THE STATE

v.

JOSEFA NATA

[COURT OF APPEAL, 1996 (Tikaram P, Casey, Thompson JJA) 17 May]

Criminal Jurisdiction

Magistrates' Courts- jurisdiction to make a supression order. Magistrates Courts Act (Cap 14) Section 46.

The Court of Appeal was asked to rule on whether a Magistrates' Court may order that the name of a party or witness be supressed. The Court HELD: that the Court's inherent jurisdiction to regulate its own procedure coupled with additional powers conferred upon it by the (English) Contempt of Court Act 1981 gave it the jurisdiction to prevent disclosure of publication of names if shown to be necessary for securing the due administration of justice. The jurisdiction is not to be exercised to spare the feelings of the parties or witnesses as for business or other reasons personal to them.

Cases cited:

Attorney General v Leveller Magazine Ltd [1979] A.C. 440; [1979] 1 All E.R. 745
Collier v Hicks (1831) 2 B & Ad 663
Ex parte Evans (1846) 9 QB 279
Governor of Lewes Prison ex parte Doyle [1917] 2 K.B. 254
R v Connelly [1964] A.C. 1254; [1964] 2 All E.R. 401
Taylor v Attorney General [1975] 2 NZLR 675

Interlocutory appeal from the High Court.

D. McNaughtan for the Appellant
I. Fa for the Respondent

Judgment of the Court:

The Director of Public Prosecutions appealed against a decision of Kepa J in the High Court on a question of law pursuant to s.22(i) of the Court of Appeal Act. The question posed is whether the Magistrates' Court in Fiji has jurisdiction to make a "Suppression Order"

The appeal comes to this Court in unusual circumstances. The Respondent pleaded guilty in the Magistrates' Court at Suva of assaulting the complainant causing her actual bodily harm. On 17 May 1994 he was discharged without conviction under s.44 of the Penal Code, subject to conditions that he pay $50.00 costs and that he not re-offend within 12 months. The learned Magistrate added: "I will in the interests of justice grant name suppression only and for public policy reasons". This was in response to counsel's request for suppression of publication of his client's name and the details of the case, to which the prosecutor raised no

objection.

A The State appealed to the High Court against these orders on the grounds that the sentence was manifestly lenient and that there was no provision in law for making a suppression order. Kepa J refused to interfere with the conditional order discharging the accused. He concluded, however, that while the Magistrates' Court had an inherent jurisdiction to order name suppression, it was not warranted in this case because it was not necessary for the due administration of justice: accordingly he quashed the order. The Respondent has no further interest in the B State's appeal and Mr. Fa (who acted for him in the courts below) submitted that at best it was an academic exercise only, and his own situation was essentially that of *amicus curiae* to assist the Court.

An appellate court will not normally entertain a criminal appeal when the issues relating to conviction and sentence have already been fully resolved. However, C Mr. McNaughtan submitted that s. 22 (1) of the Court of Appeal Act, allowing appeals on questions of law only, enables the State to challenge the High Court Judge's view that magistrates have an inherent power to make suppression orders. We have our reservations about using s.22(1) in this way, but the appeal raises an important point which it is desirable to have clarified. We are prepared to deal with it as if it were a question of law reserved by the Judge under s. 15 of the D Court of Appeal Act, but this is not to be regarded as a precedent for any other attempt under s.22(1) to obtain a decision on an academic question of law.

As noted by Kepa J, s. 67 of the Criminal Procedure Code authorises the court to exclude the public or any person, but there is no general statutory power in Fiji to order suppression of names or of their publication. There are specific provisions in different Acts. For example s.12(1) of the Juveniles Act (Cap. 56 E) prohibits publication of names or identifying particulars in respect of court proceedings involving juveniles. The court has power under s. 106(2) of the Matrimonial Causes Act (Cap.51) to suppress publication of the names of the parties and witnesses and other details relating to proceedings under the Act. There is also power under s. 257 of the Criminal Procedure Code to restrict F publication of committal proceedings.

Mr. McNaughtan submitted that because Parliament had not seen fit to extend the prohibition to criminal proceedings when it could have done so, the existence of a power to suppress publication should not be implied. However, this submission would not avail the State if in addition to such statutory powers courts have at common law an inherent jurisdiction to make such orders. The G position was aptly summarised by Master Jacob in the following passage from his lecture "The inherent jurisdiction of the Court" published in Current Legal Problems 1970 at p.24 and cited with approval by the New Zealand Court of Appeal in Taylor v Attorney General [1975] 2 NZLR 675:-

> ". ..... the term 'inherent jurisdiction of the court' is not used in contradistinction to the jurisdiction conferred on the court by statute. The contrast is not between the common law jurisdiction of the court on the one hand and its statutory jurisdiction on the other, for

> the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision." A

Magistrates' Courts are constituted by s.3(i) of the Magistrates' Court Act 1945 (Cap.14). Section 17 provides that:-

> "In the exercise of their criminal jurisdiction magistrates shall have all the powers and jurisdiction conferred on them by the Criminal Procedure Code, this Act or any other law for the time being in force." B

Section 20 provides:-

> "20. Every magistrate shall have power to issue writs of summons for the commencement of actions in a magistrates' court, to administer oaths and take solemn affirmations and declarations, to receive production of books and documents and to make such decrees and orders and issue such process and exercise such powers judicial and administrative in relation to the administration of justice, as shall from time to time be prescribed by any Act, or by rules of court, or, subject thereto, by any special order of the Chief Justice." C D

The practice and procedure of the court is dealt with in s.46 as follows:

> "46. The jurisdiction vested in magistrates shall be exercised (so far as regards practice and procedure) in the manner provided by this Act and the Criminal Procedure Code, or by such rules and orders of court as may be made pursuant to this Act and the Criminal Procedure Code, and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the county courts and courts of summary jurisdiction. E F

Section 22(1) of the Supreme Court (now High Court) Act 1876 (Cap. 13) declares that the common law in force in England on 2 January 1875 (the date when Fiji obtained a local legislature) shall be in force in Fiji. This does not mean that the law applicable in Fiji has become fossilised as at that date and that the courts cannot take account of subsequent developments. They do so on the rationale that legally they do not make the common law; they simply explain and expound a deeper understanding of what already exists. However, well before 1875 it was established that a court exercising judicial functions has an inherent power at common law to regulate its own procedure - see Halsbury (4th Edn) Vol 10 p.315 para 703, citing Ex parte Evans (1846) 9QB 279 and Collier v Hicks (1831) 2 B & Ad 663. G

Section 101(2) of the Constitution provides that no court shall be vested with jurisdiction save as is or may be conferred on it by the Constitution or by any other law. Section 168 continues in force all existing laws, which are to be construed in conformity with the Constitution. Accordingly s.22(1) of the High Court Act and ss.17, 20 and 46 of the Magistrates' Courts Act remain in force. The latter three say nothing about suppression orders, and it is necessary to enquire into what inherent jurisdiction these courts may have in this respect, and the limits on its exercise.

"Jurisdiction" is defined in the 4th Edition of Halsbury at p.323 para. 715 as "the authority which a court has to decide matters which are litigated before it or to take cognisance of matters presented to it in a formal way of decision". In Taylor v Attorney General (supra) at p.682 Richmond. J described this as jurisdiction in its primary sense, adding:-

> "But when one speaks of the "inherent jurisdiction" of the Court to make orders of the kind now in question the problem really becomes one of powers ancillary to the exercise by the Courts of their jurisdiction in the primary sense just described. Many such ancillary powers are conferred by statute or by rules of Court, but in so far as they are not so conferred then they can only exist because they are necessary to enable the Courts to act effectively within their jurisdiction in the primary sense."

This accords with the comments of Lord Morris in R v Connelly [1964] A.C. 1254; [1964] 2 All E.R. 401 at pp.1301; 409:-

> "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

The question for decision in the appeal was originally posed in Mr. MacNaughtan's submission in these terms:-

> "Whether a magistrate has inherent jurisdiction to order that the names of the defendants or witnesses should not be published at any stage in the criminal process, when the case is being heard in open court, in the absence of any statutory authority which would entitle him to do so."

During the argument he withdrew the reference to witnesses.

In Taylor v Attorney General the New Zealand Court of Appeal held that the Supreme Court possessed an inherent jurisdiction to prohibit publication of

anything that might lead to the identification of a Security Service witness, having given a direction that he be described by a letter or symbol at the trial. Kepa J relied on this decision to support his conclusion that the Magistrates' Courts in Fiji have a similar jurisdiction to order name suppression. However, in Attorney General v Leveller Magazine Ltd [1979] A.C. 440; [1979] 1 All E.R. 745, the House of Lords withheld its approval of Taylor. That case involved an appeal by the publisher of the "Leveller" Magazines and others against findings of criminal contempt arising from their disclosure of the identity of a witness in committal proceedings. The examining magistrates had ruled that he should be referred to as 'Colonel B', his real name being written and disclosed only to counsel and the Court. They made no order prohibiting publication outside.

The opinions of their Lordships are adequately summarised in the following extract from the headnote at p.745 All E.R:-

> "(i) (per Lord Diplock, Viscount Dilhorne, Lord Edmund-Davies and Lord Scarman) In exercising its control over the conduct of proceedings being heard before it, a court was entitled to derogate from the principle of open justice by sitting in private or permitting a witness not to disclose his name when giving evidence if it was necessary to do so in the due administration of justice, and where a court adopted the latter procedure and took steps to preserve the anonymity of a witness, an attempt to frustrate the actions of the court by publishing his identity was capable of being a contempt if it interfered with the due administration of justice, but in the absence of such interference merely running counter to a direction of the court was not of itself enough to make the publication a contempt of the court.
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> (3)...Per Viscount Dilhorne and Lord Edmund-Davies; Lord Russell contra; Lord Diplock leaving the matter open. A court does not have power to make an order directed to and binding on the public *ipso jure* as to what might lawfully be published outside the courtroom. Taylor v Attorney-General [1975] 2 NZLR 875 distinguished."

Viscount Dilhorne said at p.754 that there was no need to express any opinion on whether Taylor was rightly decided; it sufficed to say that Courts in England had no such power to make an order prohibiting publication, except when expressly given by statute. Lord Diplock at p.751 preferred to leave the conclusion reached in Taylor as an open question, while Lord Edmund-Davies did not mention that case but said at p.761 that "after considerable reflection he concluded that a court has no power to pronounce to the public at large such a prohibition that all disobedience to it would automatically constitute contempt."

What emerges from these opinions is a consensus that in England the only order

a court may make in these circumstances is one forbidding disclosure to the public in court of the identity of witness, if it was necessary to do so in the due administration of justice; and that disclosure outside the court could constitute contempt if it amounted to an attempt to frustrate the actions of the court in achieving the due administration of justice. This must be taken as the expression of the common law of England upon the subject.

The justification for the ability to afford this protection to witnesses arises from the courts' inherent power to exclude the public (Governor of Lewes Prison ex parte Doyle [1917] 2 K.B. 254), confirmed by s.67 of the Criminal Procedure Code. An order that the name of a witness be withheld from the public in court was recognised in the Leveller case as being a less drastic means of ensuring the due administration of justice than ordering their exclusion. This reason prompting their Lordships to accept such a rule in the case of witnesses will support a similar restriction on the disclosure of a defendant's name, but again only if it is necessary in the wider interests of securing the due administration of justice.

This is a stringent test: the inherent jurisdiction is not one to be exercised to spare the feelings of individual parties or witnesses, or for business or other reasons personal to them.

The circumstances must be of such a nature that disclosure of their names to the public would threaten the administration of justice in the particular case, or in relation to cases which may be brought in future. Such considerations arise in cases of sexual assault or blackmail, where complainants may be discouraged from pressing charges because of the understandable fear of publicity, and this has always been recognised as a valid ground for protecting their identity. There may not be many cases where protection of a defendant's identity would be warranted on these principles. One example may be where he has assisted the police in the prosecution of other offenders. The knowledge that his name could be disclosed generally in court as an informer, with the risk of retribution against him, might well deter him and result in others being reluctant to help the authorities in future. Kepa J had no hesitation in finding that the suppression order made in the present case was not necessary for the due administration of justice or to serve the ends of justice, citing from comments in the Leveller and Taylor decisions.

This brings us to the direction in s.46 of the Magistrates' Courts Act cited above, providing that in default of any rules or legislation, jurisdiction regarding their practice and procedure shall be exercised "in substantial conformity with the law for the time being observed in England in the county courts and courts of summary jurisdiction". The inherent jurisdiction of those courts relating to the identity of witnesses and defendants will be that enunciated in the Leveller case. Since it was decided in 1979, however, the Contempt of Court Act 1981 has been passed, s.11 of which provides:-

"In any case where a court (having power to do so) allows a name

> or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

This statutory modification of the inherent jurisdiction exercisable at common law by the courts mentioned in s.46 has become part of "the law and practice for the time being observed in England" in those courts. A Fiji Magistrates' Court is required to act in substantial conformity with that law and practice and it may therefore make orders in accordance with s.11 of the Contempt of Court Act relating to publication of a name which, in the exercise of its inherent jurisdiction, it has ordered to be withheld from the public in court.

We are satisfied that this conclusion, which answers the question raised in the appeal, does not contravene the provision of s.13(1) of the Constitution protecting freedom to impart information. Sub-section (2) thereof provides that nothing done under the authority of any law shall be held to be inconsistent or in contravention of s.13, to the extent (inter alia) that it makes provision for the purpose of maintaining the authority and independence of the courts. The power of the court to exercise its inherent jurisdiction in the manner accepted in this judgment clearly accords with that purpose.

For the foregoing reasons we hold that a Magistrates' Court in Fiji has jurisdiction to make a suppression of name order in criminal cases, but only in accordance with the limitations adverted to in this judgment. We formally dismiss the appeal, and Mr. Fa is entitled to costs for his appearance and assistance to the court.

(Appeal dismissed.)