

ISIKELI KINI v STATE (AAU0041 of 2002S; HAA 0034 of 2002L)

COURT OF APPEAL — CRIMINAL JURISDICTION

5 BARKER, TOMPKINS and SCOTT JJA

22, 26 November 2004

10 **Practice and procedure — appeal — whether the Appellant had constitutional right of appeal on a question of fact or a question of law or of mixed fact and law — Constitution of the Republic of Fiji ss 2(1), 28(1)(l), 29, 29(1), 121(3).**

15 On 15 February 2002, the Appellant was convicted of four offences in the Magistrates Court for the crimes of conspiracy to commit a felony namely larceny, official corruption and abuse of office. The Appellant who was a 54-year-old first offender had been the Chief Executive Officer of the Housing Authority. He was convicted with five others who were described by the resident magistrate as holding high office and positions of trust. The Appellant was sentenced to an immediate term of 12 months' imprisonment.

20 The Appellant and his co-accused appealed to the High Court against their conviction and sentence under s 308(1) of the Criminal Procedure Code. However, the High Court dismissed the appeal.

On 2 September 2002 the Appellant filed a petition of appeal to Court of Appeal and then filed an amended petition on 1 October 2004.

25 On 22 October 2004, the Respondent sought dismissal of the appeal on the ground that it did not raise a question of law. In answer to the Respondent's motion, the Appellant submitted that: (a) the Appellant had a constitutional right of appeal on a question of law and on a question of fact or a question of mixed law and fact; and alternatively; (b) that the petition of appeal raised a question of law.

On 17 November 2004, the Respondent's motion was referred by the President to the Full Court for determination.

30 **Held** — (1) According to the Court of Appeal Act s 22(1), an appeal can be brought to the Court of Appeal only on a question of law. Rule 35(4) of the Court of Appeal Rules, requires that the Applicant's petition precisely specify this question of law. The Appellant was unable to precisely state such a question of law, except to say that the question was whether or not the Appellant had received a fair trial. The ground of appeal advanced, and the written submissions supporting it did not raise a question of law alone and therefore
35 the Appellant's first submission failed.

(2) Section 29(1) of the Constitution of the Republic of Fiji grants every person charged with an offence the right to a fair trial. Section 29(1) deals with trials and an appeal is not the same thing as a trial. All rights of appeal are statutory, in this case governed by the Court of Appeal Act which requires a question of law. For this reason, the Appellant's
40 second submission also failed.

Appeal dismissed.

Cases referred to

Osea Palagi v R (Cr App 72/84); *Police v McNaughton* [1970] NZLR 889; *R v Jefferies* [1969] 1 QB 120; [1968] 3 All ER 238, cited.

45 *K. Vuataki* for the Appellant

A. A. Prasad for the Respondent

Barker, Tompkins and Scott JJA. On 15 February 2002 the Appellant was convicted of four offences in the Magistrates Court at Lautoka. They were:

- 50 (1) conspiracy to commit a felony namely larceny;
(2) official corruption; and

(3) abuse of office.

The Appellant who was a 54-year first offender had been the Chief Executive Officer of the Housing Authority. He was convicted with five others who were described by the resident magistrate as holding high office and positions of trust.

5 Their activities were described as a major fraud involving a public statutory body. The Appellant was sentenced to an immediate term of 12 months' imprisonment.

The Appellant and his co-accused appealed to the High Court at Lautoka against their conviction and sentence. They did so under the provisions of s 308(1) of the Criminal Procedure Code (Cap 21) which provides that:

10 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.

Section 308(3) specifies that:

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

Section 319 of the Criminal Procedure Code (the CPC) provides that on appeal the High Court may:

... confirm, reverse or vary the decision of the Magistrates' Court ...

20 While the Appellant had represented himself for at least part of the trial in the Magistrates Court (which, with short interruptions ran from 15 January to 11 December 2001) he was represented by counsel (Mr Sheik Shah) at the hearing of the appeal which took place over three days, 14–16 August 2002.

25 On 21 August 2002 the High Court (Govind J) delivered its judgment. All the appeals against conviction were dismissed. The sentence of 12 months' imprisonment imposed on this Appellant was confirmed.

On 2 September 2002 the Appellant in person filed a petition of appeal to this court.

30 On 1 October 2004 the Appellant, who was by now represented by Mr Vuataki, filed an amended petition of appeal.

The only ground of appeal now advanced is that:

35 The Learned High Court Appellate Judge erred in law in finding at page 19 of his Judgment "that there was sufficient evidence to convict the Appellant" without considering whether evidence was properly admitted, whether proper weight was given to uncorroborated evidence, whether benefit of reasonable doubt was given to the Appellant and the Learned Magistrates non consideration of evidence that supported non conviction in the following particulars:

There then followed eleven paragraphs of particulars, only the last of which suggested that the judge had erred.

