MUSKAN BALAGGAN v STATE (MISC0011 of 2012)

COURT OF APPEAL — MISCELLANEOUS JURISDICTION

CALANCHINI AP

11, 25 May 2012

Criminal law — jurisdiction — Court of Appeal — appeal against orders by High Court — order disqualifying counsel — order refusing application to transfer matter — whether Court of Appeal has jurisdiction to hear motion — whether final or interlocutory orders — whether Court of Appeal has jurisdiction to entertain appeal from interlocutory order made in course of criminal proceeding — no right of appeal — Administration of Justice Decree ss 7(1), 165 — Court of Appeal Act ss 3(2)(a), 3(3), 3(4), 21, 22, 35(1), 35(2) — Criminal Procedure Code ss 158(2), 188.

The appellant applied to the Court of Appeal for two orders made by the High Court to be quashed and set aside. The High Court had made an order disqualifying the appellant's counsel from acting for the appellant in the trial, and another ruling on the transfer of the matter.

Held –

(1) Criminal appeals to the Court of Appeal are restricted to the jurisdiction conferred by Part IV of the Court of Appeal Act. Under those circumstances, neither of the orders of the High Court come within s 21 of the Act.

(2) Where criminal proceedings are commenced in the High Court exercising its original jurisdiction and the matter proceeds to trial and the judge proceeds to pronounce judgment, that judgment is the final judgment. Every other application and every order made by the judge on the hearing of that application should be considered interlocutory.

(3) The order refusing the application to transfer the matter was made in a criminal proceeding, was interlocutory in nature and no appeal lies to the Court of Appeal. The disqualification order was an interlocutory order made pursuant to the court's jurisdiction to determine whether a legal practitioner, as an officer of the court, should be permitted to appear for the accused at the trial. No appeal lies to the Court of Appeal.

Appeals dismissed.

Cases referred to

R v Collins [1970] 1 QB 710; *Taylor v Attorney-General* [1975] 2 NZLR 675, applied.

The State v Khan and Singh (unreported Misc Action HAM 34 of 2003, 12 December 2003), cited.

Graham Southwick v The State (unreported criminal No 6 of 1999 delivered on 1 March 2002), considered.

Goundar v Minister for Health (unreported civil appeal No 75 of 2006, 9 July 2008); *R v Smith* [1974] 1 All ER 651, followed.

R. Chaudhry for the Appellant.

I. Whippy for the Respondent.

Calanchini AP. By an Amended Notice of Motion dated 2 May 2012 the Appellant applied to the Court of Appeal for the following orders:

> ***"1 The order for disqualification of Rajendra Chaudhry made by Goundar J on the 16th day of March 2012 be set aside and quashed and that Mr Chaudhry to be re-instated as counsel for the Applicant in the High Court matter Criminal Case No HAM 005 of 2012 and***

2 The ruling on transfer as made by Goundar J on 9 March 2012 be set aside and quashed and this matter be remitted to its proper jurisdiction being Lautoka so that the issue of transfer can be properly argued.'

The application was supported by an affidavit sworn on 21 March 2012 by Muskan Balaggan (the Appellant).

At the hearing of the motion Mr R Chaudhry appeared for the Appellant. I indicated to Mr Chaudhry that I was concerned that he was appearing in the proceedings before me sitting as a single judge of the Court of Appeal. Counsel submitted that the order made by the learned judge applied only to representation of the Appellant at the trial in the Court below. Although that submission, in my judgment, runs contrary at least to the spirit of the learned Judge's order, I permitted Counsel to make his submissions in order to expedite the hearing of the motion.

The Amended motion relates to an order made on 16 March 2012 by the learned Judge disqualifying Mr Chaudhry from representing the Appellant. The motion also relates to a refusal by the learned Judge in a ruling dated 9 March 2012 to order the transfer of the matter to the Lautoka Registry of the High Court.

The background to the orders may be summarised. On 31 January 2011 the Appellant was charged with a drug related offence in the Magistrates Court at Nadi. On 11 February 2011 the Appellant was granted bail upon an application by Mr Chaudhry. After granting bail the learned Magistrate transferred the case to the High Court. According to the material in the submissions filed by the Appellant, Mr Chaudhry did not object to the transfer order made by the learned Magistrate.

Subsequently, on 4 March 2011 the Appellant appeared in the High Court at Lautoka. The Court allowed the Appellant to remain on bail and permitted Mr Chaudhry to continue to act as her surety. Then on 26 May 2011 the Appellant applied to challenge the validity of the transfer order that had been made by the Magistrates Court on 11 February 2011.

On 13 June 2011 the Appellant lodged a complaint with the Fiji Police Force that she had been raped by Mr Chaudhry on numerous occasions while he was acting as her legal representative and surety in respect of her bail. However, on 4 July 2011 she withdrew her complaint and admitted that the allegation of rape was false.

On 8 July 2011 the High Court held that the transfer order was valid and dismissed the Appellant's application for it to be quashed.

On 4 August 2011 the Appellant pleaded guilty to a charge of giving false information to a public servant and was sentenced to two years imprisonment by the Magistrates Court. The Appellant is currently serving that sentence.

Sometime before 6 September 2011 the Judge handling the case in Lautoka necused himself and the proceedings were transferred to a Judge in Suva. A number of pre-trial hearings were held in Suva after September 2011 without any apparent objection to the transfer to the matter to Suva.

On 1 February 2012 the Appellant filed a motion seeking orders that (1) the transfer challenge dismissed by the High Court in Lautoka be reheard, (2) the transfer order made by the Magistrates Court be quashed and set aside and (3) the matter be remitted to the Magistrates Court to determine transfer and for election of court.

The application was heard on 29 February 2012 and in a written Ruling delivered on 9 March 2012 the High Court dismissed the Appellant's application.

It would appear that at some stage during the course of the proceedings referred to in the paragraph above, the learned Judge indicated that Mr Chaudhry had continued to represent the Appellant in the proceedings relating to the drug offences. As a result the High Court on its own motion considered whether Mr Chaudhry should continue to act or should be disqualified from acting as Counsel for the Appellant in the proceedings. In exercising its inherent jurisdiction to ensure that the Appellant received a fair trial, the High Court determined that Mr Chaudhry should be disqualified from acting for the Appellant in the trial relating to the drug offence.

There are two issues raised by the Amended Motion for my determination. First, the Appellant must establish that the Court of Appeal has jurisdiction to determine the application made by motion. Secondly, the Appellant must then establish the existence of an arguable point sufficient for me to grant leave to appeal to the Full Court. Since a single judge of the Court is authorized by s 35(1) to exercise certain powers of the Court of Appeal, it is clear as a matter of logic that if the Court of Appeal does not have the jurisdiction to hear the applications, then a single judge can not have the power to do so. Under s 35 (1) of the Act the jurisdiction of a single judge to determine an application for leave is dependent upon the jurisdiction of the Court to hear and determine the appeal.

So the crucial issue is whether the Court of Appeal has jurisdiction to hear the motion. There are two questions involved in that issue. The first question is whether the two orders under challenge were final or interlocutory orders. The second question is whether this Court has jurisdiction to entertain an appeal from an interlocutory order made in the course of a criminal proceeding.

Before discussing these two issues, it would be useful to recall the essential features of the jurisdiction of the Court of Appeal.

In *R v Collins* [1970] 1 QB 710 the Court of Appeal stated at 714:

> ***'A Court of Appeal created by statute has no jurisdiction beyond that which Parliament confers upon it.'***

This Court is a Court of Appeal created by the Court of Appeal Act Cap 12 (the Act). The jurisdiction of the Court of Appeal is set out in s 3 (2) (a) of the Act which provides:

> ***'The Court shall have power and jurisdiction to hear and determine all appeals which lie to the Court by virtue of the Constitution, this Act or of any other law for the time being in force.'***

Then, s 3 (3) of the Act sets out the general jurisdiction of the Court under the Act:

> ***"Appeals lie to the Court as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court."***

It is also necessary to refer to s 7 (1) of the Administration of Justice Decree 2009 (the Decree) which states:

> ***"The Court of Appeal has jurisdiction, subject to this Decree and to such requirements as prescribed by law to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by law."***

Therefore under the Court of Appeal Act the jurisdiction of the Court to hear and determine appeals is restricted to appeals which lie to the Court under the Act itself or any other Act. Pursuant to s 3(3) of the Act appeals lie as of right from final judgments given in the exercise of the original jurisdiction of the High Court. There are in that section three expressions which are significant in

determining the Court's general jurisdiction. The first is that *'appeals lie as of right.'* This expression is used to indicate that leave to appeal is not required. The second expression is '*from final judgments*.' This expression is used to indicate that appeals do not lie from interlocutory judgments. The third expression *'is the original jurisdiction of the High Court.'* This expression indicates that appeals do not lie when the High Court is exercising its appellate jurisdiction. The question of appeals from the High Court exercising its appellate jurisdiction is covered in s 3(4) of the Act.

Section 3(3) in effect provides that in respect of an appeal from a final judgment of the High Court exercising its original jurisdiction leave is not required.

Under the Decree the jurisdiction of the Court is expressed as a jurisdiction to hear and determine appeals subject to the Decree and to such requirements prescribed by law. The expression '*to such requirements prescribed by law'* can in effect be presumed to be a reference to the requirements prescribed by the Act itself. It is therefore necessary to identify the requirements prescribed by the Act.

Part IV of the Act is headed *'Appeals in criminal cases.'* Above s 21 is the heading *'Right of appeal in criminal cases.'* Under s 21 a person convicted on a trial held before the High Court may appeal to the Court of Appeal (a) against conviction on any ground of appeal involving a question of law alone, (b) with the leave of the Court of Appeal against conviction on any ground involving a question of fact alone or a question of mixed law and fact or any other ground which appears to be a sufficient ground of appeal and (c) with the leave of the Court against sentence passed on conviction. In addition with the leave of the Court a person may appeal against the decision of a High Court Judge refusing bail pending trial. Section 22 makes provision for appeals by the State.

Under s 21 the only right of appeal which is consistent with s 3 (3) is the right to appeal against conviction on a question of law. Being an appeal against conviction on trial it is a final judgment from the High Court exercising its original jurisdiction. Under s 21 leave is not required and is therefore as of right.

However under s 21 in respect of an appeal against conviction on a question of fact or mixed fact and law leave must first be obtained. Although a final judgment from the High Court exercising its original jurisdiction, the appeal is not as of right. Similarly, in respect of an appeal against sentence, although from a final judgment of the High Court exercising its original jurisdiction, leave is required.

Furthermore, the right to appeal under s 21 is restricted to a person convicted on a trial. There is an exception in that s 21(3) gives a right to appeal in respect of a decision by a High Court judge granting or refusing trial bail. Leave is required under s 21(3).

This would appear to be a case when it is necessary to apply the principle of statutory interpretation that an Act must be read as a whole. As a result, in my judgment, when the Act is read as a whole, it is clear that the general jurisdiction in s 3(3) of the Act must be regarded by necessary implication as having been qualified, so far as criminal appeals are concerned, by Part IV of the Act. In my judgment criminal appeals to this Court are restricted to the jurisdiction conferred by Part IV of the Act. Under those circumstances, neither of the orders of the learned High Court Judge come within s 21.

However Mr Chaudhry submitted that the general jurisdiction conferred by s 3(3) to determine appeals as of right from final judgments of the High Court given in the exercise of its original jurisdiction conferred on this Court

jurisdiction to determine the applications in the Motion. In other words criminal appeals were not limited to Part IV of the Act. There was a wider more general jurisdiction under s 3(3) of the Act.

Even if this submission can be regarded as the intention of the legislature, then it is still incumbent on the Appellant to establish that the decisions constituted final judgments of the High Court. This is necessary because, as previously stated, the Court of Appeal has no statutory powers beyond those conferred on it by the Act. There is no provision in Part IV of the Act that confers a jurisdiction on the Court of Appeal to hear interlocutory criminal appeals. Mr Chaudhry did not submit that the decisions were interlocutory nor that the Court had jurisdiction to entertain interlocutory appeals. The thrust of his submissions was that both decisions were final decisions.

Whether a decision or judgment is final or interlocutory is an issue which usually arises in civil proceedings. In criminal proceedings it is more readily assumed that the final decision or judgment is the decision of the Court which brings the criminal proceeding to a conclusion. In *Goundar v Minister for Health* (unreported civil appeal No. 75 of 2006 delivered on 9 July 2008) this Court stated at paragraph 37 and 38:

> ***"37 This is the position. When proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgments and orders are not interlocutory.' (ie they are final).***
>
> ***38 Every other application to the High Court should be considered interlocutory _ _ _."***

It is my view that, although the Court's decision in **Goundar** (supra) was delivered in the context of a civil appeal, the principle for distinguishing an interlocutory from a final decision can be applied to the criminal jurisdiction of the Court. As a result I would apply the test in this way. Where criminal proceedings are commenced in the High Court exercising its original jurisdiction and the matter proceeds to trial and the judge proceeds to pronounce judgment then that judgment is a final judgment. Every other application and every order made by the judge on the hearing of that application should be considered interlocutory.

As for the order refusing the application to transfer the matter to the Lautoka registry I have no hesitation in concluding (1) that the order made by the learned judge was made in a criminal proceeding, (2) was interlocutory in nature and (3) that no appeal lies to the Court of Appeal. In my judgment it is of no consequence that the issue of transfer arises pursuant to a statutory provision.

In relation to the decision to disqualify counsel from representing the Appellant at the trial, Mr Chaudhry referred to s 165 of the Decree which states:

> ***'Any person accused of an offence before any criminal court or against whom proceedings are instituted under this Decree in any court, may of right be defended by a lawyer.'***

This provision is in similar terms to s 188 of the now repealed Criminal Procedure Code. However, as Gates J (as then was) observed in *The State v Khan and Singh* (unreported Misc Action HAM 34 of 2003 delivered 12 December 2003) at paragraph 24:

> ***'That section does not go further and provide for a right of choice in the matter. But it cannot be doubted that all courts will strive to see that an accused person, so far as is possible and reasonable in achieving a fair trial, obtains the services of***

counsel of his choice. This is not an absolute right however. Rather it is one which must be weighed along with other often competing rights.'

Quite clearly there will be circumstances when an accused person will not be able to be represented by counsel of choice. For anyone of a number of reasons counsel of equal competence and ability may be required to represent the accused person at the trial. The scope of the court's inherent jurisdiction in this regard was explained by Cooke P in *Black v Taylor* [1993] 3 NZLR 403 at 406:

'As to those who may be allowed to represent parties to argue cases, the Courts have an inherent jurisdiction: see _ _ _. The jurisdiction extends to the propriety of a representative appearing in a particular case: it is not then a question of the right of practice generally, which is governed in New Zealand by statute, but a question concerning what is needed or may be permitted to ensure in a particular case both justice and the appearance of justice.'

Furthermore, Woodhouse J in *Taylor v Attorney-General* [1975] 2 NZLR 675 observed at 689 that the inherent jurisdiction of the Court:

'_ _ _ is part not of the substantive but of the procedural law _ _ _.'

In exercising the inherent jurisdiction of the High Court for the purpose of controlling the parties associated with the proceedings the learned Judge had made on 16 March 2012 an order in the course of litigation between the Appellant and the Respondent. It was an interlocutory order in a criminal proceeding. It was not a final order in the sense that it disposed of the litigation between the parties.

During the course of his submission on the question of jurisdiction Mr Chaudhry referred the Court to the decision of this Court in *Graham Southwick v The State* (unreported criminal No. 6 of 1999 delivered on 1 March 2002). In its decision the court considered the meaning of s 3(3) of the Court of Appeal Act. The court concluded that the order in relation to costs made by Pathik J at first instance *'was dispositive of the issue before him, ie the statutory application for costs: in that sense, it was final.'* In that case the Court of Appeal found that the judge at first instance was exercising the original jurisdiction of the High Court conferred on it by s 158(2) of the Criminal Procedure Code. This Court was satisfied that the requirements of s 3(3) had been established. However, the Court concluded that the grounds for an award of costs had not been made out under s 158(2) of the Code.

Section 158(2) of the Code (now reproduced in s 150(2) of the Decree) gave a discretion to a judge or magistrate who had acquitted or discharged a person accused of an offence to order the prosecutor to pay the accused reasonable costs. The only limitation expressed in the section was that an order would not be made unless the court considered that the prosecutor had no reasonable grounds for bringing the proceedings or had unreasonably prolonged the matter. The point is that an accused person has a right under statute to apply for costs if he is acquitted or discharged. Ordinarily reasonable costs will be awarded provided the court is satisfied that the prosecutor has no reasonable grounds for prosecuting or has been found to have unreasonably prolonged the prosecution. Such an order is made at the conclusion of the criminal proceeding upon acquittal or discharge. Whilst the order for discharge may be interlocutory, the order for costs was final.

