IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction) CIVIL APPEAL No.5 OF 1997

Between : FREDERICK BRYSTEN

Appellant

And : SIMON DORSEN

Respondent

Coram :

Mr Justice J.W. von Doussa
Mr Justice Bruce Robertson
Mr Justice K. Mataskelekele
Mr Justice Oliver Saksak

Counsel :

Mr Robert Sugden for the Appellant
Mr Silas Hakwa for the Respondent

JUDGMENT

The Notice of Appeal in this matter seeks to appeal to the Court of Appeal from a decision of single Judge of the Supreme Court of Vanuatu sitting in its appellate jurisdiction in an appeal from the Magistrates Court. At the outset of the hearing, the Court considered the jurisdictional question whether there is a second right of appeal in a matter which originates in the Magistrates Court. After hearing full argument on point, the Court retired to consider that question. On reconvening the Court announced that the appeal would be dismissed on the ground that the Court of Appeal lacked jurisdiction. The reasons for that decision now follow.

The background to the filing of the Notice of Appeal was that in the Magistrates Court in 1992 the respondent obtained a judgment against the appellant for VT220.400 to be paid within 5 months. The appellant appealed to the Supreme Court. The appeal was heard by the Acting Chief Justice who allowed it in part. His Honour varied the Order made in the Magistrates Court by reducing the judgment in favour of the respondent to VT186.750. The appellant was ordered to pay the costs of the trial in the Magistrates Court, and no order was made for costs on the appeal.

In Appeal Case No.2 of 1995, John Athel v. Edwin and Annette Spooner, the question arose whether the Court of Appeal had jurisdiction to hear an appeal from a single Judge who had decided an appeal from the Magistrates Court. On an application to stay the enforcement of the judgment pending the appeal, Justice R.M. Downing in an interlocutory judgment delivered on 5 April 1995, said that he found it unusual that the laws of the Republic of Vanuatu would permit a second appeal as of right in such a matter to the Court of Appeal. His Honour observed that in most Common Law jurisdictions an appeal from the Magistrates Court to the Supreme Court is expressed to be final except in most extraordinary circumstances. However his Honour said he had been unable to find any such limitation in the laws of the Republic. It appears that following the decision, Chief Justice Vaudin d'Imecourt issued a direction that reads :

> *"There is no appeal from the Appellate Jurisdiction of the Supreme Court.*
>
> *See Constitution Article 50 : "Parliament shall provide for appeals from the original jurisdiction of the Supreme Court and may provide for an appeals from such appellate jurisdiction as it may have to a Court of Appeal which shall be constituted by two or more Judges of the Supreme Court sitting together."*
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> *The Courts Act CAP 122 S.26(3) & (4) make it clear that Parliament has only conferred a right of Appeal (as it must by Art.50 of the Constitution) from the original jurisdiction of the Supreme Court ; if Parliament had intended to confer a right of appeal from the appellate jurisdiction of the Supreme Court it would have to do so expressly. No such right has been provided by Parliament."*

That statement expresses the Chief Justice's view, but the direction did not constitute a judgment of the Court which has binding authority.

Counsel for the appellant drew the Court's attention to the Court of Appeal Rules 1973. These Rules were made by the Rules Committee in exercise of powers conferred upon it by s.22 of the Western Pacific (Court) Order in Council 1961, with the concurrence of the President

of the Fiji Court of Appeal and with the approval of her Majesty's High Commissioner for the Western Pacific. These Rules recognised that in the court structure which existed prior to Independence there could be an appeal from a decision of the High Court of the Western Pacific sitting in its appellate jurisdiction to the Fiji Court of Appeal. Thus, within the structure of the British National Courts operating in the New Hebrides an appeal was possible from the Magistrates Court to the High Court of the Western Pacific, and a further appeal could then be made to the Fiji Court of Appeal.

It should be noted that the British National Court system was not the only one operating in the New Hebrides before independence. There was also a French National Court System, and there was the Joint Court.

After Independence, the pre-existing complex structure of Courts was abolished. By the Constitution of the Republic of Vanuatu, the Republic became a Sovereign Democratic State (Art.1), with its own courts structure. Article 47 vested the administration of justice in the judiciary. Article 49 provides that the Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings and such other jurisdiction and powers as may be conferred on it by the Constitution or by law. Parliament is expressly empowered by Art.16 to make laws for the peace, order and good Government of Vanuatu. That general power is itself wide enough to empower Parliament to make laws for appeals from Judges of the Supreme Court sitting either in the original jurisdiction of the Court or in an appellate jurisdiction from the Magistrates Court. However the framers of the Constitution saw the question of appeals as of sufficient importance to require express provision in Art. 50 of the Constitution, which is set out above in the direction by Chief Justice Vaudin d'Imecourt :

In compliance with the direction in Art.50 of the Constitution, Parliament has provided for appeals from the original jurisdiction of the Supreme Court to the Court of Appeal. The Courts Act [CAP 122] in Part IV establishes the Court of Appeal. Section 26, which comes within that part, provides :

"APPELLATE JURISDICTION

26.(1) *Subject to subsection (2), the Chief Justice, acting with, and in accordance with, the advice of the Judicial Service Commission, shall be responsible for arranging the composition of the Court of Appeal for the hearing of proceedings before that Court.*

(2) *On every such appeal the procedure and the findings, whether of fact or law, of the court appealed from shall be subject to review by the appellate court which shall be entitled to substitute its own judgment or opinion thereon*

save that the appellate court shall not interfere with the exercise by the court appealed from of a discretion conferred by any written law unless the same was manifestely wrong.

