

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 54 of 2018

BETWEEN : **DESHWAR KISHORE DUTT**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Appellant in person.
: Mr. J. Niudamu for the Respondent.

Date of Hearing : 13 September, 2018
Date of Judgment : 14 September, 2018

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Lautoka for the offence of going equipped for theft contrary to section 315 of the Crimes Act, 2009.
2. It was alleged that the appellant with another on the 27th day of September, 2016 at Lautoka when not at home, in possession of

breaking implements (details given in the charge) with the intention to use it in the course of, or in connection with, theft or a property offence.

3. On 30 September, 2016 the appellant appeared in the Magistrate's Court with counsel whereby his plea was deferred.
4. After numerous adjournments for one reason or the other on 18 July, 2017 the appellant's counsel was given leave to withdraw, the appellant waived his right to counsel.
5. The charge was read and explained the appellant understood the charge and pleaded not guilty. Thereafter the matter went through numerous adjournments, on 6 March, 2018 the appellant changed his plea from not guilty to guilty.
6. For completeness the Magistrate's Court minutes of 6 March, 2018 (copy record pages 15 and 16) are reproduced below:

"06/03/18

Prosecution: Sgt. Arvind

Acc: 1 Present

Acc: 2 Present

The first accused wishes to change his plea.

Preferred language – English

Charge is read out and explained. The accused understands the charge. The accused pleads guilty. The accused says that he pleads guilty on his own freewill.

Summary of facts read out and explained. Facts admitted. I convict the accused. The prosecution seeks time to file previous convictions and a date is given for mitigation.

Production order issued for accused.”

7. On 30 April, 2018 the appellant filed a notice of motion to change his plea from guilty to not guilty. After considering the application filed by the appellant the learned Magistrate refused the application.
9. The appellant being dissatisfied with the ruling of the learned Magistrate on 16 August, 2018 filed a timely appeal in this court.
10. The appellant filed numerous grounds of appeal, however, in his written submission (paragraph 2.2) the appellant confined his appeal to the following ground:

“The learned Trial Magistrate should and must have gone much deeper before analysing and concluding that the plea was unequivocal and that the appellant had not suffered any form of pressure and fear before changing his plea of not guilty to guilty.”

11. At the hearing the State Counsel raised a preliminary objection that the appeal before this court was premature because the appellant’s guilt had not been determined since he was yet to be sentenced. Counsel relies on section 246 (7) of the Criminal Procedure Act.
12. For completeness the entire section 246 of the Criminal Procedure Act is reproduced:

246. — (1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgment and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.

13. In response the appellant submits this court has the jurisdiction to hear this appeal. The appellant relies on two Court of Appeal decisions namely *Vilikesa Dobui v The State, Criminal Appeal No. AAU0002 of 1999* and *Lauzik Mukesh Chand v The State, Criminal Appeal No. 0013 of 1998*.
14. In the case of *Vilikesa Dobui (supra)* the appellant had appeared in the Magistrate's Court at Kadavu charged with selling liquor without a licence contrary to section 77 (1) of the Liquor Act. He pleaded guilty, was convicted and sentenced.

15. The appellant filed a Notice of Motion in the High Court seeking revision of the conviction and sentence under section 323 and 325 of the Criminal Procedure Code (now repealed) on the basis that the plea of guilty was equivocal and the case should be remitted to the Magistrate's Court for trial on a plea of not guilty. The appeal was dismissed.

17. The appellant Mr. Dutt relies on the reasons given by the Court of Appeal in the following words:

"... where an accused person wishes to appeal on the ground that the plea he entered was equivocal or is otherwise not a true admission of guilt, he is not restricted by section 309(1) his appeal is based on the assertion that, on the face of the record, it was not a true admission of guilt. In this case, the appellant had a right to challenge the plea by an appeal to the High Court. He did not and the restriction in section 325 (5) applies. The learned judge should not have entertained an application for revision at the instance of the party who could have appealed"

18. The situation in *Dobui's* case is different to the current situation. Here the appellant on his own plea of guilty was convicted but is yet to be sentenced. The appellant has a right to challenge the plea by an appeal to the High Court, however, he has to comply with the law which provides for the procedure of appeal in section 246 of the Criminal Procedure Act.

19. In my judgment what the Court of Appeal is saying is that an appeal is allowed from a guilty plea provided the appeal was filed properly before the court.

20. The appellant submits that in *Lauzik Mukesh Chand's* case the Court of Appeal held that when the appellant was discharged without conviction

by the Magistrate's Court it was not a sentence hence the High Court had the power to entertain the appeal.

21. Chand's case was in respect of the appellate procedure mentioned in section 308 of the Criminal Procedure Code Cap. 21 (now repealed).
22. For completeness the entire section 308 of the Criminal Procedure Code is reproduced:

"308 (1) Save as hereinafter provided, any person who is dissatisfied with any judgment, sentence or order of a magistrates' court in any criminal cause or matter to which he is a party may appeal to the High Court against such judgment, sentence or order:

Provided that in respect of proceedings other than proceedings that were conducted in the name of the Commissioner of the Fiji Independent Commission Against Corruption, no appeal shall lie against an order of the acquittal except by, or with the sanction in writing of, the Director of Public Prosecutions.

(2) Where any sentence is passed or order made by a magistrate's court in respect of any person who is not represented by a legal practitioner he shall be informed by the magistrate of his right of appeal at the time when sentence is passed or the order made.

(3) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(4) For the purposes of this Part the extent of a sentence shall be deemed to be a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor.

(6) ...

(7) *Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of a sentence or order which includes an order for compensation, restitution, forfeiture, disqualification, costs, binding over, absolute or conditional discharge, probation or community service.*

(8) *And order by a court in a case may be the subject of an appeal to the High court, whether or not the court has proceeded to a conviction in the case.*

23. When one looks at section 308 of the Criminal Procedure Code and section 246 of the Criminal Procedure Act they are not similar, section 308 does not have a provision in similar wordings as section 246(7) of the Criminal Procedure Act therefore the decision in *Chand's* case is not relevant for the current purposes.
24. It is noted by this court that the Court of Appeal in *Chand's* case accepted the view expressed by Mills – Owens C. J. in *Asgar Ali V. R. [1964] 10 FLR 235* that in section 308(1) of the Criminal Procedure Code the word “order” must be read *eiusdem generis* with “judgment” and “sentence” so that reference is to “an order” in the nature of determining the case.
25. Section 246 (7) of the Criminal Procedure Act has specifically provided a right of appeal after guilt has been finally determined by the Magistrate’s Court before an appeal can be filed in the High Court.
26. Section 246 of the Criminal Procedure Act governs the procedure of appeal from the Magistrate’s Court to the High Court as follows:

246 (1) *“Subject to any provision of this Part to the contrary...”*

27. The above sentence states that section 246 (1) is subject to any provision in *Part XV – Appeal from Magistrates Courts*. Section 246 (7) specifically states that “no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person”.
28. In my judgment section 246 (7) literally means an accused person’s guilt is not finally determined until that accused is sentenced. The entering of a conviction is a step towards finality of guilt but not the final determination of guilt. It is only when an accused is sentenced that his or her guilt is finalized not before that. This provision should be given a wide interpretation to achieve its purpose which is to consider appeals from the final determination of a matter in the Magistrate’s Court.
29. The appeal that is filed by the appellant is an interlocutory appeal since he is yet to be sentenced which means the matter in the Magistrate’s Court is pending final determination of the case.
30. In *Asif Ismail v The State, Criminal Appeal No. HAA 01 of 2008*, this court made the following observations in respect of appeals after conviction but before sentence from the judgment of the Magistrate’s Court from paragraphs 21 to 23:

Paragraph 21

“Before I leave it is important to mention that the legislative drafters would have never contemplated “piece meal” appeals from the Magistrates Court to the High Court. If the legislation had allowed a right of appeal after an accused was convicted and before a sentence was pronounced a chaotic situation would have arisen.

Paragraph 22

An accused would delay sentencing in the Magistrate's Court until his or her appeal against conviction was decided by the High Court and then exercise another right of appeal against sentence. The justice system would be clogged to the extent that the general public and the victims would lose confidence in the judicial system.

Paragraph 23

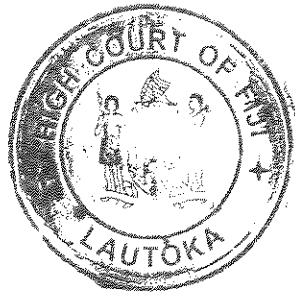
It can never be the intention of the legislature to allow for such appeal procedures. An accused has a locus standi to appeal against his or her conviction or sentence or both after a sentence had been delivered. Any appeal filed by an appellant before being sentenced will be without any legal basis and therefore premature."


31. For the above reasons, the Petition of Appeal filed by the appellant is premature. This court therefore does not have any jurisdiction to hear this appeal. The proceedings in the Magistrate's Court is still pending once that Court is ceased with the matter upon sentence then only the appeal period shall begin.
32. There is no need for this court to consider the merits of the grounds of appeal.

ORDERS

1. The preliminary objection raised by the State is upheld.
2. The Petition of Appeal filed by the appellant is dismissed for want of jurisdiction.

3. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka
14 September, 2018

Solicitors

Appellant in person.

Office of the Director of Public Prosecutions for the Respondent.