IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Judicial Review No. 22 of 1984

R. v. DIRECTOR OF PUBLIC PROSECUTIONS

EX PARTE NARAYAN NARSAIYA

Mr. V. Parmanandam for the applicant
Mr. A. Gates for the respondent

J U D G M E N T

The applicant seeks an order of certiorari to remove into this Court and quash an order made by the Chief Magistrate on the 11th day of October, 1984, whereby he declined a request by the applicant to have his case dealt with by the Supreme Court. He also seeks an Order of Prohibition to prevent the Magistrate's Court from hearing and trying the case.

There are two grounds set out in the summons seeking the orders. They are :

1. That there is an error on the face of the record in that Section 3 Subsection 2 of the Criminal Procedure Code bestows a right upon an accused not charged under the Penal Code and whose right is not restricted by the Act under which he is charged for trial by the Supreme Court.

2. That the Learned Trial Magistrate wrongly exercised his discretion under section 224 of the Criminal Procedure Code in that he failed to forward the matter to the Supreme Court for trial bearing in mind that the matter is being prosecuted by the most senior prosecutor in the office of the Director of Public Prosecutions and the matter is being heard by the Chief Magistrate of Fiji and the accused has been bailed in the sum of $5,000.00 and his passport has been required to be surrendered and that the accused could be prejudiced in his defence if the trial took place in the Magistrate's Court because of the fact that the Income Tax Act

prohibits the production of a tax-payer's file except in a Court of law and that this production can be overcome by production of the file in a Preliminary Enquiry."

The applicant was charged with eight offences all of them contrary to Section 4(2)(b) of the Income Tax Act Cap. 201. A person found guilty of an offence under this section is liable on conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding three years or both such fine and imprisonment.

The applicant in the Magistrate's Court applied for trial in the Supreme Court. The Chief Magistrate after hearing argument considered the application and in a written Ruling he refused to entertain the application for the case to be heard by the Supreme Court which would have involved the Magistrate's Court in conducting a preliminary inquiry into the offences.

Mr. Parmanandam prefaced his argument by stating the instant case was an unusual one and he wished to raise some matters that were not strictly relevant. This was done without any objection from Mr. Gates but I do not consider this Court is called upon to comment on the desirablilty or otherwise of the applicant having a right to trial by the Supreme Court for offences of the nature with which he has been charged. What the Court is concerned with is whether the learned Chief Magistrate erred.

I have considered the authorities referred to by Mr. Parmanandam. In the main they contain dicta by appellate courts to the effect that the prosecution should not invite justices or magistrates to deal with serious offences summarily (R. v. Coe 1968 1 W.L.R. 1950, R. v. South Greenhoe Justices 1950, 2 All E.R. 42, R. v. Pitson 56 Cr. App.R.391.)

The alleged offences are felonies and the applicant is charged with eight counts of the same offence. In England such offences might be tried in a superior

extent but this Court is concerned with the legal position in Fiji.

The first ground raised by the applicant is that Section 3 subsection (2) of the Criminal Procedure Code bestows a right on an accused not charged under the Penal Code and whose right is not restricted by the Act to be tried in the Supreme Court.

Section 3 subsection (2) of the Criminal Procedure Code is as follows :

> " 3.(2) All offences under any other law shall be inquired into, tried, and otherwise dealt with according to the same provisions, subject, however, to any enactment for the time being in force regulating the manner or place of inquiring into, trying, or otherwise dealing with such offences."

This subsection has application in the instant case. Mr. Parmanandam's argument is that on the proper construction of this subsection read with Section 5, subsection (2) of the Criminal Procedure Code, a Magistrate must "inquire" into offences of the nature the applicant is charged with by way of preliminary inquiry. Section 5 subsection (2) provides as follows :

> "5. (2) When no court is so mentioned, it may, subject to the proviso to subsection (1) of section 4 and the other provisions of this Code, be tried by the Supreme Court, or by any magistrate by whom such offence is shown in the fifth column of the First Schedule to be triable."

Mr. Gates has suggested that there might be a typographical error in subsection (2) of Section 3.

