

IN THE COURT OF APPEAL
AT SUVA

CRIMINAL APPEAL NO. AAU 85 OF 2012
(High Court HAA 4 of 2012)

BETWEEN : **THE STATE** *Appellant*

AND : **MOHAMMED ILIYAZ KHAN** *Respondent*

Coram : **Hon. Justice Suresh Chandra**

Counsel : **Mr. V. Perera for the Appellant**
Mr. K. Tunidau for the Respondent

Date of Hearing : **12 June 2015**

Date of Ruling : **2 March 2016**

RULING

- [1] This is an application for leave to appeal filed by the State pursuant to Section 22(1) of the Court of Appeal Act (Cap.12) against the Judgment of the High Court exercising its appellate jurisdiction regarding an appeal by the State against the acquittal of the Respondent in the Magistrate's Court.

- [2] The Respondent was charged in the Magistrate's Court for committing the offence of Larceny by servant contrary to Section 274(a)(i) of the Penal Code, (Cap.17).
- [3] The Respondent was acquitted after trial by the Magistrate's Court and the State appealed against the acquittal to the High Court.
- [4] The High Court by its judgment dated 3rd October 2012 dismissed the appeal.
- [5] Before the High Court the Respondent had taken up the objection that the State had not complied with the requirements of Section 249(1) of the Criminal Procedure Decree, 2009 to which the State had not replied.
- [6] The learned High Court Judge in his judgment dismissing the appeal of the State stated:
- "15. Considering the ground of appeal filed by the State this court is of the view that it has not complied with Section 249 of the Criminal Procedure Code."*
- "17. Anyhow considering the judgment pronounced by the learned Magistrate and the evidence at the trial find the Prosecution had not proved the elements of the offence hence I agree with the learned Magistrate."*
- [7] In the notice of appeal filed in the Court of Appeal, the following grounds have been set down:
- "(i) That the learned Judge erred in law when he incorrectly applied the provisions of Section 249(1) of the Criminal Procedure Decree, 2009 to the State's petition of appeal from the Magistrate's Court to the High Court; The State's petition of appeal having been in full compliance with Section 249(1) of the Criminal Procedure Decree, 2009."*

(ii) *That the learned Judge erred in law in failing to take into account and give proper effect to the provision at Section 249(4) of the Criminal Procedure Decree, 2009 following his finding that the appeal filed by the State did not comply with Section 249(1) of the Criminal Procedure Decree, 2009.*

(iii) *That the learned Judge erred in law in dismissing the appeal brought by the State without first having heard the State on the merits of the Appeal brought by it."*

[8] The Respondent has taken up the position in the written submissions that the Appellant's application is statute barred by the proviso to section 22(1) of the Court of Appeal (Cap.12).

[9] The Appellant has submitted that the grounds of appeal raise questions of law and therefore that leave is not required.

[10] To consider the application of the Appellant it is necessary to examine the provisions of Section 22 of the Court of Appeal Act and its proviso which states as follows:

"22(1) Any party to an appeal from a Magistrate's Court to the High Court may appeal, under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only.

Provided that no appeal shall lie against the confirmation by the High Court of a verdict of acquittal by a Magistrate's Court."

[11] In the present instance, the State appealed against the decision of the Magistrate's Court for acquitting the Respondent, to the High Court and the High Court has dismissed the appeal. The question therefore arises as to whether the said dismissal of the appeal by the High Court comes within the provisions of the proviso to Section 22(1) as being one where the High Court has confirmed the verdict of acquittal by the Magistrate's Court.

[12] The High Court, as shown above dismissed the appeal firstly on the ground that the State had not complied with the requirements of Section 249(1) of the Criminal Procedure Decree, 2009 and secondly on the ground that the decision of the Magistrate's Court was correct on a consideration of the evidence.

[13] Section 249(1) of the Criminal Procedure Decree provides:

"S.249(1) Every petition shall contain a concise statement of the grounds upon which it is alleged that the decision of the Magistrates Court has erred on the fact of the case or the applicable law."

[14] The State in their appeal from the Magistrate's Court decision to the High Court had set down only one ground of appeal which stated as follows:

"That the learned Trial Magistrate erred in law and in fact by failing to adequately consider the circumstantial evidence led at the trial of the matter during the course of his analysis of the evidence at trial."

[15] The learned High Court Judge decided that this ground did not comply with the requirements of Section 249 of the Criminal Procedure Code. This reasoning indicates that the decision of the learned High Court Judge as far as this ground is concerned is not on the merits of the case. In such an event it is arguable that the decision of the learned High Court Judge was not a confirmation of the decision of the Magistrate's Court as contemplated by the proviso to Section 22(1) of the Court of Appeal Act.

[16] However, the learned High Court Judge at paragraph 17 of the Judgment stated that on a consideration of the evidence that the Prosecution had not proved the elements of the offence and therefore he agreed with the decision of the learned Magistrate.

[17] This position of the learned High Court Judge would seem to come within the proviso to Section 22(1) of the Court of Appeal Act. But going through the record of the case before the learned High Court Judge, no opportunity had been given to the State to argue on the merits of the case as when Counsel for the State had stated to Court that he had nothing to say regarding the preliminary objection raised by the Respondent, the learned High Court Judge had set down the case for judgment and proceeded to pronounce his judgment on the next date. There is nothing on record to show that the parties made submissions as regards the merits of the case. It would appear therefore that the learned High Court Judge had affirmed the verdict of acquittal by the Magistrate's Court without hearing the merits of the appeal.

[18] In the above circumstances there is merit in grounds 1 and 3 raised by the State in their notice of appeal and leave is granted.

Orders of Court:

Leave to appeal is granted on grounds 1 and 3 in the notice of appeal.





Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL