

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

CRIMINAL APPEAL NO. AAU0049 OF 2002S  
(High Court Criminal Action No. HAA0041 of 2001L)

BETWEEN:

THE STATE

*Applicant*

AND:

JOGENDAR SINGH

*Respondent*

Coram:

Tompkins, JA  
Henry, JA  
Penlington, JA

Hearing:

Wednesday, 21st May 2003, Suva

Counsel:

Mr G H Allan for the Applicant  
Mr G P Shankar for the Respondent

Date of Judgment: Friday, 30<sup>th</sup> May, 2003

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JUDGMENT OF THE COURT

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Background

The respondent was charged with rape and an act to cause grievous bodily harm. Following a defended hearing in the magistrates' court, he was convicted on both counts and sentenced to 3 1/2 years imprisonment on the first count and 2 1/2 years imprisonment on the second.

He appealed to the High Court against conviction. In the High Court he abandoned his appeal against conviction on the second count. By a judgment delivered on 12 September 2002, the appeal against conviction on the first count was dismissed by Govind J. The judge indicated that he was minded to enhance the sentence on both counts. Counsel for the appellant submitted he should not do so, as there was no appeal against sentence. Counsel appearing for the Director of Public Prosecutions supported the judge's view that he should adopt this course.

The judge adjourned the hearing to 10 October 2002, when he heard submissions on sentence. By his judgment delivered the next day, 11 October 2002, he found that the sentence was "manifestly lenient". He accepted that he was unable to enhance the sentence beyond what the magistrate could have done. After reviewing the mitigating and aggravating factors, he set aside the sentences imposed by the magistrate and in lieu thereof imposed sentences of 4 1/2 years on both counts, to be served concurrently.

### **The application for leave**

On 21 November 2002, the appellant filed an application for leave to appeal out of time. As the time to appeal lapsed on 10 November 2002, the appeal was 11 days out of time. In the affidavit in support, counsel who appeared in the High Court deposed that he had had discussions with senior prosecutors in the office of the Director of Public Prosecutions, but owing to court commitments, they were unable to consider the matter until after the time had expired.

When the application for leave came before the then President of this court, he directed that the application be heard before a full Court of Appeal, anticipating that if leave were granted, the court would then determine the appeal. Accordingly we heard submissions from counsel on the application for leave and on the merits of the appeal.

### **The grounds of the appeal**

No draft notice of appeal setting out the grounds on which the appellant would rely if leave were granted has been filed. Counsel for the appellant submitted that the judge erred in invoking the revision jurisdiction of the High Court under s 325 (1) of the Criminal Procedure Code (Cap 21) to enhance the respondent's sentence. The judge ought to have used that jurisdiction to quash the sentence and reverse the magistrates' decision not to commit the respondent to the High Court for sentence. He would then have been remitted to the High Court for sentence. By failing to adopt this course, the judge, because he was limited to a maximum sentence of 5 years, was unable to reflect the gravity of the offending, and thereby made an error of law.

Mr Allan submitted that the High Court had jurisdiction to adopt this course under s 319(1) of the Criminal Practice Code (Cap 21) which relevantly provides:

319 -(1) At the hearing of an appeal, the Supreme Court shall hear the appellant or his barrister and solicitor, if he appears, and the respondent or his barrister and solicitor, if he appears, and the Director of Public Prosecutions or his representative, if he appears, and the Supreme Court may thereupon confirm, reverse or vary the decision of the magistrate's court, or may remit the matter with the opinion of the Supreme Court thereon to the magistrate's court, or may order a new trial, or may order trial by a court of competent jurisdiction, or may make such

other order in the matter as to it may seem just, and may by such order exercise any power which the magistrate's court might have exercised:

Mr Allan submitted that the court had jurisdiction under this subsection to "make such order in the matter as to it seems just". Having regard to the failure of the magistrate to follow the direction of this court that in circumstances such as the present, the magistrate should have declined jurisdiction and committed the respondent to the High Court for sentence, he submitted that the High Court had jurisdiction to make the order he now seeks on appeal. We have reservations whether this subsection does give the High Court jurisdiction to act in this way. The powers under subsection are qualified by the opening words "At the hearing of an appeal . . ." This was an appeal against conviction only, so "the matter" in the phrase on which Mr Allan relies is the appeal against conviction. To make the order the appellant submits the judge should have made is not to make an order in the appeal against conviction. The position would have been otherwise had there been an appeal against sentence.

Mr Allan then relied on s 325 (1) of the Code, which provides:

325 – (1) In the case of any proceedings in a magistrates' court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the Supreme Court may –

- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 319 and 320 and may enhance the sentence;
- (b) in the case of any other order other than an order of acquittal, alter or reverse such order."

He accepted that if the High Court lacked jurisdiction under s 319 (1), he would have to rely on s 325 (1) (b). But there was no order to which that paragraph of the subsection could relate. The magistrate simply imposed the sentences to which we have referred.

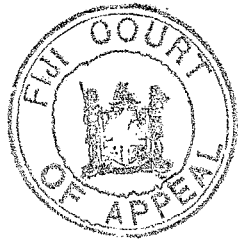
### Conclusion

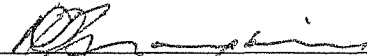
Even if the High Court had jurisdiction to make the order that the State seeks, it would not have been just to do so in the circumstances of this case. At the hearing in the magistrates' court, the prosecutor raised no objection to the magistrate assuming jurisdiction to impose the sentences. The State did not appeal against the sentence. In the High Court, when the judge indicated his intention to enhance the sentence, counsel for the State approved this course. To accept the State's contention that, contrary to the stance it had adopted until now, this court should quash the sentences imposed in the High Court and direct that court to remit the matter to the magistrates' court with a direction that the magistrate should decline jurisdiction and commit the respondent to the High Court for sentence would, in our view, be an injustice to the respondent.

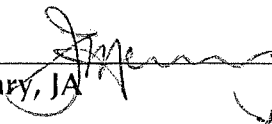
There is a further factor. The State had 30 days in which to file its notice of appeal. To allow that time to pass only for the reason that some of the senior prosecutors were busy, mitigates against granting the application.

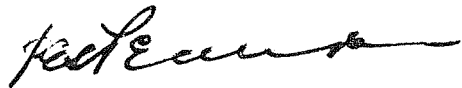
The result

The application for leave to appeal is dismissed.



  
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Tompkins, JA

  
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Henry, JA

  
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Penlington, JA

Solicitors:

Office of the Director of Public Prosecutions, Suva for the Applicant  
Messrs. G.P. Shankar and Company, Ba for the Respondent