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DIRECTOR OF PUBLIC PROSECUTIONS

v.

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JIKAR ALI

[SUPREME COURT, 1975 (Stuart J.), 15th September]

Appellate Jurisdiction

Appeal—application for leave to appeal out of time—whether good cause shown to enable court to enlarge period of limitation—Criminal Procedure Code (Cap. C 14) *ss* 289, 291.

Appeal—practice and procedure—whether application for leave to appeal out of time to be signed by Director of Public Prosecutions in person—whether successive applications for leave to appeal out of time can be made to Magistrate's Court and Supreme Court—Criminal Procedure Code (Cap. 14) *ss* 70, 71, 72, 74, 75, 295, 296 (1)—*Fiji Constitution s.* 65(5).

The respondent pleaded guilty to receiving before a Magistrate's Court in D January 1974, and was sentenced to a suspended term of imprisonment. Subsequently the thieves were sentenced to substantial terms of imprisonment. The D.P.P. applied to the Magistrate's Court for leave to appeal out of time against the leniency of the sentence imposed on the respondent which was refused on the grounds of delay.

On further application to the Supreme Court to enlarge the period of limitation prescribed by Criminal Procedure Code s. 291(1)—

E *Held* : 1. Substantial reasons would need to be advanced before such an enlargement would be granted, and in the present case there were no proper grounds for granting the application.

2. Section 75 Criminal Procedure Code conferred on a public prosecutor the power to appear and plead, which definition included the power to prepare the necessary papers such as an application for leave to appeal outside the statutory F period.

3. Although the Court was not prepared to make a final decision on the question of successive applications for leave to the Magistrate's Court and Supreme Court, it did assume in favour of the appellant that the Magistrate's and Supreme Courts were separate authorities, although it would be very rare for the Supreme Court to give leave when it had been refused by a magistrate.

G Cases referred to :

R. v. Rudra Nand & Ors. Criminal Appeal (Lautoka) 115 of 1974—unreported.

Isad Ali v. R. [1958-9] F.L.R. 1.
Lane v. Esdaile [1891] A.C. 210.
Stevenson ex parte [1892] 1 Q.B. 609 ; [1892] L.J. 492.
Hammond v. Jackson [1914] 1 K.B. 241.
H *R. v. Lesser* (1939) 27 Cr. App. R. 69.
R. v. Cullum (1942) 28 Cr. App. R. 150.
R. v. Jones (1972) 56 Cr. App. R. 413 ; [1972] 1 W.L.R. 887.
Etuate Cama v. R. 21 F.L.R. 9.
Ulaiasi Verevou v. R. Criminal Appeal 78 of 1974—unreported.

Application by the Director of Public Prosecutions to Supreme Court for leave to appeal out of time against the sentence imposed in the Magistrate's Court on the respondent for receiving stolen goods.

S. R. Shankar for the appellant.
J. R. Reddy for the respondent.

STUART J. : [1st September 1975]—

This is an application by the Director of Public Prosecutions for leave to appeal out of time against the sentence imposed by the Magistrate's Court at Ba upon a man called Jikar Ali on 20th January 1974 when he pleaded guilty to two charges of receiving property knowing the same to have been stolen, the property in question being articles to the value of $72 stolen from the Sarava Sanatan Dharam Primary School at Ba and articles to the value of $46.50 stolen from the Sarava Sanatan Dharam High School. He was originally charged on four counts—of breaking and entering each school and stealing the articles in question and alternatively of receiving them. He pleaded guilty to the charges of receiving and the more serious charges were withdrawn. He was then sentenced to nine months ' imprisonment on each charge the sentence to be suspended in each case for twelve months.

The learned Magistrate was told that Jikar Ali was 20 years of age and that the offence had been committed the day before he was to have been married, that he was of respectable family, and got into bad company. The Court accepted this, and found him to be only 19 years old. Probably nothing more would have been heard of the matter, had not the six people who had broken into the two schools and stolen the articles which Jikar Ali pleaded guilty to receiving, been convicted of that breaking and entering and larceny and each sentenced to three years imprisonment. At the hearing of their appeal, they complained of the apparent disparity in sentencing as between themselves and Jikar Ali and the prosecution announced that they intended to seek leave to appeal against Jikar Ali's sentence. They did apply to the Magistrate at Ba, but he declined to give leave because the sentence on Jikar Ali was so long ago. The prosecution now come to this Court seeking leave.

Before I deal with their application I desire to repeat what has been said before and should not need to be said again. In *R. v. Rudra Nand & Daya Ram* Criminal Appeal 115 of 1974 (Lautoka) Williams J. said :

> " The Magistrate is not free to accept an appeal which is long out of time by stating that leave to file out of time is then and there granted. A serious and lawful approach is necessary and such situations are not to be treated casually and without regard for the law. "

In this case the learned Magistrate very properly required Mr Shankar to appear in support of his application, but I can find on the file no affidavit or other paper to lead an application by the Director of Public Prosecutions to the Magistrate. That on the part of the prosecution is the " serious and lawful approach " to which the learned Judge refers.

The first observation that I have to make about the application is that the affidavit of Crown Counsel filed in support of it does not contain all the relevant facts. All that the affidavit says is " that there is a serious disparity between the sentence imposed in this case and Ba Criminal Case No. 792/75 which arose out of the same incident. " No further information is given about Ba Criminal Case No. 792/75. It should not be necessary for the Court officials to search files to acquaint the Court of facts which the applicant should have brought to the Court's attention in his affidavit, nor is Counsel entitled to supplement his affidavit by evidence from the Bar table.

The application is made under section 291 of the Criminal Procedure Code which is as follows :

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" 291. (1) Every appeal shall be in the form of a petition in writing signed by the appellant or his barrister and solicitor and shall be presented to the Magistrates' Court from the decision of which the appeal is lodged within fourteen days of the date of the decision appealed against :

Provided that the Magistrates' Court or the Supreme Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.

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(2) For the purposes of this section and without prejudice to its generality ' good cause ' shall be deemed to include—

(*a*) a case where the barrister and solicitor engaged by the appellant was not present at the hearing before the Magistrates' Court and for that reason requires further time for the preparation of the petition ;

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(*b*) any case in which a question of law of unusual difficulty is involved ;

(*c*) a case in which the sanction of the Attorney-General is required by virtue of section 289 of this Code. ''

Mr Reddy for Jikar Ali takes two preliminary objections to the application. He says first of all that there is no proper application before the Court, as an application for leave under section 289 of the Criminal Procedure Code has to be signed by the Director of Public Prosecutions himself, and the signature of a Crown Counsel will not do. Then he says that the Director of Public Prosecutions cannot make successive applications to the Magistrate's Court and to the Supreme Court.

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I will deal with those two points successively. Mr Reddy's first ground of objection is that every appeal by the Director of Public Prosecutions should be signed by the Director of Public Prosecutions in person. He refers to ss. 71 and 72 of the Criminal Procedure Code which give the control of criminal proceedings to the Director of Public Prosecutions, and points out that it is only the powers given him by ss. 70 and 71 and Part VII that the Director of Public Prosecutions may delegate to a Crown Counsel, that is to say that Crown Counsel is given general power to act for the Director of Public Prosecutions on an application for change of venue, the entering of a nolle prosequi and on the committal of accused persons for trial before the Supreme Court. He argues further that the reason for this differentiation is that an appeal by the Director of Public Prosecutions is a right which did not exist at common law and should not be lightly exercised, and, of course the present application is but the preliminary to an appeal. Mr Shankar replies to that by saying first that the power of delegation is not restricted to ss. 70 and 71, but extends to all matters under the Criminal Procedure Code in which the Director of Public Prosecutions may have to act. I do not think that Mr Shankar is correct. To go no further than s. 74, I am sure that when that section provides that the Director of Public Prosecutions may appoint any barrister and solicitor to be a public prosecutor for the purposes of any case, it is not intended that a Crown Counsel holding an instrument of delegation under s. 72 should have the power to appoint a public prosecutor. It is a power that must be exercised by the Director of Public Prosecutions himself. Similarly in s. 244C of the Criminal Procedure Code a prosecution for an offence under the section shall not be instituted otherwise than by or with the consent of the Director of Public Prosecutions. I am sure that under this section Mr Shankar would have to exhibit somewhere along the

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line a document signed by the Director of Public Prosecutions himself. So also in s. 289 it is the Director of Public Prosecutions himself who is a party, and consequently when Mr Shankar begins his affidavit by saying " I am the petitioner on behalf of the Director of Public Prosecutions " etc.—he should say " The Director of Public Prosecutions is the petitioner " etc., and in the proviso to s. 289(1) although Mr Shankar might appear on an appeal against an order of acquittal, the petition of appeal would require to be signed by the Director of Public Prosecutions himself or some written authority would need to be given by him. Then Mr Shankar says that s. 85(5) of the Constitution of Fiji scheduled to the Fiji Independence Order 1970 is a general delegation of authority. That subsection reads :

> " The powers of the Director of Public Prosecutions under the preceding subsection may be exercised by him in person or through other persons acting in accordance with his general or specific instructions. "

I think it is simply the declaratory power of which s. 72 of the Criminal Procedure Code is the specific instance. But that is not the end of the matter. Mr Shankar informs me that he is a public prosecutor, and as such he has the powers conferred by s. 75 of the Criminal Procedure Code which, so far as is material reads :

> " A public prosecutor may appear and plead without any written authority before any court in which any case of which he has charge is under inquiry, trial or appeal ; and if any private person instructs a barrister and solicitor to prosecute in any such case the public prosecutor may conduct the prosecution, and the barrister and solicitor so instructed shall act therein under his directions. "

A public prosecutor, then, may conduct a case—for I think that the words ' appear and plead ' must include preparation of the necessary papers—up to appeal, and this permits him to make the necessary petition of appeal against sentence and likewise an application for enlargement of time within which to appeal. I think Mr Reddy's point fails.

I go on to consider his second objection, that successive applications cannot be made to the Magistrate's Court and the Supreme Court, and for this he relies upon a Fiji case decided by Lowe C.J. in 1958, *Isad Ali alias Nabi v. Reginam* [1958-9] F.L.R. 1. That was a decision construing what was then s. 321(1) but is now s. 296(1) of the Criminal Procedure Code. There an appellant applied to a Magistrate's Court for bail pending appeal, and his application being refused, he applied to the Supreme Court, and Lowe C.J. refusing the application held that the appellant must make an election, and having made his election must stand by it. I am not persuaded that the question of applications permitted to either a Magistrate's Court or the Supreme Court under the Criminal Procedure Code may not depend upon s. 293 which provides that upon receiving a petition of appeal the Magistrate shall forward it to the Supreme Court. Up to that time one would expect proceedings to be in the Magistrate's Court and thereafter in the Supreme Court. In this case, of course, no petition of appeal had been filed, so that the proceedings still remained in the Magistrate's Court. However, I do not think that an application for bail is analogous to an application for enlargement of time within which to appeal. The right to have an enlargement is hedged about with restrictions, e.g. there must be good cause, and I am extremely doubtful whether there is an appeal from a refusal to grant leave. There was no right of appeal, for instance, *in Lane v. Esdaile* [1901] A.C. 201 or in *Ex parte Stevenson* [1892] 1 Q.B. 609, although it is perhaps desirable to bear in mind that the purpose of making such a decision final is to discourage

frivolous appeals, which one would not anticipate from the Director of Public Prosecutions. I prefer to leave the point raised by Mr Reddy unanswered and assume in favour of the Director of Public Prosecutions (but without deciding that he is right) that there are two independent authorities. However, it will require a very strong case to induce this Court to give leave where a Magistrate has refused it.

Mr Reddy points out that time for appeal can only be enlarged ' for good cause ' and he submits that the prosecution has not made out good cause within the meaning of that phrase as used in s. 291(2) of the Criminal Procedure Code. Now, whatever the words ' good cause ' may mean, they certainly include the three things mentioned in s. 291(2) which has been previously set out. Mr Shankar's first difficulty is that he cannot bring himself within any of the matters referred to as ' good cause '. He has pointed out that the prosecution were not represented by a barrister and solicitor, but even if that were a good ground and I very much doubt if it is, seeing that the prosecution were represented by a police officer of their own choosing, it is certainly not true that for that reason the prosecution require further time for the preparation of their petition of appeal. But of course there may be other occasions of good cause. As Brey J. pointed out in *Hammond v. Jackson* [1914] 1 K.B. 241, 243, it is always difficult to distinguish between what is ' good cause ' and what is a matter for the discretion of the Judge. But however that may be, it is quite clear that a Court will require substantial reasons to be advanced before an extension will be granted. See *R. v. Lesser* (1939) 27 Cr. App. R. 69 and *R. v. Cullum* (1942) Cr. App. R. 150 *R. v. Jones* (1972) 56 Cr. App. R. 413. Now, what Mr Shankar puts forward as ' good cause ' here is that the suspended sentence is manifestly lenient and that there is a great disparity between the sentence imposed on Jikar Ali and that imposed upon the principal offenders, who, although Mr Shankar does not say so in his affidavit, were each sentenced to three years imprisonment. Perhaps the sentence may have been too lenient, but if it were so, there must be some explanation put forward in the affidavit in support as to why the prosecution did not appeal within the proper time, and there is none. Furthermore, of course, if it were unduly lenient then it was lenient before the disparity became evident, and I do not consider the disparity by itself is sufficient ground for interfering with a sentence which the prosecution did not consider sufficiently inadequate to merit an appeal within the proper time. Crown Counsel referred to two Fiji Criminal cases in which he said appeal proceedings had been taken long out of time. They were *Etuate Cama* (21 F.L.R. 9) and *Ulaiasi Verevou* (No. 78 of 1974). Etuate Cama and Ulaiasi Verevou were originally charged together for rape, the former being acquitted and the latter convicted. The conviction took place on 31st July 1974. He appealed and the Chief Justice on 23rd August 1974 expressed the opinion that Etuate Cama should not have been acquitted and the Director of Public Prosecutions then appealed against the acquittal. Presumably he would have to obtain leave to appeal, but nothing is said about leave in the report. However, it is clear that he acted promptly because the appeal against Etuate Cama was made on 2nd September 1974. I do not think these cases assist the applicant. For all the reasons I have given I consider that the application must fail and it is dismissed. I should perhaps add, that if the matter had been brought to the attention of this Court earlier, revision of Jikar Ali's sentence might have been considered.

Application for leave to appeal out of time refused.