

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

CRIMINAL APPEAL NO. AAU 0064 of 2019
[In the Magistrates' Court of Nausori Case No. 638 of 2014]

BETWEEN : **KELEMEDI KALIVETI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **04 November 2020**

Date of Ruling : **05 November 2020**

RULING

- [1] The appellant had been arraigned in the Magistrates court of Nausori on one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act, 2009 committed on 22 October 2014 at Nasele village Waidina Naitasiri in the Central Division.
- [2] After trial the appellant had been convicted and sentenced on 09 October 2018 to 05 years and 06 months of imprisonment with a non-parole period of 05 years. Being aggrieved by the conviction and sentence the appellant had filed an untimely notice of appeal against conviction and sentence in the High Court of Suva on 21 May 2019. On 24 May 2019 the High Court registry had forwarded the same to the Court of Appeal registry on the basis that the appellant had been tried under extended jurisdiction. The appeal had been registered under AAU 0064 of 2019 in the Court of Appeal.

- [3] After the respondent raised an issue regarding the jurisdiction of this court to entertain and hear the appeal, the court directed both counsel to file written submissions on the matter. Accordingly, both parties tendered written submissions on 03 November 2020.
- [4] The state has submitted that originally the appellant had been charged in the Magistrates court by the police with an indictable offence of rape and therefore, the case had been transferred to Suva High Court. In the High Court the Director of Public Prosecutions (DPP) had filed an information on 15 January 2015 against the appellant for sexual assault under section 210 (1) (a) of the Crimes Act, 2009. Sexual assault, being an indictable offence summarily triable, the appellant had been given the election in terms of section 4(1) (b) of the Criminal Procedure Act, 2009 as to the court (*i.e.* High Court or the Magistrates Court) he wanted to be tried and the appellant had elected to be tried in the Magistrates court. Thus, it is clear that the Magistrates court of Nausori had not exercised extended jurisdiction under section 4(2) of the Criminal Procedure Act, 2009 in this instance but had exercised its original jurisdiction.
- [5] It has already been held in **State v Prasad** [2019] FJCA 18; AAU123,2014 (7 March 2019) that
- [24] It is the 'offence' for which an accused is charged with, which determines the jurisdiction of the Court. If it is an indictable offence the jurisdiction lies with the High Court (S.4 (1)(a) of the Criminal Procedure Act while in a summary offence the jurisdiction lies with the Magistrate's Court. (S.4 (1)(a) of Criminal Procedure Act. The only exception being the investing of extended jurisdiction on the Magistrate's Court pursuant to section 4(2) of the Criminal Procedure Act in respect of an indictable offence.'*
- [6] **Prasad** was a case where initially the Magistrate's court had exercised extended jurisdiction as the information against the accused was in respect of an indictable offence but when the charge was amended it became a summary offence which was triable by a Magistrate's Court exercising its own jurisdiction. The Court of Appeal dealt with the issue of jurisdiction in relation to the two situations when the offence remains an indictable offence and when it is amended to a summary offence as follows.

[22]..... then the Magistrate's Court would have been exercising the authority invested on it by the High Court pursuant to section 4(2) of the Criminal Procedure Act. In such a situation, there would have been no doubt that any appeal against the decision of the Magistrate's Court exercising extended jurisdiction would have to be before the Court of Appeal in terms of section 21(2) of the Court of Appeal Act.

[26] Once the charge was amended to a summary charge, the jurisdiction of the Magistrate's Court changed. It ceased to have extended jurisdiction. A decision made by the Magistrate's Court exercising its own jurisdiction is appealable to the High Court in terms of section 246 of the Criminal Procedure Act.

[36].....When the charge was amended to a summary offence, it was reduced to writing in a form prescribed by the Criminal Procedure Act for filing of complaints in the Magistrates' Court. At this point the extended jurisdiction that was granted to the Magistrates' Court had ceased and the court acquired original jurisdiction to deal with the summary offence contained in a charge sheet. The proceedings that followed after the amendment were in the exercise of the original summary jurisdiction of the Magistrates' Court. The sentence was pronounced in the exercise of the summary jurisdiction and not in the exercise of an extended jurisdiction.

[7] Having observed that the it is settled law that the right of appeal against a decision of the Magistrates' court made under extended jurisdiction pursuant to section 4 (2) of the Criminal Procedure Act lies with the Court of Appeal pursuant to section 21 of the Court of Appeal Act [vide Kirikiti v State [2014] FJCA 223; AAU00055.2011 (7 April 2014), Kumar v State [2018] FJCA 148; AAU165.2017 (4 October 2018)], the court went onto determine that since the sentence has been pronounced by the Magistrate's court exercising its own jurisdiction *i.e.* in the exercise of summary jurisdiction, that decision is appealable to the High Court in terms of section 246 of the Criminal Procedure Act and not to the Court of Appeal.

[8] I think the same principle applies to the appellant's appeal as well. After the appellant made the election to be tried in the Magistrates court on 16 January 2015, the impugned conviction and sentence were entered by the Magistrates court exercising its original jurisdiction (not extended jurisdiction), for from the time the election was made by the appellant in terms of section 4(1)(b) of the Criminal Procedure Act, 2009 the High Court ceased to have any jurisdiction in the matter and the Magistrates court assumed its own jurisdiction. Therefore, the right of appeal was available to the High

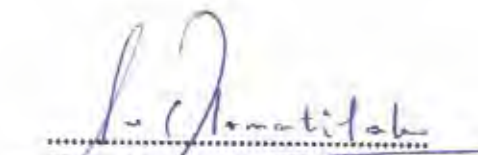
Court in terms of section 246 of the Criminal Procedure Act. Since the Magistrates court was not acting under extended jurisdiction no appeal was available to the Court of Appeal pursuant to section 21 of the Court of Appeal Act.

- [9] Therefore, the appellant had exercised his right of appeal and filed the appeal in the correct court namely the High Court of Suva. Unfortunately, the High Court registry had under the misconception that the impugned conviction and sentence of the Magistrates court were in the exercise of extended jurisdiction had forwarded the appeal to the Court of Appeal.
- [10] Clearly, this court has no jurisdiction to entertain the appellant's appeal and it is only the High Court that could hear and determine the appeal in terms of section 246 (and 248(2), being a belated appeal) of the Criminal Procedure Act, 2009. However, the appellant cannot and should not be penalised for the misjudgement on the part of the High Court registry in transferring the appeal to the Court of Appeal.
- [11] Therefore, ordinarily I would have dismissed the appeal under section 35(2) of the Court of Appeal for want of right of appeal or leave to appeal; but I would in the exercise of the discretion vested, refrain from doing so in this instance. Instead, the proceedings in appeal AAU 0064 of 2019 would be terminated forthwith and the Court of Appeal registry would be directed to forward the appellant's appeal to the High Court to deal with it according to law. For the avoidance of any doubt, I may place on record that since the appellant had no right of appeal to this court against the conviction and sentence, this appeal bearing AAU 0064 of 2019 cannot be revived or restored under any circumstances in the future in the Court of Appeal upon the delivery of this ruling. Needless to state, that the right of appeal under section 22 of the Court of Appeal Act would be available to the appellant.

Order

1. The proceedings in appeal No. AAU 0064 of 2019 is terminated forthwith in the Court of Appeal.
2. The registry of the Court of Appeal is hereby directed to forward the appellant's appeal to the High Court to dealt with it according to law.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL