

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 58 OF 2013
(High Court HAM 195 OF 2012)

BETWEEN : **SHAINAAZ MOHAMMED** **Appellant**

AND : **THE STATE** **Respondent**

Coram : **Calanchini P**

Counsel : **Mr R. P. Singh for the Appellant.**
Mr M. Korovou for the Respondent

Date of Hearing : **24 March 2014**

Date of Decision : **17 April 2014**

DECISION

[1] This is an application brought by motion filed on 10 February 2014 on behalf of the Appellant seeking the following orders:

"1. *That the first available hearing date be assigned for hearing of the appeal.*

2. *That the proceedings in Magistrates Court being Criminal Case No. 380 of 2009 be stayed pending hearing of Criminal Appeal No.AAU 58 of 2013.*”

- [2] The application was supported by an affidavit sworn on 7 February 2014 by Shainaaz Mohammed. The motion stated that the application was made pursuant to section 15 of the Constitution.
- [3] The matter was first called before me on 17 February 2014. On that occasion I indicated to Counsel that there were two issues raised by the material that needed to be addressed. The first was the application of section 15 of the Constitution to the present case. The second was the nature of the appeal filed by the Appellant on 29 May 2013 and in particular whether the decision of the High Court Judge delivered on 5 May 2013 was a decision that came within section 21 of the Court of Appeal Act Cap 12. Counsel for the Appellant sought further time to consider these matters and obtain further instructions from his principal in Labasa.
- [4] On 24 February 2014 Counsel for the Appellant informed the Court that the Appellant was proceeding with the application on the basis of the documents already filed. Directions were given for the parties to file written submissions which were filed by 21 March 2014. On 24 March 2014 Counsel for the parties indicated that they did not intend to make further oral submissions and would rely on their written submissions.
- [5] The first question that must always be addressed by a single judge of the Court of Appeal is the question of jurisdiction. In other words, does the application come within the provisions of section 35(1) of the Court of Appeal Act. Section 35(1) provides that a judge of the Court of Appeal has jurisdiction to exercise the powers of the Court of Appeal in six matters. None of those matters listed in section 35(1) includes the power to stay proceedings commenced in another court pending an appeal to the Court of Appeal. I have no hesitation in adopting the conclusion reached by Tikaram P in **Seru and Stephens –v- The State** (unreported AAU 41 and 42 of 1999; delivered 3 August 1999) at page 7:

“ ___ I hold that a single judge of the Court of Appeal has no power to make a stay order stopping a criminal trial pending appeal whether the appeal (or proposed appeal) is from a final judgment or an interlocutory decision.”

- [6] I therefore conclude that there is no jurisdiction given to a single judge under section 35(1) of the Court of Appeal Act to order a stay of the criminal proceedings commenced in the Magistrates Court (Criminal case No.380 of 2009) pending the hearing of the appeal filed in this Court being an appeal against the decision of the High Court refusing a permanent stay of the same Magistrates Court proceedings. The second order sought by the Appellant is refused.
- [7] The first order sought by the Appellant could be considered and determined on the basis that the material before the Court does not establish sufficient prejudice to justify an order being made for priority listing of the appeal or more accurately the application for leave to appeal. The prejudice alleged by the Appellant in his affidavit and perfected in the written submissions relates to issues that should more properly be raised at an appropriate time during the proceedings in the Magistrates Court. The issue in this case is not one of prejudice resulting from unreasonable delay.
- [8] However if the matter was concluded at this point, the appeal would wait its turn in the list of applications for leave to appeal to come before a single judge of the Court of Appeal under section 35(1) of the Act. Having read the decision of the learned High Court judge which is the subject of this appeal, I have formed the view that there has been a concerted effort by the Appellant to delay the trial in the Magistrates Court. By leaving the Appellant's application for leave to appeal in the list, the Court would inadvertently be assisting the Appellant's efforts. It would appear that the Magistrate has in effect stayed the proceedings pending the outcome of the Appellant's appeal to this Court.
- [9] Therefore, in the interest of justice, I propose to further consider the Appellant's application for priority listing of his appeal on the basis of jurisdiction. In issue is whether there is a valid appeal on foot for which this Court could consider granting an order for priority listing?

