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

CRIMINAL APPEAL N0. AAU0070/2005S
[High Court Criminal Action N0.HAA125/2005L]

BETWEEN:

VIJAY KUMARAN

APPELLANT

A N D:

T H E S T A T E

RESPONDENT

Coram: **Ward, President**
Barker, JA
Henry, JA

Hearing: **Tuesday, 4 July, 2006, Suva**

Counsel: **I. Khan for appellant**
K. Tunidau for respondent

Date of Judgment: **Friday, 14 July, 2006, Suva**

JUDGMENT OF THE COURT

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[1] The appellant was charged with sixteen counts of embezzlement contrary to section 274(a) (ii) of the Penal Code. The offences were committed between July 2001 and December 2001 and involved a total of more than $28,000.00. He first appeared before the Magistrates' Court on 25 June 2003. At the next hearing the prosecution applied, under section 220 of the Criminal Procedure Code, to have

the case heard in the High Court. The application was opposed at the time by counsel for the appellant but he withdrew the objection when the mandatory terms of the section were pointed out to him.

[2] There followed six further adjournments until, on 19 January 2004, the prosecution sought to withdraw its previous election and proceed to summary trial. The defence did not object and the case was fixed for trial on 28 and 29 April 2004. However, on that date the case was adjourned for mention only. The record gives no explanation for that change but, on 24 May 2004, a fresh trial date was fixed for 31 August and 1 September 2004.

[3] On 31 August 2004, the trial could not proceed because counsel for the appellant, Mr Khan, had food poisoning and, after another adjournment, a new trial date was set for 22 and 23 November 2004. However, on that date Mr Khan had injured his foot sufficiently, it appears, to be unable to attend the trial. Again following a further adjournment, it was set for trial on 30 and 31 March 2005 but it could not proceed on that date because Mr Khan had taken his wife to New Zealand for counselling following a breaking into their home.

[4] It was adjourned for mention to 20 April 2005 when counsel for the prosecution sought to add charges of fraudulent falsification of accounts in relation to each of the charges of embezzlement. Why that decision had not been made earlier or why it was considered necessary as the charges related to the same facts is not revealed in the record. However, the case was adjourned to 20 April 2004 to allow the charges to be prepared.

[5] On 20 April 2005 the record reads:

> "Prosecution: Ask to add charges today
> Khan: Ask mention date so she can file them.
> Prosecution: Based on same facts, no new disclosures. Just added further counts. Seek leave to withdraw current charges and replace with new ones.

Court: Time given to amend charges. Filed in court and copies given to parties.

Prosecution: Withdraws old charges. Substitutes new charges.

Court: Leave granted.

Khan: Ask defer putting charges to him. So he can take instructions.

Court: 1. Adjourned to 9/5/05 for charges to be put to accused and plea taken.

2. Bail continued."

[6] On 9 May the appellant was represented by Mr Shah appearing on behalf of Mr Khan. The thirty two charges, on a document headed "Amended Charges", were put to the accused and he pleaded not guilty to them all. The original sixteen charges were repeated but preceded in each case by the relevant charge of falsification of accounts.

[7] After the plea had been taken to the first four, the following exchange is recorded:

"Shah: Has he made his election?

Court: New charges are not electable. Has already made election in respect of existing charges."

The remaining charges were then put to the appellant. A new trial date was fixed for 12 and 23 September 3005 and the court wisely, in view of earlier events, advised that Mr Khan should arrange "back-up" counsel in case he was unavailable.

[8] However, on 22 August 2005 the record shows an additional hearing as the result of a letter to the court from Mr Khan:

"Nand (prosecution): No notice served on us to appear. We just got a letter. Inappropriate way to go about application. Should be motion and affidavit. This is Ms Chandra's matter. She

is in Nadi in rape trial. A hearing date has been fixed for the matter on 13/9.

Khan: Intend to withdraw consent. Intention was to vacate early. Will be withdrawing of consent from Magistrates Court to High Court. Did not wish to inconvenience magistrates' court.

Prosecution: Amendments were not electable. Old charges only are electable.

Khan: I have no authorities with me. Ask adjournment to provide them.

Court: Far too late at this stage to withdraw election. Last three hearing dates have been vacated to suit Mr I Khan. Matter should have been heard long ago.

