decision with such fortitude as he or she can command. Being successfully appealed against is one of the less attractive aspects of the judicial vocation, but it 'goes with the territory'.

Accordingly, we consider that there is no justification for allowing the Chief Magistrate to be a party to this appeal. His conduct and the effects of his conduct will be assessed by this Court purely from a study of the record; to the extent that the appeals are able to be considered by this Court. Section 22(1) of the Court of Appeal Act restricts a second appeal from a Magistrate's Court to this Court to a question of law only.

Whether that conduct will justify further action by the JSC will be for the JSC to

decide. No doubt the JSC will hear the Chief Magistrate and give him every opportunity to reply to any allegations of misconduct against him. The Constitution has set up the JSC as the appropriate body to consider complaints of this nature. If the JSC considers that the Chief Magistrate has been wrongly accused, and that he has acted properly then, no doubt, the JSC will say so and presumably, will make its decision known publicly in due course.

We see no reason to alter the long standing practice that the Court appealed from should take no part in any appeal from its decisions. The application is dismissed.

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**Sir Moti Tikaram**  
**President**

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**Sir Ian Barker**  
**Justice of Appeal**

**Solicitors:**

Messrs. Sahu Khan & Sahu Khan, Ba for the Appellant  
Office of the Director of Public Prosecutions, Suva for the Respondent  
Messrs. Esesimarm and Company Suva, for the Proposed Interested Party