[10] As noted earlier in this decision, Counsel for the Appellant was invited to address the Court on this issue in either written submissions filed before the hearing date or in oral submissions on the day of the hearing. There is no reference to this issue in the Appellant's written submissions filed before the hearing and Counsel for the Appellant did not present oral submissions at the hearing. Counsel for the Respondent has addressed the issue in the written submissions filed on behalf of the State.

[11] The issue of this Court's jurisdiction must be considered first in the context of the Constitution which came into effect on 7 September 2013. Under section 99(3) the Court has jurisdiction to hear and determine appeals from all judgments of the High Court subject to any requirements prescribed by written law. The effect of this provision is that a written law may qualify, by specifying requirements that must be satisfied, the general jurisdiction given to the Court. The written law that qualifies the jurisdiction of the Court to hear criminal appeals can be found in section 3(3) and section 21(1) of the Court of Appeal Act (the Act). Section 3(3) of the Act states:

"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."

[12] Under this section appeals lie as of right from final judgments of the High Court exercising its original as distinct from its appellate jurisdiction. Therefore leave is not required in respect of an appeal from a final judgment of the High Court exercising its original jurisdiction. The general right of appeal given under the Constitution has been qualified to the extent that under section 3 (3) appeals lie as of right from final judgments of the High Court in its original jurisdiction.

[13] Turning to section 21 of the Act, it should be noted that this section appears in Part IV of the Act with the heading "*Appeals in criminal cases.*" Section 21(1) sets out the circumstances under which a person may appeal to the Court of Appeal. The starting point for exercising the right of appeal under section 21(1) is that the appellant must be a person convicted on a trial held before the High Court. So, the final judgment in a criminal appeal must be a judgment that has resulted in the conviction of the Appellant after a trial in the High Court. Leave is not required if the Appellant

alleges an error of law only. Leave is required if the Appellant alleges an error of fact or of mixed fact and law. The Act must be read as a whole. In my judgment the general jurisdiction given to the Court under section 99(3) of the Constitution is qualified first by section 3(3) of the Act and then, further qualified, in respect of criminal appeals, by section 21 of the Act.

- [14] Therefore the question to which the Court must now turn its mind relates to the nature of the decision of the learned High Court Judge. The learned Judge refused to grant a permanent stay of proceedings in the Magistrates Court. The application had been made by motion seeking an order that:

“That the amended charge as filed by the Director of Public Prosecutions on 27 January 2012 in Suva Magistrates Court Criminal Case No.380 of 2009 be quashed, or that there be a permanent stay on all proceedings in this matter; and/or alternatively that the 5th court being conspiracy offence filed with the purported substantive offence be permanent stays.”

- [15] The application was made pursuant to section 215 of the Criminal Procedure Decree 2009 (the Decree) and the High Court’s inherent jurisdiction. Section 215(1) states:

“If any information does not state, and cannot by any amendment authorized by section 214 be made to state, any offence of which the accused has had notice, it shall be quashed either on a motion made before the accused pleads, or on a motion made in arrest of judgment.”

- [16] It is perhaps appropriate to note that section 215 appears in Part XIV of the Decree with the heading *“Procedure in trials before the High Court.”* Furthermore section 215 refers to *“any information.”* Information is defined in Section 2 of the Decree as meaning:

“a written charge preferred by the State against an accused person for the purpose of the trial of the person in the High Court.”

It would appear that section 215 did not apply to the circumstances in this case where the amended charges had been brought by way of complaint in the course of proceedings in the Magistrates Court. As a result Appellant’s application for a permanent stay was governed by the principles applied by the High Court in the exercise of its undoubted inherent jurisdiction.

