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

CRIMINAL APPEAL NO. AAU0030 OF 2004S
(High Court Civil Action No. HAC504 of 2004)

BETWEEN:

RATU INOKE TAKIVEIKATA

Appellant

AND:

THE STATE

Respondent

Coram: Ward, P
Sheppard, JA
Gallen, JA

Hearing: Tuesday, 13 July 2004, Suva

Counsel: Mr. K. Vuataki for the Appellant
Mr. G. H. Allan for the Respondent

Date of Judgment: Friday, 16 July 2004

JUDGMENT OF THE COURT

The appellant faces trial in the High Court on various serious charges and a trial date has been set for 27 July 2004. The appellant seeks an order staying the holding of his trial until such time as his counsel of choice is available which is said to be October 2004.

The proceedings can only be understood in the light of the factual background. In the circumstances of this case we sought an agreed statement of facts from counsel which has been supplied and is as follows:-

"13 May 2004	*First mention/PTC before Gates J.* *Accused represented by Mr Komaisavai.* *Court notes the difficulty in having Mr Vuataki (counsel on the record) acting due to a conflict raised by statements contained in a statement of one of the State witnesses. The accused indicates that this was appreciated by the defence and that Mr Stanton of Australia had been engaged.* *Court indicates that it was looking to set this case down for hearing on the 9th of August. Defence counsel, Mr Komaisavai, advises that Mr Stanton would not be available until 12 September. Court replies that September was too far off and that the Court itself had difficulties with September, so that any request for adjournment to September would effectively entail adjournment until October.* *Court requests the accused to obtain instructions as to whether Mr Stanton would be available for a trial commencing 9 August. Court also advises counsel that there may be a possibility of the trial commencing earlier on 27 July as there was a possibility that the trial scheduled to commence on 27 July (State v Bainivalu) will resolve by way of plea.*
24 May 2004	*Second mention/PTC* *Accused is unrepresented.* *Court advises accused that the Court was looking at 27 July as the Bainivalu case was likely to resolve by plea.* *Accused advises the Court that Mr Stanton would not be available until September. Court advises that the accused will have to start looking for new counsel if Mr Stanton is unavailable earlier. Accused is exhorted to find counsel who can meaningfully participate in pre-trial conference so as to assist narrowing the issues for trial.*
1 June 2004	*Third mention/PTC* *Accused represented by Mr Vuataki.* *Mr Vuataki repeats that Mr Stanton will not be available until September.* *Mr Vuataki advises that the defence will waive any delay as a result of an adjournment of trial.*

Mr Allan (for the State) advises that he had reviewed the Bainivalu file and that there was no sanction from any of the DPP directorate to accept a plea to a lesser charge. Mr Allan also advises that he had not had the opportunity to discuss that case with prosecuting counsel as that counsel was overseas.
Court adjourns to have defence counsel again enquire as to whether Mr Stanton could appear earlier.

4 June 2004 — *Fourth mention/PTC.*
Mr Komaisavai appears for accused.
Mr Komaisavai advises the Court that he wants his counsel of choice pursuant to section 28 of the Constitution and asked for the trial date in October on the basis that Mr Stanton was no longer available in September. Counsel referred the Court to the Bidesi case. Mr Komaisavai also foreshadowed an application to the Court premised upon delay, which application would be filed the following week.
State advises it is prepared to proceed at any time.
Court sets the trial date as 27 July 2004 so as to follow on from the Seniloli trial to be heard by Shameem J.
Further PTC date set for 9 June and accused exhorted to make earnest enquiries to obtain counsel for that date.

9 June 2004 — *Fifth mention/PTC.*
Mr Vuataki appears for accused.
Mr Vuataki advises that Mr Stanton can attend a trial in September and that local counsel will be engaged to argue a pre-trial application premised upon delay.
Court replies that it has fixed the trial date already and that the accused can have counsel of his choice if counsel can make himself available on the date of trial. The Court cannot wait until September, especially if there are complaints as to delay.

