

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 329 of 2016

STATE

v.

BALBEER SINGH

Counsel: Ms. M. Khan for State
Mr. D. Sharma for Accused

Hearing: 27th July 2017

Ruling: 31st July 2017

RULING

1. The Accused is charged with one count of Conversion, contrary to Section 279 (1) (c) (i) of the Penal Code and one count of Obtaining Financial Advantage, contrary to Section 326 (1) of the Crimes Act. The accused was first produced in the Magistrate's Court in Suva on the 27th of February 2013. Subsequent to several adjournments, the matter was set down for hearing on 15th of August 2016. On the day of the hearing, the learned Magistrate ruled that the first count is an electable offence and put the election before the accused. The accused then elected the High Court. The learned Magistrate then transferred the matter to High Court on the ground that the accused elected the first count to be heard in the High Court.
2. The matter was first called in the High Court on the 16th of September 2016. Subsequent to finalization of all pre-trial issues, the matter was adjourned for hearing on 21st - 25th of

August 2017. Meanwhile, the court found that the transfer order made by the learned Magistrate is wrong in law. Hence, this court has no jurisdiction to proceed with this matter. Accordingly, the court by its own motion invited the learned counsel for the prosecution and the defence to file written submissions on the issue of transfer order made by the learned Magistrate and the jurisdiction of the court, which they filed as per the direction.

3. The first count of Conversion, contrary to Section 279 (1) (c) (i) of the Penal Code is a misdemeanour offence under the repealed Penal Code. According to Section 4 and the fifth column of the first schedule of the Criminal Procedure Code and the Electable offence Decree of 1988, the offence of Conversion can be tried in the Magistrate's Court only with the consent of the accused.
4. The Criminal Procedure Code and the Electable Offences Decree of 1988 were repealed by the Section 298 of the Criminal Procedure Act, which came into force on the 1st of February 2010.
5. Section 301 (1) of the Criminal Procedure Act states that:

"A court hearing any proceeding for an offence which was commenced prior to the commencement of this Decree may apply the provisions of this Decree if no judgment has been made in the case and no sentence has been imposed on the offender prior to the commencement of this Decree".

6. The Penal Code was repealed by Section 391 of the Crimes Act, which came into force on the 1st of February 2010. According to Section 393 of the Crimes Act, the Penal Code still applies for the offences that have been committed prior to the commencement of the Crimes Act.
7. Accordingly, the prosecution has charged the accused with one count of Conversion under the Penal Code. However, the applicable procedure of the proceeding is the Criminal

Procedure Act and not the repealed Criminal Procedure Code or the Electable Offence Decree.

8. Sections 4 and 5 of the Criminal Procedure Act have stipulated the jurisdictions of the court in respect of the offences as stipulated under the Crimes Act and also under other laws. Section 4 of the Criminal Procedure Act states that:

- (1) *Subject to the other provisions of this Decree—*
- a. *any indictable offence under the Crimes Decree 2009 shall be tried by the High Court;*
 - b. *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; and*
 - c. *any summary offence shall be tried by a Magistrates Court.*
- (2) *Notwithstanding the provisions of sub-section (1), a judge of the High Court may, by order under his or her hand and the seal of the High Court, in any particular case or class of cases, invest a magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the magistrate's jurisdiction,*
- (3) *A magistrate hearing a case in accordance with an Order made under sub-section (2) may not impose a sentence in excess of the sentencing powers of the magistrate as provided for under this Decree.*

9. Section 5 of the Criminal Procedure Act states that:

- i) *Any offence under any law other than the Crimes Decree 2009 shall be tried by the court that is vested by that law with jurisdiction to hear the matter.*

- ii) *When no court is prescribed in any law creating an offence and such offence is not stated to be an indictable offence or summary offence, it may be tried in the Magistrates Court in accordance with any limitations placed on the jurisdiction of classes of magistrate prescribed in any law dealing with the administration and jurisdiction of the Magistrates Courts.*
10. With the abolition of the Criminal Procedure Code and Electable Offences Decree, the offences created under Penal Code fall under Section 5 (2) of the Criminal Procedure Act, where the Magistrate's Court has jurisdiction to hear these offences.
11. The second count of Obtaining Financial Advantage, contrary to Section 326 (1) of the Crimes Decree is a summary offence. In view of Section 4 (1) (c) of the Criminal Procedure Act, the Magistrate's Court has jurisdiction to hear such offence.
12. According to Section 191 of the Criminal Procedure Act, a Magistrate can transfer any charges or proceedings to the High Court. However, the jurisdiction given to the Magistrate under Section 191 should be exercised according to the provisions of the Criminal Procedure Act.
13. Section 35 (2) of the Criminal Procedure Act has stipulated that any charge involves with either an indictable offence or an indictable offence triable summarily (where the accused indicates that he does not wish to be tried in the Magistrate's Court) must be transferred to the High Court. Section 35 (2) of the Criminal Procedure Act states that:

"All criminal cases to be heard by the High Court shall be

- a) *instituted before a Magistrates Court in accordance with this Decree; and*
- b) *transferred to the High Court in accordance with this Decree 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.*


15. Section 188 of the Criminal Procedure Act has provided the procedure of transferring summary trial to the High Court, where it states that:

- i) *If before or during the course of a trial before a Magistrates Court it appears to the magistrate that the case is one which ought to be tried by the High Court the magistrate may transfer the case to the High Court under Division 3 of this Part.*
- ii) *Before the calling of evidence at trial, an application may be made by a public prosecutor or police prosecutor that the case is one which should be tried by the High Court, and upon such an application the magistrate shall —*
 - a) *hear and consider the reasons for the application;*
 - b) *hear and consider any submissions made on behalf of the accused person as to the most appropriate court to hear and determine the charges; and*
 - c) *otherwise determine matters relevant to the grounds for the application – and may continue to hear the case (unless the charges are of a nature that may be tried only by the High Court) or transfer the case to the High Court under Division 3 of this Part.*

16. According to Section 188, the Magistrate is allowed to transfer a summary trial to the High Court only on two instances. The first instance is if the Magistrate considers that the matter ought to be heard in the High Court. The second instance is that upon the application of the prosecution.

17. According to the above discussed provisions, the correct procedure of transferring these two offences to the High Court has stipulated under Section 188 of the Criminal Procedure Act. Instead of that, the learned Magistrate has relied on the provisions of repealed Criminal Procedure Act and Electable offences Decree in making this transfer order to the High Court. Hence, the transfer order is wrong and not valid in law.
18. In conclusion, I send this matter back to the Magistrate Court to continue the proceedings according to the applicable law.
19. The learned Counsel for the prosecution informed the court that the prosecution has already purchased air tickets for two of their witnesses who are traveling to Fiji from overseas in order to attend the hearing on the 21st of August 2017. Accordingly, the prosecution wishes to proceed the hearing as schedule on 21st of August 2017.
20. Though I am mindful of the fact that the cause list of the Magistrate's Court is full of other prioritized cases, I still find that the highest priority should be given to this instant matter as there has been a protracted delay of nearly four years mainly due to the procedural issues. Hence, I direct the learned Magistrate to take up the hearing of this matter as schedule from 21st - 25th of August 2017.
21. Further I direct the Senior Court Officer of the High Court Registry (Criminal Division) to serve a copy of this ruling to the relevant Learned Magistrate of Suva and to the Chief Magistrate for their information forthwith.




R.D.R.T. Rajasinghe
Judge

At Suva
31st July 2017

Solicitors
Office of the Director of Public Prosecutions for the State
R. Patel Lawyers for the Accused