

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAA 28 OF 2018

BETWEEN : **SHAMEEM MOHAMMED**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. K. Tunidau for the Appellant.
Ms. S. Babitu for the Respondent.

Date of Hearing : 25 September, 2018

Date of Judgment : 09 October, 2018

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Nadi for one count of obtaining property by deception contrary to section 317 (1) of the Crimes Act. It was alleged that the appellant between the 1st day of June and 7th day of June, 2013 at Nadi by deception, dishonestly

obtained two bullocks valued at \$1800.00 the property of Joana Nasau, with the intention of permanently depriving the said Joana Nasau.

2. The appellant pleaded not guilty in the Magistrates Court on 14 June, 2017. The appellant was present when the matter was assigned a hearing date for 5 October, 2017.
3. On 5 October, 2017 the appellant was not present in court the matter was called and stood down.
4. The matter was called for the second time during the day again the accused was absent. At this time prosecution made an application for trial in absentia. The matter was further stood down.
5. On the third occasion when the matter was recalled the learned Magistrate accepted the prosecution's application and granted the same.
6. The hearing proceeded in the absence of the appellant. The prosecution called two witnesses and tendered two exhibits. By judgment dated 27 April, 2018 the appellant was found guilty and convicted as charged.
7. The appellant being dissatisfied with the judgment of the Magistrate's Court filed a timely appeal against his conviction. The grounds of appeal were amended on 25 June, 2018.
8. Both counsel filed written submissions and also made oral submissions during the hearing.
9. It is noted by this court that the appellant has not been sentenced in the matter pending before the Magistrate's Court. The issue is whether the

appeal filed by the appellant was not properly before this court since the appellant is yet to be sentenced.

10. 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...”

11. Section 246 of the Criminal Procedure Act governs the procedure of appeal from the Magistrate’s Court to the High Court as follows:

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.

12. 246 (1) of the Criminal Procedure Act begins:

“Subject to any provision of this Part to the contrary...”

13. 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”.
14. 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 Magistrate’s Court.

15. A similar situation arose in the appeal of *Asif Ismail v The State, Criminal Appeal No. HAA 01 of 2008* this court made the following observations in respect of appeals after conviction but before sentence from the judgment of the Magistrate's Court at paragraphs 21 to 23:

Paragraph 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.

Paragraph 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.

Paragraph 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."

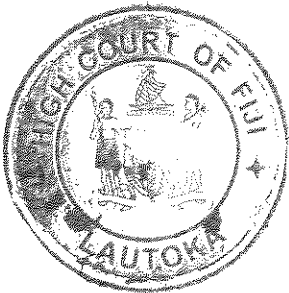
16. For the above reasons, the Petition of Appeal filed by the appellant is premature. This court therefore does not have any jurisdiction to hear

this interlocutory appeal. The proceedings in the Magistrate's Court is still pending once that court is ceased with the matter upon sentence then only the appeal period shall begin.

17. There is no need for this court to consider the merits of the amended grounds of appeal.

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.



Sunil Sharma
Judge

At Lautoka

09 October, 2018

Solicitors:

Messrs Kevueli Tunidau Lawyers, for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.