18 June 2004 — *10:30am: sixth mention/PTC-*
Mr Nawaikula appears for accused.

Mr Nawaikula applies for an adjournment of trial to October when Mr Stanton will be available on the basis that the accused is entitled to counsel of choice. Mr Nawaikula also advised that the defence would be filing an appeal against the Court's ruling refusing counsel of choice.
Court advises that it hadn't delivered any ruling on the issue but that perhaps it ought to.
2:15pm: Ruling delivered."

It is the contention of Mr Allan for the State that this court has no jurisdiction to entertain the application before it. Mr Allan submits that the decision of the Judge in the High Court in fixing the date for the trial at 27th July is an interlocutory decision not subject to appeal.

The Court of Appeal is a creature of statute and its jurisdiction is to be found in the Court of Appeal Act and in the Constitution.

Section 3(3) of the Court of Appeal Act, as amended, provides as follows:-

"(3.) Appeals lie to the court as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court."

Section 21 which specifically relates to criminal appeals has no application to this case because there has not been a conviction.

The meaning of the term "final judgment" as used in section 3 has been a matter of dispute. The whole subject was considered in this court in the case of ***Josefa Nata v The State,*** Criminal appeal No. AAU0015/2002S. In that case a submission made in the High Court that the crime of treason was not a crime under the law of Fiji had been rejected by the trial judge. That determination was made as a preliminary question and at the time the appeal was brought before the Court of Appeal the appellant had not been arraigned nor had assessors been empanelled. The State contended that the judgment of the Judge in the High Court was not a final judgment. The Court noted that two schools of thought had developed as to

what constituted a final judgment. These were categorised as "the order approach" and "the application approach" . The "order approach" required the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end it was a final order, if it did not it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter would be finally determined which ever way the Court decided the application.

The Court concluded that it was preferable at least in the criminal jurisdiction for the court to maintain "the order approach" . In consequence the court concluded that there was no final judgment before it.

The question was considered by the Supreme Court in ***Native Land Trust Board v Narawa and Matanabua*** Appeal CBV0007/2002S Decision 13th May 2004. The Court considered that the term "final judgment" as used in section 122 of the Constitution required a wider interpretation than resulted from the application of either "the order" or "the application" categorization . Unfortunately the Court did not say what replaced those categories other than that they were too restrictive. For the purposes of the Supreme Court it was suggested the question was rather one of case management. There was no reference to the Nata case.

There are two further provisions which require consideration. Section 121 of the Constitution provides as follows:-

> ***"appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any matter arising under the Constitution or involving its interpretation."***

The basis for the application both in the High Court and this Court was a contention that the effect of the judge's decision to fix the date for trial, which he did, was to deprive the appellant of his constitutional right to counsel of his choice.

It is clear from the wording that the expression "final judgment" in the Constitution ought to be interpreted in the same way as the expression when used in section 3 of the Court of Appeal Act.

The decision in Nata (supra) would exclude jurisdiction to hear the appeal. The decision of the Supreme Court (supra) may confer a wider jurisdiction but in our view it would not be sufficient to constitute a decision fixing the date of trial as a final judgment.

That is not however the end of the matter. In his submissions counsel for the appellant described the application as being a constitutional appeal. The appellant maintains that the effect of the Judge's order in the High Court deprives him of the constitutional right contained in section 28(1)(d) of the Constitution, to be represented by a legal practitioner of his choice.

Section 41(1) of the Constitution as far as relevant, provides as follows:

"(1) If a person considers that any of the provisions of this chapter has been or is likely to be contravened in relation to him or her ... then that person... may apply to the High Court for redress.

(2) The right to make application to the High Court under subsection 1 is without prejudice to any other action with respect to the matter that the person concerned may have.

.....

(6) When the High Court gives its decision on the question referred to under this section the Court in which the question arose must dispose of the case in accordance with:

(a) the decision; or

(b) if the decision is the subject of appeal to the Court of Appeal or to the Supreme Court – the decision of the Court of Appeal or Supreme Court, as the case may be."

There can be no question but that the original jurisdiction is with the High Court so that an application must first be made to the High Court, the consequential decision giving rise to a right of appeal to this Court.

It is the contention of the appellant that in the circumstances of this case the appeal to this Court is to be regarded as an appeal from an application to the High Court and may be considered accordingly.

While this argument is not without attraction in providing a convenient way of disposing of this case we regret that we are unable to accept it.

In fact there was no formal application to the High Court as required by the Constitution and there are practical consequences to that.

Section 41(10) of the Constitution provides that the Chief Justice may make rules for the purposes of section 41 with respect to the practice and procedure of the High Court including rules with respect to the time within which applications are to be made to the High Court. Such rules have been made and promulgated and these provide the procedure to be followed. Those rules require the applications to be made to the High Court by motion supported by affidavit and service must be effected on the Attorney General. We cannot accept that the motion and affidavit filed in this Court meet those obligations, or overlook the obligation to give notice to the Attorney General prior to the hearing in the High Court.

We are therefore driven to the conclusion that unless we completely ignore the rules made under the provisions of the section there has in fact been no application to the High Court as contemplated and there is therefore no decision giving a right to appeal to this court.

That would be enough to dispose of these proceedings but in the circumstances of this case we think it appropriate to make further comment which does not of course bind any other court which may become seized of this matter.

We accept that the scheduling of trials, and in particular trials which may engage the court for some time, is one giving rise to difficulty particularly where there are a limited number of judges available to hear matters of this kind and when the number of cases awaiting hearing gives rise to further problems.

We accept also that there is ample authority to the effect that the right to counsel of choice is a right which is not unrestricted but must be exercised reasonably having regard to the circumstances and bearing in mind the comments contained in the Canadian case of ***Hunter et al v Southam*** 21-11 D.L.R.(4th) 641 which emphasizes the unremitting protection of individual rights enshrined in the Constitution.

We express the view that no court would be prepared to entertain an application of this kind in circumstances which suggested that an applicant was behaving unreasonably, including attempting to postpone a hearing, to avoid trial, or to act in some manner which was likely to be disruptive to the administration of justice generally. In other words the interests of justice also fall to be considered.

In this case we note from the agreed statement of facts that as early as the 13 May 2004 the Court was advised that the appellant's counsel of choice resides in Australia and had been engaged, but would not be available because of other commitments, until the 12 September. We note that the Court requested the appellant to obtain instructions as to whether counsel concerned would be available for a trial commencing on the 9 August and also that the appellant had been advised through counsel that there was a possibility of the trial commencing on the 27 July if the case scheduled for that date did not go ahead.

It is apparent that on various occasions subsequent to that the question of trial date was raised but the appellant never resiled from a position that counsel of his choice would not be available before September and when it became apparent that September was unlikely to be convenient to the Court, would be available in October. That position was maintained before us.

While we accept the difficulties occasioned to the Court in scheduling trials of this kind nevertheless it was clear from a comparatively early stage that if the appellant was to have counsel of his choice the trial could not proceed before September and now probably not until October.

The charge is a serious one and the appellant asserts that there are reasons why counsel based in Fiji would not be appropriate to represent him. We express no comment on this.

Certainly it appears to us it is unlikely that local counsel if instructed now would be in a position to prepare adequately for a trial of this kind in the days which remain before the fixture which is scheduled. It follows that if we had been able to hold that we had jurisdiction in this matter, we would have been likely to have looked favorably on the appellant's application. In the circumstances of this case, we consider it appropriate to indicate this.

As was pointed out to counsel during the hearing, the course the State is taking has risks. If the appellant is convicted and appeals on the ground that he was deprived of the opportunity of having counsel of his choice contrary to s.28(1)(d) of the Constitution it may well be from that the trial will have miscarried, thus involving the Crown in greatly increased expense and loss of both judicial and prosecutorial time and resources. Furthermore, the time between the delivery of this judgment and the date fixed for the trial is so short (6 working days) that there is a question whether, irrespective of s.41 of the Constitution, the appellant can now expect a fair trial, simply because of the time that will be needed to select and brief

a suitable counsel, who is available, and then for him or her to be adequately instructed.

In view of the conclusion at which we have arrived, that this Court does not have jurisdiction to entertain the proceedings before us the appeal will be dismissed.

There is no order for costs.

Ward, P

Sheppard, JA

FIJI COURT OF APPEAL

Gallen, JA

Solicitors:

Messrs. Vuataki Qoro, Lautoka for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent