

IN THE COURT OF APPEAL, FIJI
[On Appeal from the Magistrates' Court]

CRIMINAL APPEAL NO. AAU 131 of 2019
[In the Magistrates' Court of Nadi Case No. CF 1553 of 2017]

BETWEEN : **APAKUKI SOWANE** *Appellant*

AND : **STATE** *Respondent*

Coram : **Prematilaka, JA**

Counsel : **Appellant absent**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **25 September 2020**

Date of Ruling : **28 September 2020**

RULING

[1] The appellant together with four others had been arraigned in the Magistrates' Court of Nadi under extended jurisdiction on one count of aggravated burglary contrary to section 313(1) of the Crimes Act, 2009, one count of theft contrary to section 291 of the Crimes Act, 2009 and one count of serious assault contrary to section 277 of the Crimes Act, 2009.

[2] According to the 'Application for leave to appeal' dated 19 June 2019 filed by the appellant, he had been interviewed on 24 May 2017, charged on 25 May 2017 and brought before the Magistrates' court on 02 June 2017. As disclosed in the affidavit dated 25 September 2020 filed by the state, the case had been transferred to the High Court and given number HAC 123 of 2017 where the learned High Court judge had vested Nadi Magistrates' court with extended jurisdiction to deal with it. Thus, since

21 July 2017 the case had been dealt with by the Nadi Magistrate on extended jurisdiction.

- [3] The appellant had raised three grounds of appeal against the ‘decision’ of the learned Magistrate in the ‘Application for leave to appeal’. They are (i) failure of the Magistrate to allow the appellant to challenge the arresting officers’ statements and the search list before the trial proper (ii) failure of the Magistrate to conduct a *voir dire* inquiry into his challenge to the statements of the arresting officers and the search list and (iii) failure of the Magistrate to allow the appellant to cross-examine the arresting officers despite his expressed request. Obviously, all three grounds of appeal overlap with each other.
- [4] The respondent has submitted in the affidavit that on 10 December 2019 the *voir dire* inquiry had commenced but the prosecution had managed to lead the evidence of only one police officer and the inquiry had been adjourned to 12 December 2019 to set a date for the continuation of the inquiry. In the meantime, by 24 February 2020 the appellant had applied for the proceedings to be permanently stayed where the submissions of the prosecution regarding that application were pending. On 26 February 2020, the prosecution had filed its submissions on the stay of proceedings application and the hearing of it had been adjourned to 25 March 2020. On 23 and 24 September 2020 the hearing into the application to stay proceedings had proceeded while the substantive case had been adjourned to 28 September 2020 pending the ruling on the stay of proceedings application.
- [5] Therefore, the *voir dire* inquiry remains yet to be concluded and the case has not proceeded at all to trial proper against the appellant.
- [6] In the circumstances, the state submitted on 25 September 2020 that the appellant’s current appeal to this court is vexatious or frivolous and should be dismissed under section 35(2) of the Court of Appeal Act on the premise there is no right of appeal against an interlocutory or interim order of the Magistrates’ court to the Court of Appeal.

[7] It appears from a perusal of the appeal record in AAU 131 of 2019 that the appellant's 'Application for leave to appeal' had been addressed to the High Court and filed in the High Court but the HC registry had forwarded it to the CA registry. The CA registry had issued production orders to Natabuwa Correction Centre, Lautoka for the appellant's appearance in this court on 21 July 2010 and 25 September 2020 but the appellant was absent on both days.

[8] Since it is clear from the submissions made and the affidavit filed by the state that the substantive case against the appellant was still pending in the Magistrates' court at the *voir dire* inquiry stage, it would be a waste of judicial time and administrative resources to continue to mention this matter in this court if the appellant's appeal is bound to fail because there is no right of appeal or right to seek leave to appeal. Thus, an order as to the maintainability of the appellant's appeal should be made at this stage.

[9] I held in **Naulu v Fiji Independent Commission Against Corruption** [2020] FJCA 163; AAU161.2016 (14 September 2020):

[12] In my view, the power of dismissal of an appeal under section 35(2) could be exercised by a single judge only

(i) If the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal.

(ii) As long as a decision has not been made by the single judge under section 35(1), particularly on leave to appeal or extension of time.'

[10] A view was expressed in **Charan v State** [2020] FJCA 144; AAU179.2019 (24 August 2020) on the extended jurisdiction of the Magistrates' court as follows.

[7] On the other hand, when the Magistrate's Court exercises jurisdiction invested in it by the High Court by virtue of section 4(2) of the Criminal Procedure Act, 2009 ('extended jurisdiction') to try an offence, which, in the absence of such extension of jurisdiction, would be beyond the Magistrate's jurisdiction, the Magistrates' Court is deemed to exercise original jurisdiction of the High Court (subject, of course to the limitation of powers of sentencing) and therefore, the right of appeal is provided in section 21 of the Court of Appeal Act.

[11] Yet, there is another point of view as to whether there could be a direct appeal to the Court of Appeal from the Magistrates' court even in its extended jurisdiction as pointed out in **Tuisamoa v State** [2020] FJCA 155; AAU0076.2017 (28 August 2020)

*[23] There is also an argument to the effect, not without merit that in terms of section 99(3), (4) and (5) of the Constitution of the Republic of Fiji, the Court of Appeal has jurisdiction to hear and determine appeals only from the High Court as prescribed by the Constitution and other written law. Further, section 100 (5), (6) and (7) of the Constitution specifying appellate jurisdiction of the High Court, support the above contention. Therefore, the argument goes that there cannot be a direct appeal to the Court of Appeal against the judgment, sentence or order of a Magistrates Court whether given in its original jurisdiction or extended jurisdiction. In other words an appeal against a discharge made under section 169(2)(b)(ii) of the Criminal Procedure Act, 2009 should be filed in the High Court and not in the Court of Appeal. **Chand** lends some support to this argument though it did not consider the question arising from original and extended jurisdiction of the Magistrates Court vis-à-vis the correct appellate forum.*

[24] If this line of argument is adopted, all appeals from the Magistrates Court will have to be heard in the High Court as the court of first appeal in its appellate or supervisory jurisdiction and only a second tier appeal could be filed in the Court of Appeal in terms of section 22 of the Court of Appeal Act upon a decision of the High Court made in its appellate or supervisory jurisdiction.

[25] This thinking appeals to me as it could do away with the artificially created direct appeal to the Court of Appeal from any judgment, sentence or order given in the Magistrates Court. Such a direct right of appeal to the Court of Appeal is unsanctioned by any provision of the Constitution or any other written law. It also sits in harmony with purposive interpretation of section 21 and 22 of the Court of Appeal Act and section 246 of the Criminal Procedure Act, 2009. However, for this proposition to apply it has to be based on the premise that when the Magistrates Court exercises extended jurisdiction it does not exercise the original jurisdiction of the High Court but its own jurisdiction, for the High Court cannot entertain appeals from its own judgments, sentences or orders or exercise supervisory jurisdiction over such judgments, sentences or orders.'

[12] However, the distinction between original jurisdiction and extended jurisdiction of the Magistrates court is not relevant to the issue that has arisen in the current appeal, for the issue here is whether there is a right of appeal to the Court of Appeal against the interlocutory or interim orders of the Magistrates Court (or for that matter of the High Court).

- [13] In **Balaggan v State** [2012] FJLawRp 139; (2012) 2 FLR 92 (25 May 2012) Calanchini AP as single judge had held that criminal appeals to the Court of Appeal are restricted to the jurisdiction conferred by Part IV of the Court of Appeal Act effectively ruling out the general jurisdiction under section 3(3) of the CA Act. The full court in **State v Chand** [2015] FJCA 64; AAU0085.2012 (28 May 2015) had held that the interpretation of Calanchini P was the correct interpretation. Even section 3(3) of the CA Act refers to final judgments of the High Court and not to any interlocutory or interim orders.
- [14] Thus, whether the Magistrates' court exercises the original jurisdiction of the High Court when acting under extended jurisdiction invested under section 4(2) of the Criminal Procedure Act, 2009 or not, the impugned order of the learned Magistrate complained of by the appellant appears to be an interlocutory or interim order.
- [15] Section 21 of the Court of Appeal is clear in that an appeal lies to the Court of Appeal only against a conviction, sentence, acquittal and an order granting or refusing bail pending trial entered or made in the High Court. Even if it is assumed that the Magistrates' court exercises the original jurisdiction of the High Court when acting under extended jurisdiction invested under section 4(2) of the Criminal Procedure Act, 2009, still the right of appeal to the Court of Appeal is regulated by section 21. Though, section 22 provides for an appeal against a 'decision' to the Court of Appeal, such decision should be of the High Court resulting from the exercise of its appellate jurisdiction on an appeal from the Magistrates' court or in the exercise of revisionary jurisdiction or a decision upon a case stated under the Criminal Procedure Act, 2009. Such a decision cannot be an interlocutory or interim order but it should be a final decision determining the rights of parties.
- [16] In terms of section 23 of the Court of Appeal Act, the Court of Appeal could either allow or dismiss an appeal against conviction or acquittal or quash the sentence passed at the trial and pass any other sentence warranted by law. Similarly, the Court of Appeal could confirm, reverse or vary the decision of the High Court on an appeal against the grant or refusal of bail pending trial. Interlocutory or interim orders are not included in

section 23 either. This is the same with section 24 as well where the powers of the Court of Appeal in special cases are stated.

[17] Therefore, it is clear that the legislature has not envisaged appellate powers to be exercised by the Court of Appeal in respect of interlocutory or interim orders in criminal cases.

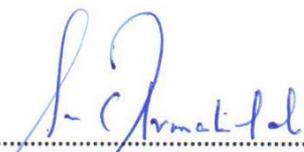
[18] What the appellant is appealing against in this appeal is an interlocutory or interim order by the learned Magistrate in a pending case. The Magistrate has not in any way finally determined the rights of the appellant. The existence of a conviction, sentence, acquittal and an order granting or refusing bail pending trial of the Magistrates court is a condition precedent or a *sine qua non* to invoke and cloth the Court of Appeal with appellate jurisdiction under section 21(1) read with section 22 of the Court of Appeal Act (assuming that extended jurisdiction of the MC is deemed to be HC original jurisdiction for the application of section 21 and section 22 of the CA Act).

[19] Therefore, the appellant's 'Application for leave to appeal' or his appeal is bound to fail because there is no right of appeal or no right to seek leave to appeal against the purported decision of the learned Magistrate.

Order

1. Application for leave to appeal/Appeal bearing no. AAU 131 of 2019 is dismissed in terms of section 35(2) of the Court of Appeal Act.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL