

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

CRIMINAL APPEAL NO.AAU0012 OF 2006
[High Court Criminal Appeal N0.HAC054 of 2005]

BETWEEN:

JOELI TAWATATAU

Appellant

AND:



THE STATE

Respondent

Applicant in person
D. Goundar for respondent

Hearing: 13 March 2006

Ruling: 21 March 2006

RULING

This is an application for leave to appeal from a decision in the High Court remitting a case to the Magistrates' Court for hearing and for a stay of the order pending appeal.

The applicant and another man were charged with robbery with violence on 6 October 2005, contrary to section 293(1) (b) of the Penal Code. The applicant also faced an additional charge of resisting arrest on the same date.

Both accused appeared before the Magistrate on 11 October 2005 and asked time to seek legal advice. The case was adjourned to 2 November and then further to 16 November 2005.

On that day, the other accused did not appear and an arrest warrant was issued. The present applicant elected High Court trial on the first count and entered a plea of not guilty to the second. His case was transferred to the High Court under section 223 of the Criminal Procedure Code with an order that he appear on 30 December 2005. I note that, by section 227, that date should have been no more than 28 days after the transfer order.

The other accused appeared later on the 16 November 2005, elected Magistrates Court trial of the robbery count and entered a plea of not guilty.

On 30 December 2005 in the High Court, the learned judge's note records the proceedings:

[Pros] - Case for first call. 2 Accused. One has his case heard by the Magistrates' Court, other accused elected trial by High Court. section 334."

Court - You are charged with robbery with violence. It is a very serious offence. Have you got a counsel.

Accused - I have applied for legal aid 2 weeks ago. I have not heard from legal aid."

It was then adjourned to 13 January 2006 when the judge's note reads:

[Pros] - This is a robbery with violence. Will remit this to Magistrates' Court.

Court - Can remit under Electable Offences Decree.

Adjourned to 20 January 2006 for feedback on remittal by the DPP."

On the next date, the record states:

[Pros] - Ask for remittal to Magistrates' Court, section 247 of CPC.

Court - Remitted to Magistrates Court for mention only on the 27 January 2006 at 9am to set a hearing date.

Accused - I wanted High Court trial because the magistrates are too speedy in setting trial date.

Court – Well you should be getting ready for trial now.

Accused – I wish to appeal that to the Court of Appeal. I won't get a fair trial in the Magistrates' Court. That is my experience since 1990.

Court – Cannot accept that. Remitted to the lower court.”

The papers before me do not include the Magistrates' Court file for the hearing on 27 January 2006 but counsel for the State advises that the magistrate again transferred the papers to the High Court for trial. That would appear to be correct because there is a memorandum, dated 27 February 2006, on the file from the acting Officer in Charge, High Court Criminal, Suva to the Senior Court Officer, Magistrate's Court, Suva:

“The above mentioned file and Transfer Order refers.

I have been directed to advise that [the High Court judge's] order for the Remittal of Proceedings on 20 January 2006 still stands and should be complied with.

Find returned is your original file ... for necessary action.

By a copy of this memorandum the officer of the Director of Public Prosecutions is also informed accordingly please.”

In the meantime, the applicant had lodged his application for leave to this Court dated 13 February 2006.

By section 21 of the Court of Appeal Act, the right of appeal from the High Court is limited to a person convicted on a trial before that court. The requirement that he has been convicted is not repeated in section 22 but that section governs appeals from the High Court in its appellate jurisdiction. The difficulty for this applicant is that he has not been convicted so section 21 does not apply and he is not appealing from a decision of the High Court in its appellate jurisdiction under section 22.

It would appear this Court must refuse his application for leave to appeal.

The applicant, understandably, asks what is his remedy. He is caught in what appears to be a difference of opinion between the magistrate and the judge and risks being left in perpetual limbo.

It is difficult to understand why this situation arose.

Section 3 of the Electable Offences Decree, 1988, limits the right to elect trial before the High Court to persons charged with an electable offence. Those offences are set out in the Schedule and include robbery with violence, contrary to section 293(1) of the Penal Code; the charge in this case. Section 6 provides that, to the extent that the Decree deals with the right of trial in the High Court, the Criminal Procedure Code is amended and is to be read subject to the Decree.

By section 225(1) of the Criminal Procedure Code a magistrate may accept a guilty plea to an electable offence and record a conviction. However, subsection (2) provides:

“(2) Notwithstanding subsection (1), a person ... who has elected trial by the High Court in respect of an electable offence may reserve his plea until arraignment by the High Court.”

Section 226 then provides :

“If an accused person has pleaded guilty and been convicted or pleaded not guilty to an electable offence in respect of which the accused has elected trial in the High Court ... the magistrate shall, forthwith, order the transfer of the charges or proceedings to the High Court for sentencing or for trial.” *(my emphasis)*

I assume the magistrate acted under that section both when first transferring the case and also after it was remitted from the High Court.

Section 228(3) provides:

“(3) Upon first appearance before the High Court of an accused person who has pleaded not guilty under section 226 or has reserved his plea under section 225, the High Court shall proceed to arraignment.” *(my emphasis)*

The reference by counsel for the State to section 334 at the first hearing in the High Court is puzzling. If it is a reference to the Criminal Procedure Code, that section includes a power of the High Court to remit a case for trial but only when a case has been stated by the Magistrates' Court.

It would appear that the judge's note at the next hearing, "Can remit under Electable Offences Decree" should have been followed by a question mark in view of the next sentence. However, whilst section 347, to which counsel referred subsequently, previously allowed the DPP to send a case back to the magistrates court after committal, it was repealed by the Amendment Act of 2003.

As I have already said, I can only refuse the application for leave to appeal. My comments on the law are no more than my opinion. Whether they will assist the applicant must depend on the courts involved. If they do not, I suggest the Legal Aid Commission take his case in order to advise him of his possible remedies.

I would further suggest that the trial be stayed until this problem is resolved.



Gordon Ward

[GORDON WARD]
President
FIJI COURT OF APPEAL

21ST MARCH, 2006