English decisions are all against withdrawal of election at this late stage.

Hearing dates of 12 and 13 September confirmed."

[9] The learned magistrate gave written reason for her decision a few days later. Her refusal was appealed to the High Court on the grounds that she erred in refusing a change of election and that the appellant had a right to withdraw his election to the "amended charges".

[10] The learned High Court judge dismissed the appeal. He explained:

"The factual background to this matter is simply that the appellant when originally confronted with electable charges of embezzlement, vigorously exercised his right through counsel to oppose the matter being transferred to the High Court for hearing and wanted them to remain in

the Magistrates' Court. At no stage until some weeks before the matter was set for hearing did his counsel request the case be tried in the High Court.

The only amendment, if it can be called that, has been to expand the information by the addition of 16 additional falsification of accounts charges.

I acknowledge the appropriate concession by learned counsel for the appellant that the structure of the charges has not been materially altered. They have simply been renumbered and included in an expanded document entitled an amended information.

... A delay of 25 months between charging and disposition is not [acceptable]. The imperative in these proceedings is to have them finalised and accordingly a late and unmeritorious technical application to change election because of perceived amendments to charges lacked any weight whatsoever. The magistrate was correct ..."

[11] The appeal to this court is on three grounds:

1. That the learned Appellate Judge erred in law in dismissing the appeal and depriving the appellant of his constitutional right and his right of election under the Electable Offences Decree 1988.
2. That the learned Appellate Judge erred in law in not considering that the appellant was served with amended charges on sixteen (16) extra counts and therefore the appellant has the right of election.
3. That the learned Appellant (sic) Judge erred in law in finding that the learned trial Magistrate has acted properly when she refused the appellant to withdraw his consent to trial in the Magistrate's Court and to elect a High Court trial.

[12] Clearly the third ground states the basis of the appeal. We do not know which constitutional right is referred to in the first ground or what is meant by the

"amended charges of sixteen extra counts" in the second because, in breach of the normal practice, no written submissions have been filed in this Court by the appellant.

[13] However, on 20 June 2006, counsel for the respondent filed submissions in which he conceded the appeal on two grounds, first, that the appellant was not accorded his right to elect High Court trial on the initial sixteen charges and, second, that the initial charges were not amended but withdrawn and the appellant should therefore have been acquitted or discharged before the fresh charges could be preferred.

[14] Despite counsel's concession, we do not accept the first would be sufficient to allow the appeal. The appellant was represented by counsel throughout the "lamentably slow progress of the case through the Magistrates' Court", as the learned judge aptly described it. The right to elect did not arise in respect of the appellant because the prosecution exercised its right to have the case tried in the High Court under section 220 of the Criminal Procedure Code. Where such an application is made by the prosecution before the calling of any evidence, the court is obliged to transfer the case to the High Court. As counsel conceded, that election by the prosecution overrode any wish the appellant had for summary trial. However we note, as did the learned High Court judge, that the defence's initial attempt to oppose the prosecution's application demonstrated that summary trial would, otherwise, have been the appellant's choice.

[15] Six months later, when the prosecution asked to revert to summary trial, counsel for the appellant told the court he had no objection. Furthermore, there was no objection by counsel for the appellant to the arrangements for summary trial as the court proceedings drifted through the next fourteen months, eleven adjournments and three abortive fixtures. The learned magistrate had every reason to believe that the appellant had consented to summary trial and we are satisfied that she was correct to treat that as such.

[16] The second ground which Mr Tunidau conceded is stronger and we have already indicated that we shall allow the appeal on that ground and remit the case to the Magistrates' Court.

[17] Although the list of thirty two charges was headed "Amended Charges" and they were treated as such by both the learned magistrate and the appellate judge, they were not amended charges. As was conceded by counsel for the appellant before the High Court, the original sixteen were effectively identical to the charges of embezzlement in the later list of thirty two. However, they could not be the same charges because the prosecution had sought and received the consent of the Court to withdraw the original sixteen charges and had then done so.

