

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the Magistrates' Court ]**

**CRIMINAL APPEAL NO. AAU 114 of 2019**  
**[In the Magistrates' Court of Kadavu Case No. 73 of 2017]**

**BETWEEN** : **SEMI TUIKAWAKAWA**

**Appellant**

**AND** : **STATE**

**Respondent**

**Coram** : **Prematilaka, JA**

**Counsel** : **Appellant in person**  
: **Mr. Y. Prasad for the Respondent**

**Date of Hearing** : **05 February 2021**

**Date of Ruling** : **08 February 2021**

**RULING**

[1] The appellant had been arraigned in the Magistrates court of Suva on one count of unlawful cultivation of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act, 2004 committed on 09 November 2017 at Matasawalevu, Nakasaleka, Kadavu in the Southern Division. The charge read as follows.

*‘Statement of Offence*

**UNLAWFUL CULTIVATION OF ILLICIT DRUGS:** *Contrary to Section 5(a) of the Illicit Drugs Control Act 2004.*

*Particulars of Offence*

*Semi Tuikawakawa on the 09<sup>th</sup> day of November 2017, at Matasawalevu, Nakasaleka, Kadavu in the Southern Division, without lawful authority, cultivated 8 kg of Indian Hemp botanically known as Cannabis Sativa an illicit drug.*

[2] The appellant had pleaded guilty and admitted the summary of facts. He had been convicted and sentenced on 17 May 2019 for 06 years of imprisonment with a non-parole period of 05 years. Being aggrieved by the conviction and sentence the appellant had handed over a timely application for leave to appeal against conviction and sentence to Suva Correction Centre on 14 June 2019. The appeal had been addressed to the High Court. It cannot be ascertained from the appeal record as to how the appeal papers had ended up in the Court of Appeal on the same day but it could be reasonably assumed that the Correction Centre may have lodged it with the Court of Appeal registry instead of the High Court registry. The CA registry had registered it under AAU 114 of 2019.

[3] After both the appellant and the respondent had filed written submissions the appellant indicated to this court that he wished to abandon his appeal against conviction and proceed only with the sentence appeal. He had tendered an abonnement notice in respect of conviction appeal in Form 3 dated 30 December 2020. When the matter was mentioned on 05 February 2021 the state counsel submitted a copy of the sentencing order of the learned Magistrate and stated that this court had no jurisdiction to entertain and deal with the appeal, for the Magistrates court has exercised original jurisdiction (as opposed to extended jurisdiction) in this case and therefore, the right to hear the appeal lies with the High Court.

[4] In **State v Mata** [2019] FJCA 20; AAU0056.2016 (7 March 2019) the Court of Appeal held

*'[12] Therefore, it is clear from a collective reading of section 5 of the Illicit Drugs Control Act and sections 5(2) and 7 of the Criminal Procedure Act that the Magistrates Court has jurisdiction to try offences created under section 5 of the Illicit Drugs Control Act and impose any sentences upon the accused subject to the limitations prescribed under section 7 of the Criminal Procedure Act.'*

[5] The Court of Appeal by a majority affirmed its decision in **Mata** in the subsequent case of **State v Laveta** [2019] FJCA 258; AAU65.2013 (28 November 2019) by stating as follows.

*'[19] Therefore, it is clear from a collective reading of section 5 of the Illicit Drugs Control Act and sections 5(2) and 7 of the Criminal Procedure Act that the Magistrates Court has jurisdiction to try offences created under section 5 of the Illicit Drugs Control Act and impose any sentences upon the accused subject*

*to the limitations prescribed under section 7 of the Criminal Procedure Act. The learned High Court Judge seems to have mixed up the jurisdiction of the Magistrates Court with its powers of sentencing. On the one hand the jurisdiction of the Magistrates Court to try offences under the Crimes Act and upon extended jurisdiction is given in section 4(1)(c) of the Criminal Procedure Act while its jurisdiction to try offences under other laws such as Illicit Drugs Control Act is given in section 5(2). On the other hand the sentencing powers of the Magistrates Court are given in section 7 read with section 4(3) and section 9 of the Criminal Procedure Act.*

*[20] The mere fact that the range of sentence prescribed for an offence, which is otherwise triable by the Magistrates Court [other than indictable offences falling under section 4(1) (a) and offences triable summarily by the High Court as described in section 4(1)(b) of the Criminal Procedure Act], is beyond the range of sentencing powers of the Magistrates Court does not ipso facto take away the jurisdiction of the Magistrates Court to try that offence. All that happens is that the sentence that the Magistrates Court could impose would be limited to its sentencing powers given by law.*

- [6] It has also been held in **State v Prasad** [2019] FJCA 18; AAU123.2014 (7 March 2019) that

*[24] It is the 'offence' for which an accused is charged with, which determines the jurisdiction of the Court.*

- [7] Therefore, it is clear that the Magistrates court had properly exercised jurisdiction to sentence the appellant on his own guilty plea.

