

IN THE FIJI COURT OF APPEAL, FIJI ISLANDS
AT SUVA

Appellate Jurisdiction

CRIMINAL APPEAL NO. AAUOO94 OF 2007

BETWEEN : SETH RIZWAN ALI *Appellant*

AND : THE STATE *Respondent*

Before the Honourable Judge of Appeal Mr Justice John E Byrne

Counsel : V. Maharaj for the Appellant
P. Bulamainaivalu for the Respondent/Applicant

Dates of Hearing &

Submissions : 22nd November 2007, 14th January 2008

Date of Ruling : 12th May 2008

R U L I N G

[1] **Background**

On the 12th of March, 2007 the Magistrates' Court at Suva acquitted the Appellant on one count of '***Dealing With Infringing Objects***', contrary to Section 121(1)(d)(i) of the Copyright Act 1999. The '***infringing objects***' were copies of the Voqa Ni Delaidokidoki recorded songs, and

it was alleged that the Appellant had in the course of a business, offered for sale copies of these songs being objects that were and the Appellant ought reasonably to have known were infringing copies.

- [2] On the 7th of September 2007 Winter J. in the High Court granted the Respondent leave to appeal the judgment of the Magistrates' Court even though the Notice of Appeal was filed some 49 days out of time. The learned Judge considered the relevant law on applications for leave to appeal out of time, relying on the State -v- Patel [2002] FJCA 13 which followed the decision of the New Zealand Court of Appeal in R -v- Knight [1995] 15 CR NZ 332 at 338. The relevant grounds as stated in both cases were the strength of the proposed appeal, the practical utility of the remedy sought, the length of any delay, the reasons for delay, the extent of the impact on others similarly affected and on the administration of justice together with the absence of prejudice to the Respondent.
- [3] Winter J. held that the granting of leave before him hinged around the first consideration.
- [4] In granting leave to appeal out of time the Judge referred to the novel legislation under which the Appellant had

been charged, and that there was little by way of guideline judgment to assist him. He said in paragraph 10 of his Decision *'My task is to decide whether or not the likely State appeal has an outstanding chance of success. That task does not require me to make final determinations about the appeal but to assess the relevant strength of the Appellant's case'*. My only criticism of that paragraph is the use of His Lordship's adjective **'outstanding'**. The test is not whether the State has an outstanding chance of success but whether, on all the known facts and evidence, it has a reasonable chance of success.

- [5] In the **State -v- Patel** (Supra) this Court referred to the need for strong, if not convincing grounds to support the appeal (p6).
- [6] In deciding to grant leave to appeal the learned Judge said that he accepted that this novel legislation required a cautious rather than robust approach by the Director of Public Prosecutions who had to assure himself that an appeal was sustainable. He was satisfied that the additional 1 month and 19 days was a reasonable period of time within which the Director could direct that the appeal be filed.

[7] Earlier in his Decision the Judge discussed some of the evidence before the Magistrates' Court and, no doubt because of this, he considered that it would not be appropriate for him to determine the substantive matter. Accordingly he transferred the case to his brother Justice Mataitoga and listed it for calling before that Judge on the 28th of September 2007.

[8] **The Notice of Appeal**

The Appellant filed a Notice of Appeal against the Decision of Winter J. on the 13th of September 2007 on various grounds which, in view of the Decision which I have reached, it is not necessary to mention.

[9] I say that because on the 23rd of October 2007 the State filed a Notice of Motion in this Court to strike out the Appellant's Notice of Appeal. The Motion was supported by an Affidavit of Maciu Nacaucalevu sworn on the 23rd of October 2007. That Affidavit stated that the reasons for the Respondent appealing were that the Judgment of Winter J. was only interlocutory and therefore no right of appeal was available to this Court. It said that the Notice of Appeal was premature and does not arise out of a '*final judgment*' of the High Court.

[10] **What is a final Judgment?**

This question has been considered often in the Courts both here and overseas. In my Ruling in Criminal Appeal No. AAUOO99 of 2007 **Francis Bulewa Kean -v- The State**, I considered many of the authorities and these were referred to again by the Court of Appeal in its Judgment of the 14th of April 2008 in Appeal No. AAUOO75 of 2007, **Abdul Ahmed Ali, Uma Dutt and Roshni Devi -v- The State**. The Appeal in Ali concerned the refusal of Shameem J. in the High Court on the 27th of July 2007 to grant a stay of the prosecution of the three Appellants who have been charged with murder. The Court of Appeal held that the Decision of Shameem J. was only interlocutory, being simply an intermediate step in the trial proper. The Court quoted the remarks of **Alverstone C.J. in Bozsom -v- Altrincham Urban District Council** [1903] 1KB 547 and pp548-549:

“It seems to me that the real test for determining this question ought to be this’:

“Does the Judgment or Order, as made, finally dispose of the rights of the parties? If it does, then I

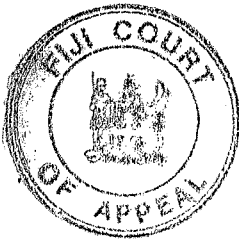
think it ought to be treated as a final order”.

[11] There is no doubt in my mind that the Judgment of Winter J. is interlocutory and not final. He states that in the last paragraph of his Decision:

‘In the interest of justice I do not believe it appropriate that I determine the substantive matter. Accordingly I am transferring this file to my brother Justice Mataitoga for his Lordship’s consideration’.

[12] Clearly the learned Judge was not making any final determination in the matter but simply allowing the matter to proceed before another Judge, in doing which, in my view, he acted correctly. He considered it desirable that Mataitoga J. should consider the appeal in its entirety.

[13] In these circumstances I grant the order sought in the Respondent's Notice of Motion and direct that the case be referred to Mataitoga J. for his consideration.



John E. Byrne

[John E. Byrne]
JUDGE OF APPEAL

At Suva

12th May 2008