[18] That was in accordance with section 201 of the Criminal Procedure Code:

> "201 – (1) The prosecutor may with the consent of the court at any time before a final order is passed in any case under this Part withdraw the complaint.
>
> (2) On any withdrawal as aforesaid –
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> *(a)* where the withdrawal is made after the accused person is called upon to make his defence, the court shall acquit the accused;
>
> *(b)* where the withdrawal is made before the accused person is called upon to make his defence, the court shall subject to the provisions of section 210, in its discretion make one or other of the following orders:-
>
> (i) an order acquitting the accused;
>
> (ii) an order discharging the accused.
>
> (3) An order discharging the accused under paragraph *(b)* (ii) of subsection (2) shall not operate as a bar to subsequent proceedings against the accused person on account of the same facts."

[19] It is clear that, once the original charges were withdrawn, the learned magistrate was required to make an order under either (i) or (ii) of subsection (2) *(b)*. Mr Tunidau suggests it may be inferred that an order was made under subparagraph (ii) from the manner in which the magistrate permitted the prosecution to file the new charges. We do not consider that is a correct approach.

[20] The provisions of subsection (2) require the magistrate to make a decision about the future conduct of the case by making an order under either (i) or (ii). If the order is made under the former, the whole case will be concluded and any attempt to repeat the charges or to file fresh charges on account of the same facts would be defeated by a plea of autrefois acquit. Clearly it is not sufficient simply to allow subsequent proceedings to be instituted in default of a decision - an assumption which would be against the accused's interests.

[21] As a result the appeal must be allowed and the case remitted to the same magistrate to determine and make the appropriate order under subparagraph (i) or (ii) of section 201(2)*(b)*. The case shall then proceed in accordance with that decision. If the magistrate makes an order under subparagraph (ii), the appellant should be allowed to make a fresh election on the charges.

[22] Before leaving the case, one matter which was not raise before us has caused us some concern. The accused's right of election has been treated as one to elect trial in the High Court under the Electable Offences Decree but it appears that Decree may conflict with some provisions of the Criminal Procedure Code.

[23] Section 4 (1) of the Criminal Procedure Code provides:

> "4. – (1) Subject to the other provisions of this Code, any offence under the Penal Code may be tried by the High Court, or by any magistrate by whom such offence is shown in the fifth column of the First Schedule to be triable;

Provided that where so stated in the fifth column of the First Schedule the offence shall not be tried by a magistrate unless the consent of the accused to such trial has first been obtained."

[24] The fifth column of the First Schedule is headed, "Court by which or class of magistrate by whose court an offence is triable in addition to the High Court" *(our emphasis)*. The entry in that column against both embezzlement and fraudulent falsification of accounts provides; "With the consent of the accused, resident magistrate."

[25] Thus, it would appear that, under the Criminal Procedure Code, all Penal Code offences are triable by the High Court. That appears to be the right of the accused and an additional protection is given to the accused by the proviso to section 4(1) by providing that he cannot lose that right by being tried in the Magistrates' Court unless he consents.

[26] The Electable Offences Decree defines an electable offence as an offence that is prescribed in the Schedule. Embezzlement is in the Schedule, fraudulent falsification is not.

[27] Section 3 of the Decree provides:

"3. No person charged with an offence under the Penal Code shall be entitled to elect to be tried before the High Court unless the offence with which he has been charged is an electable offence."

[28] Section 6 of the Decree provides:

"6. – To the extent that this Decree deals with the right of trial in the High Court of offences prescribed in the Schedule, the Criminal Procedure Code is amended and shall be read subject to this Decree."

[29] The terms of the Criminal Procedure Code suggest that the "right" granted by section 3 of the Decree is to elect trial in a court where the right to trial already

exists. If the intention is to limit the right to High Court trial to the offences in the Schedule, its effect may also be to remove an existing right to High Court trial in many other offences. To do so by what may be little more than an implication arising from another provision purporting to create a right which, in fact, already exists seems unfortunate.

[30] However, the point does not need to be resolved for the determination of this appeal and it has not been argued before us

Order:

Appeal allowed. Case remitted to the magistrate to determine the appropriate order under section 201 of the Criminal Procedure Code and to deal with the case accordingly.

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WARD, PRESIDENT

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BARKER, JA

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HENRY, JA

Solicitors:

Iqbal Khan & Associates for Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent