

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 01 of 2018

BETWEEN : **ASIF ISMAIL**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. I. Khan for the Appellant.
: Mr. A. Singh for the Respondent.

Date of Hearing : 15 August, 2018

Date of Ruling : 22 August, 2018

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Lautoka for one count of Grievous Harm contrary to section 258 of the Crimes Act. It was alleged that the appellant with another on the 16th day of October, 2015 at Lautoka unlawfully and maliciously did grievous harm to Lalesh Kumar Deo.

2. The appellant pleaded not guilty and the matter proceeded to hearing. The prosecution called the complainant and the doctor whilst the defence called the accused and two other witnesses. In a judgment delivered on 27 December, 2017 the learned Magistrate found the appellant guilty and convicted him as charged.
3. The appellant being dissatisfied with the conviction filed a timely appeal against conviction.
4. Both counsel filed written submissions and also made oral submissions during the hearing for which the court is grateful.
5. When the matter was called in this court on 29 March, 2018 this court in the interest of justice and fairness asked both counsel to address the court on the issue of jurisdiction as well as the substantive appeal.
6. Both counsel addressed the court on the issue of jurisdiction and the grounds of appeal. The appellant's counsel handed his written submissions to court in respect of jurisdiction on the day of the hearing. The counsel for the respondent had addressed the issue of jurisdiction in his written submission filed in court.
7. The learned counsel for the appellant submitted that this court had the jurisdiction to hear the appeal filed although the appellant had not been sentenced in accordance with section 246 of the Criminal Procedure Act. Counsel further submitted that the ordinary meaning of section 246 was such that there was no bar to any appeal against conviction with no restriction under the law for an appeal to be filed after an accused was convicted by the Magistrates Court before sentence.

8. Counsel further argued that section 246 (7) of the Criminal Procedure Act did not mention any thing about sentence and was only confined to a finding of guilt of the accused person. Counsel stressed that it will be erroneous of this court to read into section 246 (7) the word “sentence” which was not intended by the legislature. Counsel relies on the Court of Appeal decision in *Republic of Fiji Military Forces v Qicatabua [2008] FJCA 119 (12 September, 2008)*.

9. For completeness the entire section 246 of the Criminal Procedure Act is reproduced:

246. — (1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

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

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs,

binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.

10. The learned counsel for the appellant states that section 246(1) and (7) of the Criminal Procedure Act takes into account situation where a person has been found guilty by the Magistrate's Court giving an immediate right of appeal.
11. In support counsel relies on the case of *State v Jitendra Prasad*, criminal case no. HAC 75 of 2017 (01 August, 2017) in particular the observations made by Aluthge J. at paragraphs 14 and 15 as follows:

Paragraph 14

"The State Counsel, having conceded that this Court had jurisdiction to exercise revisional powers on section 190 transfer, argues (at paragraph 7 of the submission) that the correct approach would be to address the appeal once the final sentence had been passed.

Paragraph 15

I am not inclined to accept this contention. This court, which is vested with powers to examine the records of court below, should not be blind to serious questions of law and fact to be addressed and, if the court find them to be meritorious, must exercise revisional jurisdiction to revise the proceedings of the court below and not sentence an accused on erroneous convictions."

12. In *Prasad's case (supra)* the accused had been convicted for one count of rape contrary to sections 149 and 150 of the Penal Code Cap. 17 (now repealed). On the application of the prosecution the matter was transferred to the High Court for sentencing.
13. Here the situation is different the accused has been found guilty by the Magistrate's Court but before he could be sentenced an appeal against his conviction was filed in this court. In view of the above, section 190 of the Criminal Procedure Act does not apply which was the main issue dealt with in *Prasad's case*. Furthermore, the circumstance in which the Petition of Appeal has been filed does not allow this court to exercise its revisional jurisdiction to revise the proceedings of the court below as argued by the appellant's counsel. Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed (section 262 (5) Criminal Procedure Act).
14. In *S v Recorder of Manchester & Ors [1971] A.C.481*, Lord Upjohn observed (at page 506):

"...Put in another way, there is no decision until sentence, see Reg. v. Essex Justices, Ex parte Final [1963] 2 Q.B.816.

But the word "conviction" is used also in a secondary sense, that is, to express a verdict of guilty or acceptance of a plea of guilty before the adjudication which is only completed by sentence..."

15. Section 246 (1) begins with the following:

"Subject to any provision of this Part to the contrary..."

16. The above sentence states that section 246 (1) is subject to any provision in *Part XV – Appeal from Magistrates Courts* which includes the entire section 246 of the Criminal Procedure Act. Section 246 (7) specifically states that “no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person”.
17. In my view section 246 (7) literally means an accused person’s guilt is not finally determined until that accused is sentenced. The entering of a conviction is a step towards finality of guilt but not the final determination of guilt. It is only when an accused is sentenced that his or her guilt is finalized not before that. This provision should be given a wide interpretation to achieve its purpose which is to consider appeals from the final determination of a matter in the Magistrates Court.
18. Cooke J. said in *Reid v Reid [1979] 1 NZ LR 572 at 594* that the literal rule of interpretation was defined and explained by *Higgins J. in Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129 at p. 161-162* as follows:

“The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.”

19. For the above reasons, the Petition of Appeal filed by the appellant is premature and is not properly before the court. This court therefore has

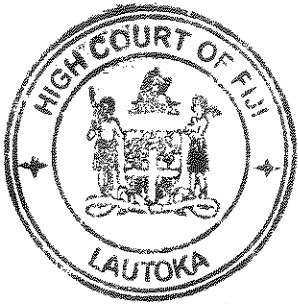
no jurisdiction to hear this appeal. As it is, the proceedings in the Magistrate's Court is still pending once that court is ceased with the matter upon sentence of the accused then only the appeal period shall begin. The Petition of Appeal filed is an interlocutory appeal and there is no right of an appeal provided for under the law.

20. There is no need for this court to consider the merits of the grounds of appeal.
21. Before I leave it is important to mention that the legislative drafters would have never contemplated "*piece meal*" appeals from the Magistrates Court to the High Court. If the legislation had allowed a right of appeal after an accused was convicted and before a sentence was pronounced a chaotic situation would have arisen.
22. An accused would delay sentencing in the Magistrate's Court until his or her appeal against conviction was decided by the High Court and then exercise another right of appeal against sentence. The justice system would be clogged to the extent that the general public and the victims would lose confidence in the judicial system.
23. It can never be the intention of the legislature to allow for such appeal procedures. An accused has a *locus standi* to appeal against his or her conviction or sentence or both after a sentence had been delivered. Any appeal filed by an appellant before being sentenced will be without any legal basis and therefore premature.

ORDERS


1. The Petition of Appeal filed by the appellant is dismissed for want of jurisdiction.

2. 30 days to appeal to the Court of Appeal.



At Lautoka

22 August, 2018


Sunil Sharma
Judge

Solicitors

Messrs. Iqbal Khan & Associates, Lautoka for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.