

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

CRIMINAL APPEAL NO. AAU 085 of 2023

BETWEEN : **AFRANA NISHA** *Appellant*

AND : **FIJI INDEPENDENT COMMISSION AGAINST
CORRUPTION** *Respondent*

Coram : **Mataitoga, RJA**

Counsel : **Khan. I, for the Appellant**
: **Fatafehi. S for the Respondent [DPP]**

Date of Hearing : **2 August 2024**

Date of Ruling : **30 September 2024**

RULING

1. The appellant [Afrana Nisha] is charged with 7 counts of **Falsification of Documents** contrary to section 160(3) of the Crimes Act 2009 and 3 counts of **Obtaining Financial Advantage**, contrary to section 326 (1) of the Crimes Act 2009. These charges are pending trial in the Magistrate Court.
2. This case has had major delay in getting the charges prosecuted in the Magistrates Court. The reasons for those delay lay equally on both parties.

3. Before the case was heard in the Magistrates Court, the appellant applied for a permanent stay of the proceedings. The Resident Magistrate who heard the application refused the stay application citing lack of jurisdiction to consider such an application.
4. The appellant being dissatisfied with this ruling by the Resident Magistrate in Magistrate Court Action No: 048 of 2021, appealed to the High Court.
5. In **Nisha v FICAC Crim App Case No: HACDA 02 of 2023S**, Justice Rajasinghe dismissed the application under section 251 of the Criminal Procedure Act and the matter was discontinued.

Appeal to Court of Appeal

6. The appellant still not satisfied with the Order of the High Court submitted this leave to appeal application pursuant to section 21(1)(b)(c) of the Court of Appeal Act. To invoke the right to appeal under this section of the Court of Appeal Act, the following must first be satisfied:
 - (i) The appellant was tried in the High Court;
 - (ii) He was convicted;
 - (iii) Sentence was passed

Is there a right of appeal?

7. From the record of this application, there was no trial of the appellant in the High Court and there was no conviction and no final judgement. This appeal is against an Order of the High Court made on 17 October 2023, dismissing an appeal against Resident Magistrate refusing the application of the appellant to permanently stay the proceedings in the Magistrate Court Action No: 048 of 2021.
8. Under section 3 (3) of the Court of Appeal Act, appeal lie to the Court as of right from final judgements of the High Court given in exercise of the original jurisdiction of the High Court. The Order made by Justice Rajasinghe in this case in the High Court is not

a final judgement. The appellant will still be tried in the Magistrate Court as was the case before these series of interlocutory applications were made.

9. In **Nacagi v State** [2014] FJCA 54; (Misc Action No: 040 of 2011), like the present, all three appellants in **Nacagi** (supra) applied to the High for a stay of proceedings in the Magistrate Court. The applications for stay were refused by the High Court. The appellants appealed against the High Court judgements refusing stay of proceedings in the Magistrates Court. The Court of Appeal stated the following; per Goundar JA,

[8] The Court of Appeal Act provides for three avenues to bring criminal appeals. Section 21(1) of the Court of Appeal Act applies to an appellant convicted on a trial held before the High Court. The appellants have not been convicted on a trial held before the High Court and therefore section 21(1) is not relevant.

[9] Section 22(1) of the Court of Appeal Act concerns appeal from the High Court in its appellate jurisdiction. The stay applications were not heard by the High Court in its appellate jurisdiction. Section 22 (1) is not relevant.

[10] Section 3(3) of the Court of Appeal Act provides for a right of appeal from the final judgments of the High Court given in the exercise of its original jurisdiction.

11] The High Court judgments refusing stay were given in its original jurisdiction. The issue is whether the judgments are final. The question whether a refusal of stay in criminal proceedings is a final judgment must be determined by the principles enunciated by the Full Court in Takiveikata v State Criminal Appeal No: AAU0030 of 2004S at pp 4-5:

"The Court noted that two schools of thought had developed as to what constituted a final judgment. These were categorised as "the order approach" and "the application approach". The "order approach" required the

classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end it was a final order, if it did not it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter would be finally determined whichever way the court decided the application.

The Court concluded that it was preferable at least in the criminal jurisdiction for the court to maintain "the order approach."

[12] Applying 'the order approach', the question that must be asked is whether the order refusing stay of prosecution brought the proceedings to an end. The answer is obvious. The order refusing stay has not brought the proceedings to an end, as the trials are pending in the Magistrates' Court. It therefore follows the judgments of the High Court are not final. Of course if stay was granted, the proceedings in the Magistrates' Court would have come to end, and the order granting stay would have been final to give the State a right of appeal under section 3 (3) of the Court of Appeal Act.

10. In **Bimlesh Singh v State [2023] FJCA 3**, and **Jason Steven Ho v FICAC [2024] FJCA 113**, dealing with an appeal under section 21(1) (b) (c) of the Court of Appeal Act in the circumstances

'[12].. the question that must be asked is whether the order refusing stay of prosecution brought the proceedings to an end. The answer is obvious. The order refusing stay has not brought the proceedings to an end, as the trials are pending in the Magistrates' Court. It therefore follows the judgments of the High Court are not final. Of course if stay was granted, the proceedings in the Magistrates' Court would have come to end, and the order granting stay would have been final to give the State a right of appeal under section 3 (3) of the Court of Appeal Act.

11. Both in terms of the clear wording of sections 3 (3) and 21(1)(b)(c) of the Court of Appeal Act and in the light of the judicial precedents discussed above, the conclusion

is that the appellant has no right of appeal against the High Court Ruling therefore this court has no jurisdiction to entertain and determine the appellant's appeal. It should stand dismissed in terms of section 35 (2) of the Court of Appeal Act.

12. I note that this matter is taking some time to get the trial in Magistrates Court started. Counsel for both parties should take all reasonable steps to get a trial date fixed for trial in the Magistrate Court.

ORDERS:

1. Leave to Appeal is dismissed under section 35(2) of the Court of Appeal.
2. The Chief Magistrate is directed to have this case mentioned within the next two weeks with Notice to both parties to fix an early trial date.
3. Court of Appeal Registry is directed to send a copy of this Ruling to the Chief Magistrate to allocate the case to Resident Magistrate.




Hon Isikeli U Maitoga
RESIDENT JUSTICE OF APPEAL