

## PAUL KASPER RUTTEN

v

STATE

[COURT OF APPEAL, 1993 (Helsham P, Kapi, Williams JJ.A.),  
20 August]

## Criminal Jurisdiction

*Extradition- writ of habeas corpus-whether a criminal proceeding- whether right of appeal against refusal by High Court- Extradition Act (Cap 23) Section 10- Court of Appeal Act (Cap 12) Sections 12 & 21.*

The appellant had been refused *habeas corpus* by the High Court following an order for his extradition by the Magistrates Court. On appeal HELD: (1) extradition proceedings were criminal in nature as was a subsequent application for *habeas corpus* (2) there was no right of appeal against the refusal of such a writ in these circumstances.

Cases cited:

*Amand v. Home Secretary* [1943] AC 147  
*George Tan Soon-Gin v. H. H. Judge Cameron* (PC 10/92)  
*Government of the United States of America v. Bowe* [1990] A.C. 50

*M. Raza* for the Appellant  
*N. Shameen* for the Respondent

**Helsham P:**

I am constrained to come to the conclusion that this Court has no jurisdiction to deal with this appeal.

Three legislative provisions are relevant. The first is s.10 of the Extradition Act Cap. 23. That provides:-

“10.- (1) Where a person is committed to custody under section 9, the court shall inform him in ordinary language of his right of action in the High Court for redress of a contravention of his right to personal liberty or for review of the order of committal, and shall forthwith give notice of the committal to the Minister.

(2) A person committed to custody under section 9 shall not be extradited under this Act-

(a) in any case, until the expiration of the period of fifteen days beginning with the day on which the order for his committal is made;

(b) if an action has been instituted in the High Court for redress of a contravention of his right to personal liberty or for review of the order of committal so long as proceedings on that action are pending. A

(3) In any such action, the High Court may, without prejudice to any other jurisdiction of the court, order the person committed to be discharged from custody if it appears to the court that-

(a) by reason of the trivial nature of the offence of which he is accused or was convicted; or B

(b) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be; or C

(c) because the accusation against him is not made in good faith in the interests of justice, it would, having regard to all the circumstances, be unjust or oppressive to extradite him.

(4) On any such application the High Court may receive additional evidence relevant to the exercise of their jurisdiction under section 6 or under subsection (3). D

(5) For the purposes of this section proceedings in an action for redress of a contravention of a person's right to personal liberty or for review of an order shall be treated as pending until any appeal in those proceedings is disposed of; and an appeal shall be treated as disposed of at the expiration of the time within which the appeal may be brought or, where leave to appeal is required, within which the application for leave may be made, if the appeal is not brought or the application made within that time." E

Sections 12 and 21 of the Court of Appeal Act respectively provide, so far as relevant:- F

"12.- (1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal- G

(a) from any decision of the High Court sitting in first instance, including any decision of a judge in chambers;

...

21. A person convicted on a trial held before the High Court may appeal under this Part to the Court of Appeal-

- A
- (a) against his conviction on any ground of appeal which involves a question of law alone;
- B
- (b) with the leave of the Court of appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and
- C
- (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.”

D As Sir Mari Kapi in separate reasons for judgment in this matter rightly points out, the Court of Appeal draws its jurisdiction from the Constitution via the Court of Appeal Act. This Court can only hear appeals in those instances where jurisdiction to do so has been conferred on it.

The circumstances leading up to this appeal and this Court's hearing of it have been dealt in the reasons prepared by Sir Mari. I do not propose to repeat them. Their simple nature belies the difficulties that lie behind.

E It is probably true to say that extradition matters dealt with under the Extradition Act would be categorised as “criminal proceedings” if one needed to describe them. They provide for apprehension of a person, a hearing before a Magistrate, incarceration, deportation. There is no appeal from a Magistrate's decision.

F Section 10 of the Extradition Act does not confer any right of appeal. It is not correct to say, in my opinion, that a right of appeal is given “under” that Act. It is not. The wording of the equivalent English Act, which, as pointed out by Sir Mari, provides that a person committed under that Act has a “right” to make an application for habeas corpus, might be said to confer a right of appeal under that Act, but that is not the case here. The local Act gives no such right. Section 10(1) only requires a person to be informed of his right of action in the High Court. The distinction may be a fine one, but I believe it is a relevant one.

