

FORAETE EPINISI JIONE v STATE (Misc0013 of 2006S)

SUPREME COURT — MISCELLANEOUS JURISDICTION

5 FRENCH, HANDLEY and IPP JJ

10 October 2006

10 **Criminal law — appeals — error of law — Constitution of the Republic of Fiji ss 119, 122(1) — Bail Act 2002 ss 30(5), 30(6) — Supreme Court Act ss 7(2), 8, 11.**

15 The Petitioner’s application, designated as a petition of appeal, sought the reversal of the concurrent and unanimous decisions of Ward P and the Full Court of the Court of Appeal refusing the Petitioner’s application for bail pending the hearing of his appeal to that court from his conviction and sentence by the High Court. The Petitioner did not establish that Ward P made any error of law, principle, or fact, in his exercise of the discretion, or that the Full Court erred in their review of Ward P’s decision. The issue was whether there was error shown in the exercise of the discretion by Ward P and the Court of Appeal.

20 **Held** — (1) There was no error shown in the exercise of the discretion by Ward P and the Court of Appeal and there was no ground for interfering with the decisions of Ward P and the Full Court of the Court of Appeal.

25 (2) The Constitution did not confer any jurisdiction on the Supreme Court to entertain an appeal from the decision of a Magistrates Court or of the High Court and only permitted an appeal by special leave from a final decision of the Court of Appeal. The Supreme Court had power to grant bail pending the hearing of an appeal to that court. The power being within the general powers of the court to make interlocutory orders incidental to such an appeal that were conferred or recognised by ss 8 and 11 of the Supreme Court Act. The power was original and not appellate, and was not available where the pending appeal was to the Court of Appeal.

30 Application dismissed.

Case referred to

House v R (1936) 55 CLR 499; 10 ALJR 202, cited.

Petitioner in person

35 *R. Gibson* for the Respondent

[1] **French, Handley and Ipp JJ.** This application, designated as a petition of appeal, seeks the reversal of the concurrent and unanimous decisions of Ward P and the Full Court of the Court of Appeal refusing the Petitioner’s application for bail pending the hearing of his appeal to that court from his conviction and sentence by the High Court.

40 [2] An appellate court grants bail to a convicted prisoner only in exceptional circumstances and an application for bail pending the hearing of an appeal invokes a judicial discretion. An appellate court, asked to review a decision made in the exercise of a judicial discretion, does not automatically re-exercise the discretion, but only intervenes if the exercise of the discretion by the primary judge miscarried. The principles which guide an appellate court in reviewing a discretionary decision are well-established, being set out by the High Court of Australia in *House v R* (1936) 55 CLR 499 at 504–5; 10 ALJR 202.

50 [3] The Petitioner has not established that the president made any error of law, principle or fact, in his exercise of the discretion or that the Full Court erred in their review of the president’s decision. The petition must therefore fail.

[4] A Petitioner seeking special leave to appeal to this court in a criminal case normally has to establish more than just error on the part of the Court of Appeal. Section 7(2) of the Supreme Court Act provides:

- 5 In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless—
- (a) a question of general legal importance is involved;
 - (b) a substantial question of principle affecting the administration of criminal justices is involved; or
 - 10 (c) substantial and grave injustice may otherwise occur.

[5] If the present “*petition*” had been intended as a special leave petition, none of these conditions could have been satisfied in this case. However on 25 September the Director of Public Prosecutions for the first time took an objection to the competency of the petition based on the Constitution. 15 Section 122(1) of the Constitution provides that this court has jurisdiction “*to hear and determine appeals from all final judgments of the Court of Appeal*”. A decision refusing bail pending the hearing of an appeal is not a final judgment because it does not finally determine whether the appellant is entitled to be liberty. It is an interlocutory judgment.

20 [6] In this case, the Petitioner relies upon s 30 (5) of the Bail Act 2002 which provides:

The Supreme Court may review any decision of a Magistrate, the High Court or the Court of Appeal, in relation to bail.

25 There is a question about the scope of the word “*review*”. In our opinion it does not, in this context, extend to review on “*the merits*” of bail decisions of lower courts. Error in the exercise of the discretion to grant or refuse bail must be shown. A less constrained approach would be inconsistent with the otherwise confined jurisdiction of the Supreme Court in the exercise of its appellate 30 functions and its role as the final appeal court.

[7] The Constitution does not confer any jurisdiction on the Supreme Court to entertain an appeal from the decision of a magistrate or of the High Court and only permits an appeal by special leave from a final decision of the Court of Appeal. This may be one of the situations contemplated by s 30(6) of the Bail Act 35 which provides:

A court may not review a decision under this Part if the court is prohibited from making a decision in relation to the grant of bail by any other written law.

40 [8] The Supreme Court has power to grant bail pending the hearing of an appeal to that court, this power being within the general powers of the court to make interlocutory orders incidental to such an appeal that are conferred or recognised by ss 8 and 11 of the Supreme Court Act. This power is original and not appellate and is not available where the pending appeal is to the Court of Appeal.

45 [9] There may be a question whether s 30(5) of the Bail Act is inconsistent with s 122(1) of the Constitution and as such invalid and of no effect. However, before deciding that question finally this court would wish to have the benefit of full professional argument, which would have to take account of s 119 of the Constitution. There is also an argument that s 30(5) of the Bail Act confers a 50 separate grant of jurisdiction to the Supreme Court and that this is permissible under the Constitution.

[10] Since this court has formed the clear view that there is no error shown in the exercise of the discretion by Ward P and the Court of Appeal there is no ground for interfering with the decisions of Ward P and the Full Court of the Court of Appeal we dismiss the petition on that ground.

5

Application dismissed.

10

15

20

25

30

35

40

45

50