## ELIKI MOTOTABUA v STATE (AAU 0021 of 2006S)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, BARKER and HENRY JJA

10, 14 July 2006

**Courts and judicial system — judges and magistrates — recusal — apprehended bias — Constitution of the Republic of Fiji s 29(3) — Criminal Procedure Code ss 308(1), 308(6), 308(8).**

Two charges of possession of dangerous drugs were filed against the Appellant on 4 February 2003 in the Magistrates Court of Nausori. The Appellant entered a not guilty plea. There were multiple delays due to unavailability of a magistrate, a prosecutor being on leave and an injury of the Appellant. On 6 July 2004, the Appellant applied for a stay of the proceedings on the ground of unreasonable delay and on 9 September 2004, the magistrate refused the stay. The Appellant then sought to have the magistrate excuse herself on the grounds that she has previously convicted and sentenced the Appellant to non-suspended imprisonment, that she was biased and that she had refused the Appellant his right to counsel. The magistrate dismissed the application.

The Appellant then sought to appeal to the High Court against both decision of the magistrate, by letters to the chief registrar in October and November 2005. He elaborated his grounds and also raised s 2 of the Constitution to support his claim unreasonable delay.

No explanation was given for the delay in processing the appeal between 15 October 2004 and 23 January 2006. In the High Court, Winter J held that he had no jurisdiction to entertain the appeal because s 308(1) of the Criminal Procedure Code did not permit appeals from the types of interlocutory orders made by the magistrate. He held that neither an application for stay nor an application for recusal could result in a decision contemplated by the words "judgment, sentence or order" in s 308(1) following *Asgar Ali v R* and *Lauzik Mukesh Chand s/o Muni Deo v State*.

The Appellant obtained leave from Ward P to appeal on a point of law namely, whether the High Court was competent to hear his appeal from the magistrate's decisions.

**Held** — The learned judge was apparently not referred to the latter decision of the court in *Ratu Ovini Bokini v State*. There the court analysed the effect of amendments to s 308 effected by the addition of three subss (6)–(8) by an amending Act in 1998.

The court preferred to follow the *Bokini* decision. For the sake of completeness, the Court of Appeal noted that s 308(6) has since been repealed. However, that appeal does not affect the view taken in *Bokini*. Counsel for the State very properly conceded that *Bokini* applied and that the appeal would have to be allowed. Accordingly, the appeal against the magistrate's refusal to excuse herself is remitted to the High Court for a determination on the merits.

The Appellant sought to argue that the charges against him should be dismissed on the grounds of delay, alleging that his constitutional right to a speedy trial had been infringed. The judge in the High Court considered that there was no right of appeal against the magistrate's refusal to stay on the grounds of delay for the same reason as he considered there was no right for appeal against her failure to excuse herself.

On the liberal *Bokini* view, the court has taken on the right of interlocutory appeal, there would be a right of appeal to the High Court from the magistrate's decision not to grant a stay on the grounds of delay. The High Court judge would have to disallow the appeal because the subject matter was constitutional redress. Application for such redress even in a criminal matter has to be made to the High Court in its special constitutional jurisdiction. Thus, the Appellant would have two choices. He can apply to the High Court for constitutional relief based on alleged delay under the special procedure. Alternatively, if convicted, he can include excessive delay as a ground of appeal against conviction.

Appeal allowed.

**Cases referred to**

*Ratu Ovini Bokini v State* [1999] 45 FLR 273, applied.

*Asgar Ali v R* [1964] 10 FLR 235; *Lauzik Mukesh Chand s/o Muni Deo v State* [1999] FJCA 12; *Singh v Director of Public Prosecutions* [2004] FJCA 37, cited.

Appellant in person

*A. Driu* for the Respondent

**Ward P, Barker and Henry JJA.**

**Introduction**

**[1]** The Appellant was charged in the Magistrates Court at Nausori on 4 February 2003 on two charges of possession of dangerous drugs. On that date, he appeared in court and entered not guilty pleas.

**[2]** Between that date and 6 July 2004, there were mentions in court and adjournments. Delays were caused by various factors, including non-appearance of prosecution witnesses, unavailability of a magistrate, a prosecutor being on leave and an injury to the Appellant. On 6 July 2004, the Appellant applied to the resident magistrate, Nausori for a stay of proceeding on the ground of unreasonable delay.

**[3]** On 9 September 2004, the magistrate issued a decision refusing the stay. She was not satisfied that there had been unreasonable delay in disposing of the case.

**[4]** On 12 October 2004, the Appellant sought to have the magistrate excuse herself on the grounds that she had convicted and sentenced the Appellant to non-suspended imprisonment on a previous occasion. He claimed as an additional reason for bias, that she had refused him his right to counsel.

**[5]** On 15 October 2004, in a written decision the magistrate dismissed the application that she disqualify herself from hearing the charges against the Appellant.

**[6]** The Appellant then sought to appeal to the High Court against both decisions of the magistrate. By letters to the chief registrar in October and November 2005, the Appellant elaborated on his grounds for appealing the magistrate's decision. He also raised s 29(3) of the Constitution in support of his claim of unreasonable delay.

**[7]** No explanation was given to this court or to the High Court for the delay in processing the appeal between 15 October 2004 and 23 January 2006 when it came before Winter J for hearing in the High Court.