G In referring to a right of redress or review, s. 10 is clearly referring to the right of any person aggrieved by some action of the authorities to approach the courts for the issue of one of the prerogative writs, by which the action can be brought up for review. That is a right arising under the common law of England, existing in Fiji since 1875, (High Court Act Cap 13 s.22) preserved by the Constitution, shaped and given a local habitation and a name in the High Court

by virtue of Order 53. That has nothing to do with the criminal law. From a decision of the High Court in relation to any application for the issue of one of the prerogative writs and appeal lies to this Court pursuant to s.12 of the Court of Appeal Act.

A

Lest it be relevant, we have not been made aware of any means of redress or review of committal under the Extradition Act other than by way of seeking the issue of one of the prerogative writs. That Act does not give any right of appeal, and s.21 of the Court of Appeal Act gives no right of appeal against a committal.

B

Now it is critical in my view that the Extradition Act acknowledges not only a right of redress or review for a person committed (s.10(1)), but goes on to make special provision which acknowledges the possibility of an appeal. The "proceedings" referred to in s.10(5) clearly, in my view, relate to proceedings brought for the issue of a prerogative writ; it is then provided that such proceedings shall be deemed to continue until any appeal in them is disposed of, or until the time for appealing has passed, or, if leave to appeal is needed, until the time for obtaining leave has elapsed. It acknowledges the right to seek the issue of a writ, and for an appeal against the decision.

C

The reason for this is perfectly obvious. It is designed to protect both sides. It operates to prevent the authorities from whipping the person committed out of the country before he has had a chance to have an appeal heard, if the High Court refuses to issue a writ, and it operates to enable the authorities to keep the person committed in the country, and stop him fleeing, if a writ is issued and the authorities wish to appeal. Very sensible and just. It is designed to hold the position in statu quo ante, as the lawyers like to say.

D

E

Now this is where the problem arises. If the decisions of the Privy Council, which are examined at some length by Sir Mari Kapi, are correct, then the proceedings for the issue of a prerogative writ taken in respect of a person committed under the Extradition Act are "criminal proceedings". Under ss.12 and 21 of the Court of Appeal Act there is no right of appeal. I do not propose to go over the relevant passages in the decisions of the Privy Council; they are sufficiently set out in the reasons for judgment of Sir Mari Kapi. But that is the result. And I suppose one cannot complain that the prerogative writ proceedings be put into some category, seeing the Court of Appeal Act seems to require that this be the case.

F

But if this Court adopts the reasons in the judgments of the Privy Council for categorising the proceedings as criminal, this Court is simply, by judicial decision, writing s.10(5) out of the Extradition Act. It is not as if the Court was saying that part of an Act is unlawful or ultra vires, e.g. as offending some provision in the Constitution; it is saying that that subsection, enacted by Parliament to protect the rights of persons committed under the Extradition Act, simply has no effect at all.

G

A This Court has, of course, given anxious consideration to whether the law in Fiji is as the Privy Council has stated. Privy Council decisions are no longer binding on the Courts here. But the matter does not end there - there are two other facets.

B One is that the Privy Council may have stated the common law in this area. If so, that was part of the law in Fiji prior to 1987. The statutory provision and the Constitution to which I have earlier referred make that clear. Whether the particular Privy Council decisions could be labelled as having been decided according to the principles of the common law, the "rules" relating to the interpretation of statutes (rules of common law or rules of common sense), or upon the whim of Privy Council, I do not pause to consider. I do not think in the circumstances of this case that is necessary.

C The other is that it would not be proper for this Court to refuse to accept as the law what the Privy Council has held it to be merely because to do so renders nugatory some provision of a statute in Fiji. There are other ways of curing the problem.

D Unless there were very cogent grounds for refusing to follow the decisions to which Sir Mari refers, then I believe this Court should do so. We do not know in what instances, if any, those decisions have been accepted and followed, and with what consequences. I suppose common sense would say that if it is necessary to categorise proceedings in this case as civil or criminal, as the Court of Appeal Act seems to postulate, then these ones have more the flavour of criminal than civil. So be it.

E We hope that the attention of the legislature is immediately drawn to this situation. At the time when the Extradition Act was enacted it was clearly the intention of Parliament not to deprive a person committed under the Extradition Act of any right of appeal against a decision of the High Court. This Court has been constrained to do just that. The matter warrants attention.

F I wish to say nothing about any possible avenues of redress or review for a person committed under the Extradition Act, nor of any other avenues of appeal. If and when the need to consider anything arises, no doubt it will be dealt with. It does not arise here.

G I believe the proper course to take is to make a declaration that an appeal from the proceedings in the High Court in this case does not exist, and on that basis the appeal is dismissed.

**Kapi JA:**

The appellant was committed to custody on the 8th July 1992 by the Magistrates Court at Suva under the provisions of Extradition Act Cap 23 (hereinafter referred to as the Act). These extradition proceedings were taken in relation to criminal charges filed against the appellant in the District Court of the Northern

District of California in the United States of America.

Under s.10 of the Act, the court of committal is obliged to advise the person committed of his right of action in the High Court:

- (a) for redress of a contravention of his right to personal liberty;  
or
- (b) for review of the order of committal.

It should be pointed out that s.10(1) merely gives the right to be informed of any further action the person may take in the High Court with regard to the committal order. It does not set out the precise nature of the action for redress or the nature of the review in the High Court. One has to go outside the Act and determine the precise nature of the action or the precise nature of the review as the case may be in other provisions of the law.

The appellant in this case chose to challenge the committal order by way of "an action in the High Court for redress of a contravention of his right to personal liberty" I pause here to note that the English counter-part, the Fugitive Offenders Act 1967 provides that a person committed has a "...right to make an application for habeas corpus.." I draw attention to the general wording in the Fiji Act and the fact that the Republic of Fiji has a constitution and provides for the protection of right to personal liberty and endorsement of this right (ss. 6, 19 and 113 of the Constitution of the Sovereign Democratic Republic of Fiji (hereinafter referred to as the Constitution)). Having said that, I say no more about it as the appellant in this case did not choose his remedy under the provisions of the Constitution. The appellant chose his remedy under the common law by way of an application for writ of habeas corpus. There can be no doubt that this common law remedy comes within the meaning of the words "an action...for redress of a contravention of ..right to personal liberty."

The High Court heard the application and dismissed it on the 24th August 1992.

The appellant filed an appeal against the decision of the High Court in the Court of Appeal. The appellant then applied for bail pending the appeal. This application came before Sir Moti Tikaram for determination under s. 35 of the Court of Appeal Act (Cap. 12) (hereinafter referred to as CAA). At the hearing, counsel for the respondent raised a preliminary objection contending that the appellant has no right of appeal to the Court of Appeal and therefore has no right to apply for bail. Sir Moti Tikaram said:

"It is not in dispute that should it be found that the Applicant indeed has no right of appeal the question of granting or refusing bail will fall by the way side. In short a question of jurisdiction is in issue because if the Applicant has no right of appeal the Court of Appeal has no jurisdiction to entertain his Notice of Appeal.

A In the circumstances I do not think that it is desirable that a single Judge should rule on the preliminary but fundamental issue that the Applicant has no right of appeal.....

B I therefore propose to transfer the bail application to the Court of Appeal itself as distinct from a single Judge so that the preliminary issue of jurisdiction could be determined by the Court itself. If the Court decides that the Applicant has no right of appeal then that will be the end of the matter and no further proceedings will be necessary. On the other hand, if the Court decides that the Applicant has a right of appeal it could then proceed to deal with the bail application on merits or remit the bail application to be dealt with by a single Judge.”

C The matter has now come before this Court to determine whether, the appellant has a right of appeal to the Court of Appeal.

The Fiji Court of Appeal is a body established by statute (see s. Part II of CAA and Chapter VIII Part 2 of the Constitution) and therefore its jurisdiction is to be determined by reference to statutory laws.

D Counsel for the appellant primarily relied upon s. 10(5) of the Act to support his argument that his client has a right of appeal to the Court of Appeal. It reads as follows:

E “(5) For the purposes of this section proceedings in an action for redress of a contravention of a person’s right to personal liberty or for review of an order shall be treated as pending until any appeal in those proceedings is disposed of; and an appeal shall be treated as disposed of at the expiration of the time within which the appeal may be brought or, where leave to appeal is required, within which the application for leave may be made, if the appeal is not brought or the application made within that time.”

F Counsel for the respondent has submitted that s. 10(5) of the Act does not create a right of appeal but merely provides for the stay of the extradition proceedings (i.e. an action for redress of a contravention of a person’s right to personal liberty or for review of a committal order) until any appeal is disposed of. Reference to appeal in this provision, it is submitted, refers to an appeal (if any) authorised under another provision of the Act or another law.

G The words to be interpreted in this provision are “until any appeal in those proceedings is disposed of”. The last limb of the provision beginning with the words “and an appeal shall .....” and ending with the words “.. application made within that time” simply set out the circumstances in which an appeal may be treated as disposed of if no appeal or application for leave is filed

within the time period allowed by law.

The practical effect of this provision is that where an action for redress of a contravention of a person's right to personal liberty or for review of a committal order is taken as referred to in s.10(1) of the Act, such proceedings may not be proceeded with until the time in which a person may appeal (if any) has expired. If no appeal is filed within the time permitted, the proceedings taken in the High Court may proceed. If an appeal is lodged, the proceedings taken shall be treated as pending until that appeal is disposed of.

A

I agree with counsel for the respondent that these words are incapable of creating a right of appeal per se. It does not deal with the right of appeal, the period in which such a party may appeal and the court in which the appeal may lie. One has to go to other provisions in the Act or another law to find out if there is such right of appeal and other relevant matters in relation to an appeal. Section 10(5) of the Act cannot assist the appellant in determining the question of whether, he has a right of appeal to the Court of Appeal from the decision of the High Court in this case.

B

C

The position may be compared with England. The Fugitive Offenders Act 1967 may be described as somewhat similar to the Fiji Act with significant differences. Section 10 of our Act is in exactly the same terms as s.8 of the English Act. However, the English Act under s. 15(1) gives a right of appeal from the Divisional Court to the House of Lords. We do not have such a provision under our Act.

D

The question then arises; does the appellant have any right of appeal under any other law?

E

The provisions of CAA distinguishes right of appeal between civil (Part III) and criminal (Part IV) matters.

Counsel for the respondent submitted that the appellant does not have a right of appeal under Part III of CAA, in particular s.12(1)(a), because the habeas corpus proceedings in the High Court in this case are by nature criminal. Counsel for the appellant made no submissions on the issue.

F

Section 12(1)(a) is as follows:

“12-(1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal-

G

(a) from any decision of the High Court sitting in first instance, including any decision of a judge in chambers;”

The determination of the question whether the habeas corpus proceedings in



A the High Court (which originated in the Magistrate's court under the provisions of Extradition Act) are criminal in nature is important to the question of whether the appellant has a right of appeal under s.12(1) (a) of CAA. Also this issue is one of general importance in that a writ of habeas corpus is a civil procedure under Order 53 of the High Court Rules 1988 which may be adopted in civil or criminal proceedings alike. The question arises; how does one determine the nature of a proceeding where a writ of habeas corpus procedure is adopted? This issue arose for decision in George Tan Soon-Gin -v- His Honour Judge Cameron and The Attorney General of Hong Kong (Privy Council Appeal No. 10 of 1992, delivered on the 29th June 1992). The facts of this case for our purposes may be summarised as follows:

B  
C Criminal prosecutions were sought to be brought against several people in Hong Kong. These cases may be referred to as "The Carrian Case", "The BMFL Case", "The Barclays (Asia) Case" and "The WestLB Case".

D In the Carrian case, the appellant was the chairman of a group of companies of which the Carrian International Limited was the most important. The Carrian empire collapsed in 1983 and criminal investigations led to two charges against the appellant arising out of the accounts of Carrian and a building called Gainmon House. The trial in relation to the accounts of Carrian began in February 1986. The case was dismissed on a no case submission. The prosecution offered no evidence in relation to the Gainmon House affair.

E F In the BMFL case, Bumiputra Malaysia Finance Limited a subsidiary of a Malaysian bank controlled by the government of Malaysia, advanced money to Carrian. Criminal charges are sought to be brought against the appellant and other officials of BMFL including one Mr Osman. Because of the trial in the Carrian case, the prosecution in BMFL case did not proceed and was pending at the time of the appeal. The trial in the BMFL was further complicated by Mr Osman's absence from the jurisdiction. Attempts have been made by prosecution authorities to have him extradited. These and other difficulties prevented the trial going ahead in Hong Kong. The trial was still pending at the time of appeal.

G In the Barclays (Asia) case, it was alleged that Carrian made illegal advances to Barclays (Asia) Ltd. A Mr. Turner, an officer of Barclays was convicted and sentenced for offences relating to these advances. It is proposed that the appellant be charged with some of the offences with which Mr. Turner was charged. However, the prosecution authorities decided that they would not proceed with this charges until after the trial of BMFL case.

The prosecuting authorities also propose to charge the appellant with charges relating to transactions between Carrian and West Detsche Landesbank Girozentrale (WestLB), a banking organisation.

After a long delay, the prosecuting authorities decided to go ahead with the prosecution of the Barclays (Asia) case and the WestLB case. These matters were transferred to the District Court for this purpose. The appellant made two applications in the District Court:

- (1) For perpetual stay of the Barclays (Asia) prosecutions.
- (2) For an order that the trials of the Barclays (Asia) and WestLB charges should be postponed until the conclusion of the BMFL trial.

The applications were refused.

The appellant then applied to the High Court by way of judicial review for the review of decisions by the District Court. The High Court refused relief.

The appellant then appealed to the Court of Appeal against the decision of the High Court. During the argument of the appeal, the question arose whether the Court of Appeal had any jurisdiction to hear the appeal. The court ruled that there was no jurisdiction to hear the appeal. The court ruled that there was no jurisdiction and dismissed the appeal. It is not necessary deal with other matters which were also appealed but for our purposes, the appellant appealed to the Privy Council on the question of the jurisdiction of the Court of Appeal.

The Board stated the nature of the issue in the following passage:

“The Court of Appeal in Hong Kong has both a civil and a criminal jurisdiction, each defined and limited by section 3 of the Supreme Court Ordinance, Cap. 4, Laws of Hong Kong. It is common ground that none of the instances in which criminal jurisdiction is conferred on the Court of Appeal by section 13(3) is material to the present case. It is also common ground that, if the Court is to have civil jurisdiction under section 13(2) in a case such as the present, this must be by virtue of section 13(2)(a), which reads as follows:-

‘13(2) The civil jurisdiction of the Court of Appeal shall consist of -

(a) appeals from any judgment or order of the High Court in any civil cause or matter.’

The question is thus whether the proceedings before Barnett J. Constituted a civil cause or matter.”

The Board extensively examined all the cases in England and in Hong Kong on the subject. It is only necessary to refer to two of the authorities. The first is Amand -v- Home Secretary [1943] A.C. 147. That was a case in which the

A appellant, who had been conscripted whilst in England into the Netherlands armed forces was alleged to be absent without leave. Pursuant to an order made under the Allied Forces Act he was arrested by the Metropolitan Police. He applied for habeas corpus in the Divisional court but was refused. He appealed but a preliminary objection was raised on the basis that no appeal lies as the appeal was in a criminal "cause or matter". The House of Lords confirmed that no appeal lies as the matter was a criminal matter.

B The Board in discussing the distinction between cases of habeas corpus in a criminal matter, and cases where the matter is not criminal, quoted with approval a passage from the judgement of Viscount Simon in Amand (at page 156):-

C "It is the nature and the character of the proceeding in which habeas corpus is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal ... The proceedings in the present case are for the direct purpose of handing the appellant over so that he may be dealt with on these charges. Whether they are hereafter withdrawn or disproved does not affect the criminal character of the matter in the least ..."

D The Board also quoted from Lord Wright from the same judgement (at page 159):-

E "The words 'cause or matter' are, in my opinion, apt to include any form of proceedings. The word 'matter' does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word 'cause'. In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the Allied Forces Act and to order and to deliver the appellant to the Dutch Military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in criminal cause or matter. That was the matter of substantive law. The writ of habeas corpus deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. ... The principle which I deduced from authorities I have cited and other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, which result in the conviction of the person charged and in a sentence of some punishment, such a cause or matter by an

English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal.”

A

The second case which the Board referred to is Government of the United States of America -v- Bowe [1990] A.C. 50, a decision of the Privy Council. This was an extradition case. A fugitive was the subject of extradition proceedings in the Bahamas. The matter went to the Supreme Court. An appeal was lodged from the Supreme Court to the Court of Appeal. Amongst the points in issue was the question whether, if the appeal was validly brought, the court had jurisdiction to make an order for costs. On a further appeal to the Privy Council the Board held that, if jurisdiction existed at all, it must have been under a section of the relevant Bahamas legislation (section 23 of the Court of Appeal Act) which provided that:

B

“No costs shall be allowed by the court on either side in connection with the hearing and determination of an appeal in any criminal cause or matter..”

C

The Board stated at page 535:

“Ultimately the question for decision admits of, and indeed demands, a simple answer. The certiorari and prohibition proceedings constituted criminal cause or matter, as would a habeas corpus application if the subject matter were criminal in the sense described in Amand -v- Home Secretary ...”

D

The Board also examined cases in Hong Kong. It is not necessary to review those cases as the Board applied the principles set out in Amand -v- Home Secretary and The Government of the United States of America -v- Bowe. However, it is worth quoting a passage from the judgement of Court of Appeal in Hong Kong, per Silke V.-P. In this case:

E

“... this court, when the root is criminal, cannot have conferred upon it, by that growing in some transmuted fashion a civil tree, an appellate jurisdiction which, in my judgement, terms of the legislation do not permit. ... While the whole scheme of the Judicial review sections of the Supreme Court Ordinance is couched in terms of civil proceedings. I do not accept that it is right to ignore the nature of the cause from which those applications spring.”

F

G

Applying these principles the Board in this case said at page 11:

“Their Lordships have no doubt that the approach of the Court of Appeal in the present case was right. The language of the Ordinance directs attention, not to the proceedings which led to

A the order from which the appeal is brought, but to the nature of  
the cause or matter 'in' which appeal is brought. If the cause  
or matter is properly characterised as criminal, it cannot lose  
that character simply because at one stage it is carried forward  
by techniques which closely resemble those employed in civil  
matters, or which lead to relief often granted in civil matters,  
or which are available in civil or criminal matters alike; any  
more than, having gained this new character by the employment  
B of such techniques came to an end. The position is much simpler  
than this. Nobody could doubt that the applications made by  
the appellant to the District Judge were applications in a criminal  
cause, for their purpose was to determine the way in which the  
prosecution should proceed. The purpose of the judicial review  
was to dispose of the District Judge's order as to permit the  
C substitution by the reviewing court of a different order, still  
directed to the way in which the matter should proceed.  
Whatever the position may be as regards the kind of procedure,  
ancillary to a criminal matter, such as the entreatment of surety  
considered in R. -v- Southampton Justices, Ex parte Green  
(supra), everything happening in the present case has been no  
D more than one stage in a continuing contest between the  
prosecutor and the appellant in a matter which from the outset  
has been exclusively criminal in nature."

E This Court is no longer bound by the decisions of the Privy Council but would  
regard them as persuasive only. With respect, I consider that the reasoning by  
the Board in this case is the correct approach and I would adopt the reasoning  
as the proper basis for interpreting s.12 of CAA.

F The proceedings from which the application for habeas corpus was brought  
were taken under the provisions of Extradition Act. An examination of Part II  
and III of the Act under which the appellant was committed to custody clearly  
show the proceedings under the Act are of a criminal nature. Even though  
these criminal proceedings in the Magistrate's Court were brought to the High  
Court by way of an application for habeas corpus (a civil procedure), there  
can be no doubt from the test set out in Amand and Government of the United  
States of America -v- Bowe that for the purposes of s.12(1) (a) of the Court of  
Appeal Act, the proceedings in the High Court still retained its criminal nature  
G from the proceedings commenced in the Magistrate's Court under the provisions  
of the Extradition Act. Section 12 of CAA is not applicable to the appellant.

Under Part IV of CAA, the appellant can find very little assistance. Section  
21 is confined to persons who are either convicted or sentenced in a criminal  
matter. The appellant has not been convicted or sentenced in a criminal matter.

Section 22 provides for a right of appeal from a decision of the High Court

English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal.”

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or matter is properly characterised as criminal, it cannot lose  
that character simply because at one stage it is carried forward  
by techniques which closely resemble those employed in civil  
matters, or which lead to relief often granted in civil matters,  
or which are available in civil or criminal matters alike; any  
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the appellant to the District Judge were applications in a criminal  
cause, for their purpose was to determine the way in which the  
prosecution should proceed. The purpose of the judicial review  
was to dispose of the District Judge's order as to permit the  
C substitution by the reviewing court of a different order, still  
directed to the way in which the matter should proceed.  
Whatever the position may be as regards the kind of procedure,  
ancillary to a criminal matter, such as the entreatment of surety  
considered in R. -v- Southampton Justices, Ex parte Green  
(supra), everything happening in the present case has been no  
D more than one stage in a continuing contest between the  
prosecutor and the appellant in a matter which from the outset  
has been exclusively criminal in nature."

E This Court is no longer bound by the decisions of the Privy Council but would  
regard them as persuasive only. With respect, I consider that the reasoning by  
the Board in this case is the correct approach and I would adopt the reasoning  
as the proper basis for interpreting s.12 of CAA.

F The proceedings from which the application for habeas corpus was brought  
were taken under the provisions of Extradition Act. An examination of Part II  
and III of the Act under which the appellant was committed to custody clearly  
show the proceedings under the Act are of a criminal nature. Even though  
these criminal proceedings in the Magistrate's Court were brought to the High  
Court by way of an application for habeas corpus (a civil procedure), there  
can be no doubt from the test set out in Amand and Government of the United  
States of America -v- Bowe that for the purposes of s.12(1) (a) of the Court of  
Appeal Act, the proceedings in the High Court still retained its criminal nature  
from the proceedings commenced in the Magistrate's Court under the provisions  
G of the Extradition Act. Section 12 of CAA is not applicable to the appellant.

Under Part IV of CAA, the appellant can find very little assistance. Section  
21 is confined to persons who are either convicted or sentenced in a criminal  
matter. The appellant has not been convicted or sentenced in a criminal matter.

Section 22 provides for a right of appeal from a decision of the High Court

which is exercising an appellate jurisdiction. In the present case, the appellant chose to invoke an original jurisdiction of the High Court by way of an application for habeas corpus. The High Court was not exercising an appellate jurisdiction by way of an appeal from decision of a Magistrate. The appellant can find very little assistance from this provision.

A

Both counsel rested their submissions on the above named statutes. They made no reference to the powers of the High Court and the Court of Appeal under the provisions of the Constitution. The provisions which may be relevant are ss. 111 (1) and 115 (1) (b) of the Constitution.

B

Section 111 reads:

“111. - (1) The High Court shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law. (My emphasis).

C

(2) The High Court shall have jurisdiction to hear and determine appeals in both civil and criminal matters from courts subordinate to it as may be conferred on it by this Constitution or any other law.”

D

Section 115 (1) (b) reads:

“115.- (1) An appeal to the Fiji Court of Appeal shall lie from decisions of the High Court in the following cases, that is to say-

E

(B) as of right from final decisions given in exercise of the original jurisdiction conferred on the High Court by section 19 and 111 of this Constitution.”

(My emphasis)

F

However, I do not wish to express any opinion on the application of these provisions as the parties have not raised and argued these provisions. This Court should not lightly undertake any question of interpretation and/or application of the provisions of this Constitution without the benefit of full arguments by the parties. I draw attention to these provisions for future cases. As there is no right of appeal under the Extradition Act and the Court of Appeal Act, the appeal is therefore incompetent and should be stuck off. Therefore the appellant has no corresponding right to bail pending appeal.

G

This matter should now proceed in accordance with the provisions of the Extradition Act.



Williams J.A.:

A I have had the advantage of reading the reasons for judgment of the President and Sir Mari Kapi and agree with their conclusions and the order proposed.

*(Appeal dismissed)*

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