

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO. AAU 009 of 2019**  
**[In the High Court at Lautoka Case No. HAC 94 of 2015]**

**BETWEEN** : **EDWIN ALVIN KUMAR**  
  
**AND** : **STATE** *Appellant*  
*Respondent*

**Coram** : Prematilaka, RJA  
Mataitoga, JA  
Qetaki, JA

**Counsel** : Mr. M. Fesaitu for the Appellant  
: Mr. L. J. Burney for the Respondent

**Date of Hearing** : 06 September 2023

**Date of Judgment** : 28 September 2023

## **JUDGMENT**

**Prematilaka, RJA**

- [1] The appellant had been indicted in the High Court at Lautoka with one count of penile rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and one count of sexual assault (licking and sucking the vagina) on an adult complainant contrary to section 210 (1) of the Crimes Act, 2009 committed at Nadi in the Western Division on 06 May, 2015.
- [2] The assessors by a majority had opined that the appellant was not guilty of both counts. The learned trial judge had disagreed with the majority opinion of 'not guilty', convicted the appellant of both counts and sentenced him on 20 April 2018 to 06 years, 07 months and 20 days of imprisonment with a non- parole period of 06 years

for rape and 03 years of imprisonment for sexual assault; both sentences to run concurrently.

- [3] A judge of this court granted enlargement of time to appeal against conviction to the appellant on one ground of appeal. The sole ground of appeal allowed and urged on behalf of the appellant at the full court hearing against the conviction is as follow.

***THAT the Learned Trial Judge erred in law in not allowing the appellant his right to an election on the count of Sexual Assault.***

- [4] The trial judge in the sentencing order had summarized the evidence against the appellant as follows.

*[3] You are complainant's former husband. On the 5<sup>th</sup> of May, 2015, you visited complainant around midnight notwithstanding her protest while she was alone with the daughters. When the complainant went to the bedroom to make two daughters sleep, you entered the bedroom despite her protest. While she was making daughters sleep, you started touching her. Then you pushed her and told her to lie down on the bed. When she fell on the bed, you came on her and started pulling her nightie up and pantie down. Then you dragged her to the kitchen and pushed her hard down on the mattress. You started kissing her tummy and told her to suck your penis. Then you started licking her vagina.*

*[4] You made her turn and told her to do "sit ups" on his penis. Then you made her lie down on the mattress and started having sexual intercourse with her without her consent. You ejaculated inside her vagina. When he was doing all these things she was feeling the pain in her vagina. When she was crying you threatened her and told, 'don't go to Police and report. If you will go to Police, I will take out one of your eyes and kill you.'*

- [5] The appellant had opted to give evidence and called one witness. The defence case had been one of denial in that the appellant did not commit any of the alleged sexual acts. His version had been that the allegation against him was fabricated to hurt him because the complainant was jealous of him and was angry because he refused to stay with her permanently at her house in Waimalika.

#### ***Ground of appeal***

- [6] The proceedings against the appellant had commenced at Nadi Magistrates Court where he had been charged only with rape (an indictable offence) on 28 May 2015. The matter had been then transferred to the High Court where the Director of Public

Prosecutions (DPP) filed the information dated 22 June 2015 against the appellant for rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 and sexual assault contrary to section 210(1) and (2) of the Crimes Act, 2009.

- [7] The appellant argues that the learned High Court judge did not give him the election as to which court (Magistrates Court or High Court) he wished to be tried on the charge of sexual assault which is an indictable offence triable summarily.

***Does an accused have the right of election in the High Court?***

- [8] The basis of this argument appears to be section 4(1)(b) of the Criminal Procedure Act, 2009 which states that *'any indictable offence triable summarily under the Crimes Decree 2009 shall be tried by the High Court or a Magistrates Court, at the election of the accused person'*. The more important question is whether the election to be tried is available to an accused indicted in the High Court or it is only available to an accused charged before the Magistrates Court.

- [9] One may argue, as the appellant's counsel does, that the comma after *'...Magistrates Court...'* and placing *'at the election of the accused person'* at the end of section 4(1)(b) suggest that in the High Court as well as the Magistrates Court the election is available to an accused. However, the definition of *'indictable offence triable summarily'* in section 2 of Part I of the Criminal Procedure Act, 2009 clearly indicates that it is otherwise. It is as follows.

*'indictable offence triable summarily' means any offence stated in the Crimes Act 2009 or any other law prescribing offences to be an indictable offence triable summarily, and which shall be triable —*

- (a) *in the High Court in accordance with the provisions of this Act; or*
- (b) *at the election of the accused person, in a Magistrates Court in accordance with the provisions of this Act;*

- [10] There is no reference to an election as far as the High Court is concerned under (a) which means that an *'indictable offence triable summarily'* shall be triable in the High Court without any election by the accused whereas under (b) an *'indictable offence*

triable summarily' shall be triable in a Magistrates Court only at the accused's election. This may suggest that the election is available for an 'indictable offence triable summarily' only in the Magistrates Court. In other words, an accused has no right or option to elect his forum when he is facing an 'indictable offence triable summarily' in the High Court but if he is arraigned in the Magistrates Court for an 'indictable offence triable summarily' he has an election to be tried in the Magistrates Court which also means that if the accused does not elect to be tried in the Magistrates Court, the 'indictable offence triable summarily' shall *ipso facto* be triable in the High Court.

### ***Institution and transfer of criminal cases***

[11] Section 35(2) of the Criminal Procedure Act, 2009 deals with institution and transfer of criminal cases to be heard by the High Court as follows.

(2) *All criminal cases to be heard by the High Court shall be —*

(a) *instituted before a Magistrates Court in accordance with this Act; and*

(b) *transferred to the High Court in accordance with this Act if the offence is —*

(i) *an indictable offence; or*

(ii) *an indictable offence triable summarily, and the accused has indicated to the Magistrates Court that he or she wishes to be tried in the High Court.*

[12] Pure indictable offences, i.e., those that are solely *indictable* (and not *indictable triable summarily*) must be mandatorily transferred to and tried in the High Court, as per section 35(2)(b)(i). In terms of section 35(2)(b)(ii), a case involving *an indictable offence triable summarily* too must be transferred to the High Court when the accused indicates to the Magistrates Court that he or she wishes to be tried in the High Court. This may once again suggest that the election is available only in the Magistrates Court as far as *an indictable offence triable summarily* is concerned. No right of election is available in the High Court. Section 35(2)(b)(ii) simply provides a willing

accused with the opportunity for his *indictable offence triable summarily* to be heard by the High Court instead of in the Magistrates Court.

[13] However, section 35(2)(b)(ii) may sound somewhat inconsistent with section 2(b) of Part I of the Criminal Procedure Act in that according to section 35(2)(b)(ii) a case involving *an indictable offence summarily triable* must be transferred to the High Court only if the accused wishes to be tried in the High Court (otherwise it remains in the Magistrates Court) whereas in terms of section 2(b) of Part I of the Criminal Procedure Act *an indictable offence triable summarily* is triable in the Magistrates Court only if he so elects (otherwise it is triable in the High Court). However, this seemingly inconsistent position could be reconciled by a holistic and logical interpretation of both provisions.

[14] *An indictable offence triable summarily* instituted before a Magistrates Court must be transferred to the High Court only if an accused indicates that he wishes to be tried in the High Court and not otherwise [section 35(2)(b)(ii)]. If the accused facing *an indictable offence triable summarily* instituted before a Magistrates Court makes a positive election to be tried in the Magistrates Court, he must be tried accordingly [section 2(b) of Part I of the Criminal Procedure Act]. Faced with *an indictable offence triable summarily* before a Magistrates Court, if the accused neither indicates that he wishes to be tried in the High Court; nor elects to be tried in the Magistrates Court, by default his case remains where it is instituted and shall be tried in the Magistrates Court. Here, the accused is deemed to have elected to be tried in the Magistrates Court for the *indictable offence triable summarily*. This does not derogate from the Magistrate's discretion to transfer the *indictable offence triable summarily* to the High Court on his or her own motion pursuant to section 188 (1) or on application of the prosecutor in terms of section 188 (2) of the Criminal Procedure Act

***What happens when a criminal case is instituted in the Magistrates Court for an indictable offence as well as an indictable offence triable summarily?***

[15] Section 35(2) is silent as to what a Magistrate should do when a single case instituted in the Magistrates Court pertains to both *an indictable offence* and *an indictable offence triable summarily* arising from the same transaction. If section 35(2)(b) is to

be interpreted in such a way that the Magistrates Court has to transfer the *indictable offence* to the High Court while proceeding to hear the *indictable offence summarily triable* if the accused does not indicate that he wishes to be tried in the High Court or elects to be tried in the Magistrates Court, it would lead to a scenario where two offences committed in the same transaction are simultaneously proceeding in two different courts creating confusion, leading to unacceptable burden and cost and inefficiency in the legal process in addition to inconvenience to the accused as well as the victim and witnesses. Different outcomes in separate courts on the same evidence would bring the system of justice to disrepute and lead to loss of public confidence.

- [16] It appears that public interest and efficient administration of justice achieved by joinder of charges permitted by section 198(2) of the Criminal Procedure Act upon a single trial into all offences would be lost if the appellant's contention is upheld. In other words, for argument sake if the appellant had been given the election in the High Court and he had elected to be tried in the Magistrates Court on the sexual assault charge there would have been two parallel trials in the High Court (rape) and the Magistrates Court (sexual assault) where the same evidence would be led; one before the High Court judge with assessors and the other before the Magistrate. I do not think that the legislature would have intended such an outcome and no interpretation that would lead to absurdity should be adopted.
- [17] To avoid such absurd outcomes, it is necessary to interpret the relevant provisions in a way that ensures consistency and avoids dual proceedings. In practice, the legal system often interprets statutes in a manner that avoids absurd or impractical results. If there is ambiguity in the language of a law, courts may look to legislative intent or principles of statutory construction to determine the most reasonable interpretation.
- [18] In this context, it is clear that the legislature would not have meant such a debilitating effect on the administration of justice as described above by the language of sections 2(b) of Part I of the Criminal Procedure Act, 4(1)(b) and 35(2) of the Criminal Procedure Act.
- [19] Therefore, the only holistic, logical and rational interpretation would be that if a case instituted in the Magistrates Court contains both *an indictable offence* and *an*

*indictable offence summarily triable* arising from the same transaction, the Magistrate must transfer the *entire case* to the High Court as per section 35(2)(b), for the greater includes the lessor.

[20] Even if one argues that if a case instituted in the Magistrates Court contains both *an indictable offence* and *an indictable offence summarily triable* arising from the same transaction, the accused should still be put to his election as to the forum in respect of the latter, the Magistrate still has a discretion to transfer the *indictable offence summarily triable* also to the High Court in terms of section 188 of the Criminal Procedure Act.

[21] In **Tasova v Office of the Director of Public Prosecutions** [2022] FJSC 43; CAV0012.2019 (26 September 2022) the accused had been charged with indictable offences and a summary offence arising out of the same facts. The learned Magistrate in the exercise of discretion conferred upon the Magistrate transferred the entire case to the High Court. The Supreme Court referring to section 188 of the Criminal Procedure Act held

32. *This provision gives the Magistrate unfettered discretion to transfer any case to High Court if appears to the Magistrate that the case is one which ought to be tried by the High Court irrespective of whether the offence is indictable offence, indictable offence triable summarily, summary offence and/or offences for which no Court is assigned.*

33. *The Magistrate has the discretion to transfer the case on his or her own motion pursuant to s188 (1) or on application of the prosecutor (s188 (2)).*

36. *It is more appropriate for Magistrates to transfer proceedings to High Court where the accused is charged with indictable offence (over which High Court has exclusive jurisdiction), and summary offence arising out of same facts for the simple reason that common sense and public interest dictates that the offences arising out of same facts ought to be tried once before one Judicial Officer. This will surely ensure that victims of crimes are not put to undue inconvenience and that there is no inconsistency in finding of facts and application of legal principles in addition to the delay that will ensue if two judicial officers will be involved in dealing with charges arising out of same facts.*

[22] The Supreme Court in ***Tasova*** further laid down the following legal propositions.

[39] *In summary this Court holds that:-*

a. **Indictable offence**: Proceedings are instituted in Magistrates Court and then transferred to the High Court which has exclusive jurisdiction pursuant to s4(1)(a) and 35(2) of CPA.

b. **Indictable Offence Triable Summarily**: The accused has right to elect to be tried in the Magistrate Court or the High Court.....

*If the accused elects trial by Magistrate and if it appears to the Magistrate that proceedings ought to be transferred to High Court or application is made by prosecutor for transfer of case to High Court then the Magistrate may in the exercise of his or her discretion transfer the proceedings to the High Court.*

c. **Summary Offence**: The Magistrate Court has jurisdiction to hear cases. However if it appears to the Magistrate that proceedings ought to be transferred to High Court or application is made by prosecutor for transfer of case to High Court then the Magistrate may in the exercise of his or her discretion transfer the proceedings to the High Court.

d. **Offence for which no Court is prescribed (s5(2) of CPA)**: The Magistrate has jurisdiction to hear cases. However if it appears to the Magistrate that proceedings ought to be transferred to High Court or application is made by prosecutor for transfer of case to High Court then the Magistrate may in exercise of his or her discretion transfer the proceedings to the High Court.

40. *Once, the Magistrate transfers the charges or proceedings to the High Court pursuant to s188 and 191 of CPA then the High Court in exercise of its unlimited Jurisdiction pursuant to s100(3) of the Constitution shall hear and determine the matter.*

[23] In **Batikalou v State** [2015] FJCA 2; AAU31.2011 (2 January 2015) relied on by the appellant, the accused had been produced in the Magistrates Court. The Magistrate having observed that the appellant was charged with indictable offences (however robbery was an indictable offence triable summarily), had transferred the case to the High Court. The appellant had pleaded guilty to the charge of robbery and sentenced to a term of 08 years imprisonment with a non-parole term of 07 years. The appellate counsel had submitted that although the charge was an indictable offence triable summarily, the appellant was not given the statutory option or an inquiry was not made with regard to the wish of the appellant whether he would prefer to be tried in the Magistrates Court or the High Court.

[24] In **Batikalou** the Court of Appeal stated *inter alia*



[12] *"Indictable offence triable summarily" means any offence stated in the Crimes Decree 2009 or any other law prescribing an offences to be an indictable offence triable summarily, and which shall be triable – (a) in the High Court in accordance with the provisions of this Decree; or (b) at the election of the accused person, in a Magistrate Court in accordance with the provisions of this Decree; (section 2 (a) and (b) of the Criminal Procedure Decree 2009).*

[13] *Indictable offences are tried in the High Court. However, indictable offences triable summarily, shall be tried by the High Court or Magistrate Court at the election of the accused person (section 4 (1) (b)). Such cases should be transferred to the High Court only if the accused has indicated to the Magistrate Court that he or she wishes to be tried in the High Court (section 35 (2) (b) (II) of the Criminal Procedure Decree 2009).*

[17] *The learned counsel for the respondent humbly admitted to the failures on the part of the learned Magistrate and the High Court Judge to offer the statutory option to the appellant.*

[29] *There are a series of cases in which the Fiji courts have also adopted the strict view applied in cases such as R v Have (supra). In Aca Koroi v The State [2013] FJHC 306; HAM 186 of 2012S (21 June 2013), the proceedings before the Magistrate Court was declared a nullity due to the failure of the Magistrate to provide the option available under section 4 (1) (b) of the Criminal Procedure Decree 2009. Again in The State v Ilaitia Ravuwai (2014 FJHC 487; HAC 118 of 2014S; 3 July 2014) the proceedings before the Magistrate Court were declared a nullity and the case was remitted to the Magistrate Court for election to be put to the accused in conformity with section 4 (1) (b) of the Criminal Procedure Decree 2009.*

[30] *It is not disputed that the appellant was deprived of a statutory requirement. The appellant possessed a legal right to choose to be tried either in the Magistrate's Court or the High Court, a right given by law. Can this right arbitrarily be taken away? The intention of the relevant sections in the Criminal Procedure Decree 2009 is clear and unambiguous. And when the law is clear and unambiguous as this, it is not the role of the judge to make or even modify the law but rather to apply it as it is.*

[25] Mr. Burney expressed reservations about the statement at paragraph [30] of *Batikalou* that *'...The appellant possessed a legal right to choose to be tried either in the Magistrate's Court or the High Court, a right given by law.'* The State counsel in *Batikalou* seems to have conceded that point before the Court of Appeal. Mr. Burney also submitted that section 191 of the Criminal Procedure Act, 2009 empowers a magistrate to transfer *any charges or proceedings* to the High Court.

[26] Be that as it may, *Batikalou* should be distinguished from the appellant's case, for in *Batikalou* the accused was faced only with a charge of robbery, *an indictable offence summarily triable* coming under section 35(2)(b)(ii) whereas the appellant was arraigned for rape, a pure indictable offence coming under section 35(2)(b)(i) and there was no question of any election at all prior to transfer of the case to the High Court.

*Could an indictable offence triable summarily be preferred in the High Court? Does an accused have any election?*

[27] The appellant's situation does not fall within the ambit of section 35(2)(b)(ii) as no charge of sexual assault was preferred against him in the Magistrates Court. The Magistrate quite rightly transferred his case containing only a rape charge to the High Court in terms of section 35(2)(b)(i). Therefore, there was no question of the appellant being accorded any election with regard to the sexual assault charge which was preferred for the first time as part of the information only in the High Court.

[28] Further, and more convincingly, section 198(2) of the Criminal Procedure Act states that, in the information, the DPP may charge an accused with *any offence*, either in addition to or in substitution for the offence in respect of which the accused person has been transferred to the High Court for trial. The reference to 'any offence' undoubtedly includes *an indictable offence triable summarily* and therefore, an accused served with an information which includes *an indictable offence triable summarily* or containing solely *an indictable offence triable summarily* has no right to election in the High Court.

[29] In *Tasova* the Supreme Court held

20. *This Court holds that any offence that is added or substituted pursuant to s198 (2) can be heard by the High Court irrespective of whether offence added or substituted is indictable, indictable offence triable summarily, summary offence or offence for which no Court is prescribed.*

[30] Coupled with section 198(2), section 59 of the Criminal Procedure Act is also relevant in this regard.

59.—(1) **Any offence** may be charged together in the same charge or information if the offences charged are—

(a) founded on the same facts or form; or

(b) are part of a series of offences of the same or a similar nature.

(2) Where more than one offence is charged in a charge or information, a description of each offence shall be set out in a separate paragraph of the charge or information, and each paragraph shall be called a count.

[31] Thus, an information may contain not only *indictable offenses* but also *indictable offences triable summarily* and *summary offences* and an accused is not entitled to any election as to the forum in the High Court.

[32] The fact that section 100 (3) of the Constitution has vested the High Court with unlimited jurisdiction to determine any criminal proceedings confirms that not only *indictable offences triable summarily* but also *summary offences* in addition to indictable offences could be heard in the High Court.

*“100(3) The High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other original jurisdiction as is conferred on it under this Constitution or any written law”.*

[33] For the reasons spelt out above, I beg to depart from the strict view taken at paragraph [30] of *Batikalou*.

#### Oetaki, JA

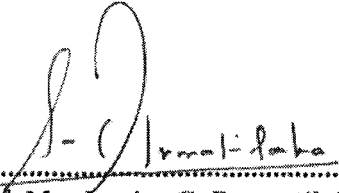
[34] I am in agreement with the judgment, the reasoning and conclusion.

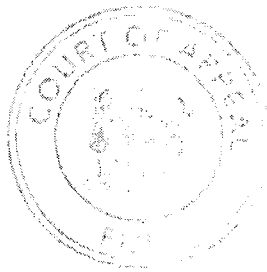
#### Mataitoga, JA

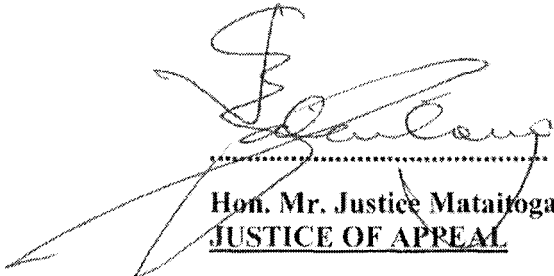
[35] I concur with your reasons and practical conclusion.

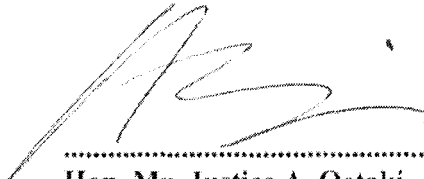
**Order of court**

1. Appeal against conviction is dismissed.

  
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**Hon. Mr. Justice C. Prematilaka**  
**RESIDENT JUSTICE OF APPEAL**



  
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**Hon. Mr. Justice Mataifoga**  
**JUSTICE OF APPEAL**

  
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**Hon. Mr. Justice A. Qetaki**  
**JUSTICE OF APPEAL**