In the first and second lines the words used are "inquired into, tried and otherwise dealt with" in the last two lines the "and" becomes "or".

If the use of the word "and" produces a meaning that all non penal code offences must be "inquired into"

by way of preliminary inquiry then there is in my view every justification for interpreting "and" as "or". As Scrutton L.J. in Green v. Premier Glynrhonwy State Co. (1928) 1 K.B. 561 said at page 568:

> "You do sometimes read 'or' as 'and', in a statute.....But you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or' ".

I do not consider it is necessary to interpret "and" as "or" in the subsection. The same words are used in section 3 subsection (1).

The word "inquire" does not connote a preliminary inquiry as required by section 224 of the Criminal Procedure Code.

That section provides as follows :

> "Whenever any charge has been brought against any person of an offence not triable by a magistrates' court or as to which the magistrate is of opinion that it ought to be tried by the Supreme Court or where an application in that behalf has been made by a public prosecutor a preliminary inquiry shall be held, according to the provisions hereinafter contained, by a magistrate's court, locally and otherwise competent."

It will be noted that C.P.C. 224 provides for three situations where a preliminary inquiry is held :

1. Where Magistrate Court has no jurisdiction.
2. Where Magistrate considers case should be tried by the Supreme Court and
3. Where a public prosecutor applies for the case to be tried in the Supreme Court.

An accused person has no right under Section 224 of the Criminal Procedure Code to ask for Supreme Court trial but there is nothing to stop him asking the Magistrate to order a preliminary inquiry.

In the instant case, the applicant did apply and if the Chief Magistrate had been persuaded that the offences

should have been tried by the Supreme Court he could have held a preliminary inquiry.

"Inquire" must be given its common meaning of "to make investigation, to search,seek to make inquisition ('inquisition' "a judicial investigation") (Shorter Oxford English Dictionary).

This sense of the word is also used in section 81(2) C.P.C. dealing with the form and contents of a summons.

The summons requires the person named therein to appear before a Court "having jurisdiction to inquire into and deal with the complaint and charge....."

In the instant case the applicant was summoned to appear before the Magistrate's Court.

Mr. Parmanandam also points out that the offences are not shown in the fifth column of the First Schedule. He points out that Section 5(2) refers to "such offence" indicating a specified offence.

The offences under the Penal Code are specified in the First Schedule but no specific mention is made of what may be called non-penal code offence or "other offences". The heading is :

> "OFFENCES UNDER OTHER LAWS WHERE NO SPECIFIC PROVISION IS MADE TO THE CONTRARY IN THOSE LAWS".

The fact that the offence is not specified is immaterial. The provision in the First Schedule covers <u>all</u> offences other than those under the Penal Code or where the law specifies otherwise. Subsection (2) of section 51 specifically empowers a Magistrate to try a case where the Fifth Schedule so specifies i.e. in this instance when maximum punishment is 3 years imprisonment with or without a fine.

The Chief Magistrate had jurisdiction to try the instant case and there is no merit in the first ground raised by the applicant.

The second ground raises the question of exercise of the Chief Magistrate's discretion.

Mr. Gates has referred to the case of R.N. Patel & Ors. v. Commissioner of Inland Revenue, C.A. 35 of 1984 where the Fiji Court of Appeal dealt with the question of exercise of discretion. The Court said at p.8:

> "And on the hearing and determination of the appeal, this Court cannot substitute its opinion on the question for that of the respondent. It can consider only whether he has allowed himself to be satisfied on a consideration of matters which are to be conveniently described as and encompassed in the phrase "extraneous and irrelevant considerations" (quote from McCormick v. Federal Commissioner of Taxation 1945 A.C. 71 C.L.R. 283) or by mistake."

There is nothing in the Record to indicate that the Chief Magistrate did not properly exercise his discretion. He had jurisdiction and the Prosecution furthermore had requested summary trial which it was legally entitled to seek.

The applicant has not made out a case for quashing the decision of the Chief Magistrate.

The application is dismissed with costs to the respondent.

(R.G. KERMODE)
J U D G E

S U V A,

28th JANUARY, 1985