

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

CRIMINAL APPEAL NO. AAU 124 of 2019
[In the Magistrates' Court at Lautoka Case No. 994 of 2017]

BETWEEN : **SAULA LALAGAVESI**
Appellant

AND : **STATE**
Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant absent and unrepresented**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **28 January 2021**

Date of Ruling : **29 January 2021**

RULING

- [1] The appellant had been arraigned in the Magistrates court of Lautoka on one count of burglary contrary to section 312(1) of the Crimes Act, 2009 and another count of theft contrary to section 291 of the Crimes Act, 2009.
- [2] When the case was transferred to Lautoka High Court under HAC 228 of 2017 it had invested jurisdiction in the Magistrates court to try the appellant. The trial in the Magistrates court has not yet commenced with the last mention date being 01 December 2020.
- [3] In the meantime the appellant had been charged apparently in another case under four counts where the third count had been the 'breach of bail condition' contrary to section 26(1) of the Bail Act. The appellant had pleaded guilty and admitted the

summary of facts in relation to the third count of 'breach of bail condition'. The Magistrate on 29 April 2019 had convicted the appellant on his own plea and imposed a fine of 03 penalty units with a default term of 30 days imprisonment. The conviction and sentence had been entered under case No.CF994/17. It is not clear whether the substantive matter relating to the breach of bail condition is Cr.417/17 as stated by the Magistrate in the sentencing order or CF994/17 as stated by the state.

- [4] The appellant had appealed against the conviction entered on 29 April 2019 to the High Court at Lautoka stating that he was convicted under a wrong case number *i.e.* CF 994/17. The appeal had been filed out of time on 22 August 2019.
- [5] The High Court registry, possibly under the wrong impression that the conviction and sentence had been entered in CF 994/17 where the Magistrate had exercised extended jurisdiction had forwarded the appellant's appeal to the CA registry on 22 August 2019. The appeal had been registered under AAU 124 of 2019 in the Court of Appeal.
- [6] The appeal AAU 124/19 was mentioned before this court on 21 July 2020, 01 September 2020, 22 October 2020, 14 December 2020, 13 January 2021 and 28 January 2021. However, despite Production Orders having been sent to Natabua Correction Centre, Lautoka repeatedly by the Court of Appeal Registry to produce the appellant to court on the above dates the Officer in Charge of Natabua Correction Centre had failed to comply with those orders without assigning any reason whatsoever and as a result the appellant never appeared before this court and was absent on the said dates. It must be stated for the record that this is not the only case where the Officer in Charge of Natabua Correction Centre had failed to carry out lawful Production Orders regarding many an appellant held in Natabua Correction Centre resulting in disruption of the work of this court in attending to their appeals. This trend has been continuing in the past several months and continues to occur unabated to date.

- [7] After the respondent raised an issue regarding the jurisdiction of this court to entertain and hear this appeal, the court directed the counsel for the respondent to file an affidavit and written submissions on the matter which were done on 05 November 2020 and 28 January 2021 respectively. Since the appellant had not expressed any desire to be present on his application for extension of time (as per Form 4 of CA Rules) and anyway is not entitled to be present without leave [vide section 31 (1) and 35(1)(c) of CA Act] at this stage of the proceedings, this court decided to deal with the preliminary issue on jurisdiction forthwith as further delay caused by him not being produced by Natabua Correction Centre would deprive him of pursuing his appeal in the correct forum.
- [8] Leave aside the confusion regarding the case numbers and the number of cases involved, it is clear that the Magistrates court of Lautoka had not exercised extended jurisdiction under section 4(2) of the Criminal Procedure Act, 2009 in convicting and sentencing the appellant for 'breach of bail condition' contrary to section 26(1) of the Bail Act but had exercised its original jurisdiction in terms of section 5(2) of the Criminal Procedure Code. Section 26(1) of the Bail Act does not prescribe a particular court nor does it state such offence to be an indictable offence or summary offence. Therefore, the Magistrates court of Lautoka had exercised original jurisdiction in entering the conviction and sentence against the appellant on 29 April 2019. This is similar to a situation where the Magistrates court exercises its own jurisdiction regarding a summary offence.
- [9] **State v Prasad** [2019] FJCA 18; AAU123.2014 (7 March 2019) though decided in a slightly different context sheds some light to resolve the matter at hand and it stated:

'[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.'

- [10] **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.

- [11] 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.

- [12] I adopted similar reasoning in Kaliveti v State [2020] FJCA 215; AAU0064.2019 (5 November 2020).
- [13] I think the same principle could be applied to the appellant's appeal as well. The Magistrates court on 29 April 2019 had entered the impugned conviction and sentence exercising its original jurisdiction (not extended jurisdiction) and therefore, the right of appeal was available to the High Court in terms of section 246 read with section 248 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.
- [14] Therefore, I hold that when the Magistrates court assumes jurisdiction and tries an offence under any other law other than the Crimes Act, 2009 in terms of section 5(2) of the Criminal Procedure Code, the court exercises its original jurisdiction and any person dissatisfied with any judgment, sentence or order of the Magistrates court should appeal to the High Court against such judgment, sentence or order.
- [15] Therefore, the appellant had exercised his right of appeal and filed the appeal in the correct court namely the High Court of Lautoka. 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.
- [16] 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.
- [17] 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 124 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 124 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 124 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