40 On 22 October 2004 the Respondent filed a motion seeking to have the appeal dismissed on the ground that it did not raise a question of law.

On 10 November 2004, the Appellant filed submissions in answer to the Respondent's motion. They were:

45 (a) that the Appellant had a constitutional right of appeal on a question of law and on a question of fact or a question of mixed law and fact; alternatively

(b) that the petition of appeal raised a question of law.

On 17 November 2004 the Respondent's motion was referred by the President to the Full Court for determination.

50 Mr Vuataki first suggested that the Appellant's petition did in fact raise a question of law. Section 22(1) of the Court of Appeal Act (Cap 12) provides:

Any party to an appeal from a Magistrates' Court to the High Court may appeal under this part against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of law which involves a question of law only.

5 Rule 35(4) of the Court of Appeal Rules requires the notice of appeal precisely to specify the question of law upon which the appeal is brought.

In *Osea Palagi v R* (unreported, Crim App 72/84), the Court of Appeal explained that an appeal pursuant to s 22 is prima facie an appeal against the decision of the High Court. However, in the most exceptional circumstances, the Court of Appeal has jurisdiction to go behind the High Court's decision to
10 consider the conduct of the case in the Magistrates Court.

Unfortunately we were not provided with a copy of the grounds of appeal filed in the High Court by the Appellant but the matters complained of by him were summarised on pp 18 and 19 of the High Court's judgment.

When asked precisely to state the question of law upon which the
15 determination of this court was sought, Mr Vuataki did not refer to the particulars of his ground of appeal. All of these, as has been noted, with one exception, referred to mistakes said to have been made by the magistrate rather than by the High Court judge with whose judgment this court is primarily concerned. Instead, counsel suggested that the question of law which needed to be answered
20 was whether the Appellant had had a fair trial.

In our view, a question framed in these general terms does not comply with the Act or the Rules. Where a question of law is raised, the findings of fact, the conclusions at law and the precise question of law raised must be placed before the court so that the court can readily ascertain what is at issue: see, for example,
25 *Police v McNaughton* [1970] NZLR 889.

The High Court had the benefit of a careful and comprehensive judgment delivered by the resident magistrate. The judgment deals with each of the matters of law raised by the Appellant in his grounds of appeal. As is apparent from the High Court's judgment, the reasons given by the resident magistrate for arriving
30 at his conclusions were examined by the High Court and found to be without error.

Unlike the Criminal Procedure Code which gives an Appellant a right of appeal on a question of fact, a question of law or a mixed question of both, the Court of Appeal Act is clear: the appeal must raise a question of law only. In
35 our view the ground of appeal presently advanced and the written submissions filed in its support clearly raise mixed questions of fact and law and accordingly do not raise a question of law alone. Mr Vuataki's first submission fails.

Mr Vuataki's second submission was dependant on s 29(1) of the Constitution. This reads:

40 Every person charged with an offence has the right to a fair trial before a Court of Law.

Mr Vuataki might also have referred to s 28(1)(l) which provides:

45 Every person charged with an offence has the right if found guilty to appeal to a higher court.

Mr Vuataki pointed out that s 2(1) of the Constitution states that the Constitution is the Supreme Law of Fiji and that therefore, all other legislation, the Court of Appeal Act included, is subject to its provisions. We agree but the question here is not whether the Constitution is supreme but whether there is a
50 conflict between the rights protected by the Constitution and the restrictions on appeal contained in the Court of Appeal Act.

This was a case where the Appellant was tried in the Magistrates Court. The CPC permitted him to appeal to the High Court on mixed questions of law and fact. He did so. He exercised the right conferred on him by s 28(1)(l) of the Constitution and by s 308 of the CPC.

5 Although it does not seem that the Appellant specifically referred to the Constitution in his appeal to the High Court, his general complaint was that his trial was unfair: in other words, that he did not have the fair trial to which he was entitled under s 29 of the Constitution.

10 It need hardly be stated that a trial is not the same thing as an appeal. Section 29(1) is concerned with trials, not with appeals.

It must also be remembered that there is no common law right of appeal and therefore, that all rights of appeal are statutory (see *R v Jefferies* [1969] 1 QB 120; [1968] 3 All ER 238).

15 Mr Vuataki appeared to be suggesting that the undoubted right to have one's appeal heard and disposed of fairly implied a right of appeal not only on a question of law but also a mixed question of law and fact.

We are satisfied that this submission overlooks s 121(3) of the Constitution which reads:

20 the Parliament may provide that appeals lie to the Court of Appeal as of right or with leave ... from other judgments of the High Court in accordance with such requirements as the Parliament prescribes.

25 Parliament has prescribed that s 22(1) of the Court of Appeal Act governs appeals from the High Court in its appellate jurisdiction and that such appeals are to be based on grounds of appeal involving a question of law only. Mr Vuataki's second submission must therefore fail.

Result

The appeal is dismissed.

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Appeal dismissed.

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