- [8] **Prasad** was a case where initially the Magistrate's court had exercised extended jurisdiction as the information against the accused was in respect of an indictable offence but when the charge was amended it became a summary offence which was triable by a Magistrate's Court exercising its own jurisdiction. The Court of Appeal said:

*[26] Once the charge was amended to a summary charge, the jurisdiction of the Magistrate's Court changed. It ceased to have extended jurisdiction. A decision made by the Magistrate's Court exercising its own jurisdiction is appealable to the High Court in terms of section 246 of the Criminal Procedure Act.*

*[36]..... The proceedings that followed after the amendment were in the exercise of the original summary jurisdiction of the Magistrates' Court. The sentence was pronounced in the exercise of the summary jurisdiction and not in the exercise of an extended jurisdiction.*

- [9] In **Prasad**, having observed that the it is settled law that the right of appeal against a decision of the Magistrates' court made under extended jurisdiction pursuant to section 4 (2) of the Criminal Procedure Act lies with the Court of Appeal pursuant to section 21 of the Court of Appeal Act [vide **Kirikiti v State** [2014] FJCA 223; AAU00055.2011 (7 April 2014), **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018)], the court went onto determine that since the sentence has been pronounced by the Magistrate's court exercising its own jurisdiction i.e. in the exercise of summary jurisdiction, that decision is appealable to the High Court in terms of section 246 of the Criminal Procedure Act and not to the Court of Appeal.
- [10] Similar reasoning was adopted in **Kaliveti v State** [2020] FJCA 215; AAU0064.2019 (5 November 2020) where the accused had elected to be tried in the Magistrates court and I concluded:

*'[4] The state has submitted that originally the appellant had been charged in the Magistrates court by the police with an indictable offence of rape and therefore, the case had been transferred to Suva High Court. In the High Court the Director of Public Prosecutions (DPP) had filed an information on 15 January 2015 against the appellant for sexual assault under section 210 (1) (a) of the Crimes Act, 2009. Sexual assault, being an indictable offence summarily triable, the appellant had been given the election in terms of section 4(1) (b) of the Criminal Procedure Act, 2009 as to the court (i.e. High Court or the Magistrates Court) he wanted to be tried and the appellant had elected to be tried in the Magistrates court. Thus, it is clear that the Magistrates court of Nausori had not exercised extended jurisdiction under section 4(2) of the Criminal Procedure Act, 2009 in this instance but had exercised its original jurisdiction.*

- [11] In **Lalagavesi v State** [2021] FJCA 23; AAU124.2019 (29 January 2021) I adopted the same principle and held in relation to a conviction and sentence of the accused for 'breach of bail condition' contrary to section 26(1) of the Bail Act where the Magistrates court had exercised its original jurisdiction in terms of section 5(2) of the Criminal Procedure Code, the right of appeal was available to the High Court in terms of section 246 read with section 248 of the Criminal Procedure Act and since the Magistrates court was not acting under extended jurisdiction no appeal was available to the Court of Appeal pursuant to section 21 of the Court of Appeal Act.

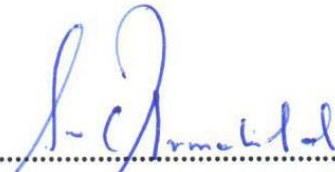
- [12] I think the same principles would apply to the appellant's appeal as well.
- [13] Therefore, the appellant had exercised his right of appeal properly by addressing this appeal to the High Court. Unfortunately, the Correction Centre had forwarded the appeal to the Court of Appeal.
- [14] Clearly, this court has no jurisdiction to entertain the appellant's appeal and it is only the High Court that could hear and determine the appeal in terms of section 246 of the Criminal Procedure Act, 2009. However, the appellant cannot and should not be penalised for the misjudgement on the part of the Correction Centre in lodging the appeal in the Court of Appeal.
- [15] Therefore, ordinarily I would have dismissed the appeal under section 35(2) of the Court of Appeal for want of right of appeal or leave to appeal; but I would in the exercise of the discretion vested, refrain from doing so in this instance. Instead, the proceedings in appeal AAU 114 of 2019 would be terminated forthwith and the Court of Appeal registry would be directed to forward the appellant's appeal to the High Court to deal with it according to law. For the avoidance of any doubt, I may place on record that since the appellant had no right of appeal to this court against the conviction and sentence, this appeal bearing AAU 114 of 2019 cannot be revived or restored under any circumstances in the future in the Court of Appeal upon the delivery of this ruling. Needless to state, that the right of appeal under section 22 of the Court of Appeal Act would be available to the appellant.

### **Order**

1. The proceedings in appeal No. AAU 114 of 2019 are terminated forthwith in the Court of Appeal.

2. The registry of the Court of Appeal is hereby directed to forward the appellant's appeal to the High Court along with the sentencing order dated 17 May 2019 and written submissions filed by both parties to be dealt with the appeal according to law.



  
.....  
Hon. Mr. Justice C. Prematilaka  
JUSTICE OF APPEAL