By contrast the statutory right given under s 188 of the Code (now repealed) and s 165 of the Decree is a right to be defended by a legal practitioner. As noted earlier, it is not a right to be defended by a legal practitioner of choice. The Court is entitled to exercise its inherent jurisdiction in an appropriate case and order that a particular practitioner should not represent an accused person in the trial. It has

nothing to do with the ultimate disposition of the criminal proceedings. Unlike the order of the Judge at first instance in **Southwick** (supra), the decision of the learned Judge in the present proceedings was not final, but interlocutory.

As an interlocutory order made pursuant to the Court's inherent jurisdiction, the comments of Lord Denning MR in *R v Smith* [1974] 1 All ER 651 at 655 are relevant:

'So far as trials on indictment are concerned, the only remedy, so far as I can see, is that given by the (Act) to the criminal side of the Court of Appeal. There is given an appeal to a person convicted. _ _ _. He can appeal after he is convicted. But not before. It seems that there is no appeal against an interlocutory order: see *R v Collins* [1970] 1 QB 710. This may, at first sight, seem surprising, but in consideration, there is much to be said for it. The trial judge should have the final word on such matters as adjournments, joint or several trials, bail, particulars and so forth.'

I would add to that list transfer applications and legal representation.

'The only remedy is this, in case a trial judge should make a mistake on an interlocutory matter, such as to cause injustice, the (person) can appeal against conviction, and it will be taken into account at that stage: _ _ _. But, save in this way, there is no appeal to the Court of Appeal against an interlocutory order.'

The facts in that case are of some interest. The Court of Appeal considered an order made by the judge at first instance that the legal representative of the accused person personally pay the costs of the adjournment of the trial that was otherwise ready to commence. The following summary of the facts is taken from the headnote of the report of *R v Smith* (supra).

'At the opening of the trial before a criminal judge, counsel for the accused asked for an adjournment so that evidence could be taken by deposition from a witness who was too ill to attend her trial. The judge granted the application 'but' ordered those instructing counsel to personally pay the costs of both the prosecution and the defence (because of legal aid) thrown away by the adjournment. No application had been made by the prosecution for such an order and, in fact, the adjournment was not in any way due to the fault of the instructors.'

Interestingly, the appellants appealed to the Civil Division of the Court of Appeal against the order that they should pay the cost of the adjournment. The appeal was dismissed (1) because the appeal arose out of a criminal proceeding and (2) there was no right to appeal in respect of interlocutory orders made in a criminal proceeding.

The costs order made by the judge at first instance in the **Southwick** case (supra) can be distinguished from the cost order made in *R v Smith* (supra). In the **Southwick** case (supra) the costs order was made as a final order pursuant to a statutory right to apply for costs upon acquittal or discharge. The Court of Appeal noted that the judge at first instance had ordered that the Appellant Southwick be discharged. Section 158 (2) of the Code gave the right to apply for costs to those who had been either acquitted or discharged.

The order for costs in *R v Smith* (supra) was an order made before the trial commenced. It was made against the solicitors instructing Counsel for the accused person. It was made by the learned trial judge on his own motion. It was made pursuant to the court's jurisdiction to order a solicitor, as an officer of the court, personally to pay costs occasioned by his negligence.

The order made by the learned judge in the present matter was, in my judgment, an interlocutory order made pursuant to the court's jurisdiction to determine whether a legal practitioner, as an officer of the court, should be permitted to appear for the accused at the trial. The order can be made on the judge's own motion. Whether the learned judge was mistaken in making the disqualification order cannot be appealed to either the civil or criminal divisions of the Court of Appeal as an interlocutory appeal. It may form the basis of a ground of appeal in the event that the Appellant is convicted.

The motion was treated by the parties as an application for leave to appeal before a single judge pursuant to s 35(1) of the Act. In view of my conclusion that neither application in the motion comes within the jurisdiction of the Court of Appeal, I order that the appeals be dismissed pursuant to s 35(2) of the Act on the basis that there is no right to appeal.

Appeals dismissed.