- [17] In refusing the application for a permanent stay the learned Judge, in exercising the discretion whether to grant the relief claimed, concluded that the stay application was unnecessary and inappropriate. The learned Judge declined to invoke the inherent jurisdiction of the Court on the basis that the same issues had already been considered in the Magistrates Court and that the Appellant had failed to exercise the right of appeal to the High Court.
- [18] In Ali, Dutt and Devi –v- The State (unreported AAU 75 of 2007 delivered 14 April 2008) this Court (per Byrne Pathik and Mataitoga JJ.A) concluded that the refusal of a High Court Judge to grant a permanent stay of proceedings was simply an intermediate step in the trial proper. It did not finally determine the rights of the Appellant.
- [19] In this case the application for a permanent stay was filed on 18 October 2012 in the High Court. At that stage the proceedings against the Appellant in the Magistrates Court had been on-going since March 2009. It was only some months after the Respondent had filed on 27 January 2012 amended charges that the Appellant applied for the permanent stay. The application was clearly an intermediate step in the proceedings in the Magistrates Court. The application in the High Court was interlocutory in nature and the Ruling was interlocutory. It was as a result not a decision against which the Appellant has a right of appeal under section 21(1) of the Act.
- [20] Although the Appellant claimed that his application to this Court was made pursuant to section 15 of the Constitution, the Appellant did not make any reference to section 15 in his written submissions.
- [21] It is apparent that most of the obligations and rights that are set out in section 15, which is headed "*Access to courts or tribunals*", are no more than a codification of common law rights and obligations that have been developed by the courts over many years.
- [22] The submissions filed by the Appellant cover a number of issues. There is a complaint that the High Court did not consider the application for a permanent stay on

the merits. There is a claim that the amended charges have no application to the Appellant. There are detailed submissions referring to facts and law that relate to the amended charges. There is no attempt to connect these matters with section 15 of the Constitution nor to the corresponding common law right to a fair trial.

[23] The submission also refers to section 14(2) (o) of the Constitution which provides that

“(2) Every person charged with an offence has the right:
(a) - (n) _____
(o) of appeal to, or review by, a higher court.”

[24] It is only necessary to make two observations about this provision. The first is that section 14 (2) (o) must be taken to mean upon conviction the charged person has the right of appeal to, or review by, a higher court. The second is that the provision does not by itself provide that there is always an automatic unconditional right of appeal. Other provisions in the Constitution, such as section 99(3) make it quite clear that the right to appeal to the Court of Appeal is subject to such requirements as may be prescribed by a written law.

[25] The submission states in effect that a single judge has the power pursuant to the Constitution to refer the matter to the Full Court in the interest of justice and “*enormous prejudice*” to the Appellant.

[26] As noted earlier in this decision a single judge can only exercise the jurisdiction given under section 35(1) of the Act. There is no power to refer to the Full Court any matter on the grounds claimed by the Appellant. Furthermore there has to be a power vested in the Court of Appeal itself before it can be exercised by a single judge under section 35(1).

[27] The Appellant by implication appears to suggest that the Court of Appeal’s jurisdiction is to be found in the Constitution. The only provision which may be of assistance to the Appellant is section 99(4) which provides that:

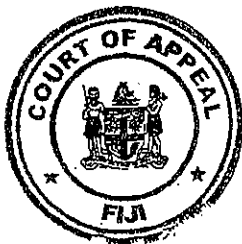
“(4) Appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any manner arising under this Constitution or involving its interpretation.”

[28] However, as previously noted, the decision of the learned Judge in the High Court was not a final judgment. Furthermore the decision was handed down in May 2013, some months prior to the Constitution coming into effect and finally, the decision related to an application made under section 215 of the Criminal Procedure Decree 2009 and the High Court's inherent jurisdiction. At all times the Appellant's claim has been that the amended charges should be permanently stayed because the legislation upon which the charges are based does not apply to the Appellant. In my judgment it is not a breach of any constitutional provision to insist that the claim made by the Appellant be determined at trial in the Court before whom the Appellant has been charged.

[29] For all of the above reasons I order that the Notice of Motion be dismissed and that the appeal be dismissed under section 35(2) of the Act on the basis that it is bound to fail because there is no right of appeal.

Orders:

- (1) *The Notice of Motion filed on 10 February 2014 is dismissed.*
- (2) *The Appeal filed on 29 May 2013 is dismissed under section 35(2) of the Act.*



W. Calanchini

**HON. MR JUSTICE W. D. CALANCHINI
PRESIDENT, COURT OF APPEAL**