**[8]** Winter J held that he had no jurisdiction to entertain the appeal because s 308(1) of the Criminal Procedure Code did not permit appeals from the types of interlocutory orders made by the magistrate. He held that neither an application for stay nor an application for recusal could result in a decision contemplated by the words "judgment, sentence or order" in s 308(1). He followed *Asgar Ali v R* [1964] 10 FLR 235 at 237 (*Asgar Ali*) and *Lauzik Mukesh Chand s/o Muni Deo v State* [1999] FJCA 12 (*Lauzik Mukesh Chand*).

**[9]** The learned judge was apparently not referred to the later decision of this court in *Ratu Ovini Bokini v State* [1999] 45 FLR 273 (*Bokini*). There, this court analysed the effect of the amendments to s 308, effected by the addition of three subss (6)–(8) by an amending Act in 1998. This court referred to the authorities

prior to the amendment which had reached differing conclusions on the extent of the appeal right under s 308(1). The court observed that these varying interpretations would have been known to the legislature when it passed the 1998 amendment.

**[10]** The Appellant obtained leave from Ward P to appeal to this court on a point of law namely, whether the High Court was competent to hear his appeal from the magistrate's decisions.

**[11]** In *Bokini* this court said:

> The intention of the legislature in adding subsections (6) to (8) of s 308 must have included:
>
> (a) a desire to clarify the law regarding appeal rights in bail applications — a matter discussed by this Court in *Southwick's* case.
>
> (b) a desire for clarification of the categories of orders of Magistrates which could be the subject of appeal, given the circumstances of conflicting Court of Appeal decisions.
>
> In the new subsection 308(8), the Legislature made it clear that an "order" can be appealed against although there has been no conviction. Obviously, this subsection could apply in a situation where an accused has been found guilty but discharged without conviction — not uncommon fate for first offenders on less serious charges, for example. But the words of the amendment are not restricted to those sorts of situation. They enhance s 308(1) which speaks of any "order", a word which one interpretation had restricted to final order. The opening words of s 308(7) reflect the notion that he categories of sentence and order embraced by s 308(1) are wide. We see no warrant for reading down the statute and hold that this order in question of the Chief Magistrate (ie the order refusing to disqualify himself) is susceptible to an appeal under s 308 of the CPC, even though it was made in committal proceedings.
>
> We are not impressed with the "floodgates" argument that interlocutory appeals in criminal matters will increase because of this interpretation. We have sufficient faith in High Court Judges to deal swiftly and severely with frivolous appeals against Magistrates' interlocutory orders, brought merely to buy time or to obstruct the criminal process. Only interlocutory appeals with the degree of seriousness demonstrated by this case should be entertained. Accordingly, we agree with Byrne J that the High Court had jurisdiction to hear the appeal under s 208 of he Criminal Procedure Code.

**[12]** The court in *Bokini* was not referred to *Lauzik Mukesh Chand* which was decided on 12 February 1999, only some 5 months after the amendments to s 308 came into force on 17 September 1998. It is not apparent from the judgment of the court in *Lauzik Mukesh Chand* what was the date when the High Court had made the order from which an appeal had been sought to have been brought. Chand had been discharged without conviction by a magistrate. A High Court judge, on an appeal by the state against sentence, convicted him and imposed a suspended sentence of imprisonment. In this court, it was submitted that the judge had no power to entertain the appeal because the magistrate had made an order and not imposed a sentence. The court followed *Asgar Ali*, interpreting the words "order" as *"an order in the nature of determining the case"*. Hence, this court held that the High Court could entertain the appeal.

**[13]** Section 308(8) clearly states that an order by a magistrate "*may be the subject of an appeal to the High Court, whether or not the Court has proceeded to a conviction in the case*". That subsection and indeed the whole of the 1998 amendment — was not referred to in the court's judgment in *Lauzik Mukesh Chand.* So this court prefers to follow the *Bokini* decision. For the sake of completeness, we note that s 308(6) has since been repealed. However, that appeal does not affect the view taken in *Bokini*.

**[14]** Counsel for the State very properly conceded that *Bokini* applied and that the appeal would have to be allowed.

**[15]** Accordingly, the appeal against the magistrate's refusal to excuse herself is remitted to the High Court for a determination on the merits.

**[16]** The Appellant sought to argue that the charges against him should be dismissed on the grounds of delay, alleging that his constitutional right to a speedy trial had been infringed.

**[17]** The judge in the High Court considered that there was no right of appeal against the magistrate's refusal to stay on the grounds of delay for the same reason as he considered there was no right for appeal against her failure to excuse herself.

**[18]** Technically, on the liberal *Bokini* view we have taken on the right of interlocutory appeal, there would be a right of appeal to the High Court from the magistrate's decision not to grant a stay on the grounds of delay. However, the High Court judge would have to disallow the appeal because the subject matter was constitutional redress. Application for such redress even in a criminal matter, has to be made to the High Court in its special constitutional jurisdiction. See *Singh v Director of Public Prosecutions*, a decision of this court of 16 July 2004 ( [2004] FJCA 37).

**[19]** The Appellant would have two choices. He can apply to the High Court for constitutional relief based on alleged delay under the special procedure. Alternatively, if convicted, he can include excessive delay as a ground of appeal against conviction.

**[20]** The appeal is allowed. The High Court is directed to hear on the merits, the Appellant's appeal against the decision of the magistrate of 15 October 2004 refusing to disqualify herself. The High Court has jurisdiction to hear the appeal against refusal to stay, but cannot give relief for the reasons given above.

*Appeal allowed.*