(3) The Court of Appeal may in its discretion deal with the appeal on the notes of evidence recorded in the case without hearing any such evidence again.

(4) In the exercise of the appellate jurisdiction of the Court of Appeal under this section, any judgment of the Court shall have full force and effect and may be executed and enforced in like manner as if it were an original judgment of the Supreme Court."

The Courts Act [CAP 122] also established, in s.16, a right of appeal to the Supreme Court from the Magistrates Court. That provision vested appellate jurisdiction in the Supreme Court. The section is silent on whether a further right of appeal exists from a decision of a Judge of the Supreme Court exercising that appellate jurisdiction.

A right of appeal from the decision of a Court is the creature of statute. In the present case a right of appeal to the Court of Appeal can exist only if it is provided by legislation. If a right of appeal was intended to exist from a Judge of the Supreme Court sitting in its appellate jurisdiction under s. 16, it is therefore surprising that no mention is made of that right in s.16, or elsewhere in the Courts Act.

Section 26(3) and (4) of the Courts Act were the provisions relied on by Chief Justice Vaudin d'Imecourt in his direction published in Appeal No.2 of 1995. We do not consider subsection (3) is inconsistent with there being a further right of appeal, but subsection (4) does suggest that no right of appeal exists. If a right of appeal were intended, subsection (4) would have provided that a judgment of the Court of Appeal would have force and effect and may be executed and enforced in like manner as if it were a judgment of the Magistrates Court.

As we have already noted, on Independence the three existing court structures were abolished, and the Constitution provided for a new court structure. Parliament was directed by the Constitution that it "shall" provide for appeals from the original jurisdiction of the Supreme Court, and it has done so in the Courts Act. Parliament was also empowered, but not directed, by the word "may" in Art.50 to provide for appeals from such appellate jurisdiction as the Supreme Court may have. An appellate jurisdiction was created by s.16 of the Courts Act. However, when enacting s.16 Parliament did not expressly provide for an appeal from that appellate jurisdiction, and in our opinion no such right can be implied.

Counsel for the appellant argues that a right of appeal from the appellate jurisdiction of the Supreme Court to the Court of Appeal arises under Article 95(1) or (2) of the Constitution which read :

"EXISTING LAW

95(1) Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day as if they had been made in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution.

(2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom."

Counsel for the appellant argues that because the Appeal Court Rules (1973) contemplate a right of appeal from the High Court of the Western Pacific sitting in its appellate jurisdiction, such a right is preserved under Art.95(1) or (2) until there is a law of Vanuatu which otherwise provides. We consider Art.95(1) can have no application as the Court of Appeal Rules (1973) are not Joint Regulations or subsidiary legislation made thereunder. Further, we consider Art.95(2) cannot assist the appellant. The 1973 Rules provide the procedures to be followed where a right of appeal exists. The Rules do not create the right of appeal. It is necessary to look to other legislations to find the statutory right of appeal. As the pre-existing court structure in which the right of appeal existed before Independence has been abolished in the Republic of Vanuatu, the appellant cannot any longer rely on that right. In so far as rights of appeal now exist under the Constitution and the Courts Act, the Rules can be applied to them, but as we have indicated, the right of Appeal so provided is limited to a right of appeal to the Court of Appeal from a single Judge sitting in the original jurisdiction of the Supreme Court.

It is also necessary to refer to Art. 94 of the Constitution which reads :

"94. All legal proceedings, whether civil or criminal, pending immediately before the Day of Independence before any court in Vanuatu shall be disposed of on and after that day in accordance with general or specific directions given by the Supreme Court subject to any law which may be enacted for that purpose."

Article 94 contained transitional provisions. It is of note that the disposition of pending litigation was to be in accordance with the directions given by the Supreme Court, subject to any law which may be enacted for that purpose. Thus, even in relation to a pending litigation, the pre-existing rights of appeal did not continue beyond Independence.

For these reasons, we consider that there is no right of appeal to the Court of Appeal from the decision of a single Judge of the Supreme Court sitting in the appellate jurisdiction established under s.16 of the Courts Act.

This conclusion is not a suprising one. In civil litigation in the Supreme Court, the complexities of the issues involved, and the value of the property in dispute, are likely to be very much greater than in disputes in the Magistrates Court. However, a litigant in the Supreme Court who is dissatisfied with the judgment of the trial Judge has only one right of appeal. It would be odd if a litigant in a relatively small claim in the Magistrates Court had two automatic rights of appeal.

A question of policy however arises. It is possible that on rare occasions a matter will arise in the Magistrates Court which involves an important question of law, or some issue of major public importance. In such a case, it might be appropriate that the issue be finally resolved by the Court of Appeal, either on reference of a question of law by a single Judge to whom the first appeal is made, or by way of further appeal. In some jurisdictions, this situation is catered for by allowing a further appeal to a Court of Appeal subject to a grant of leave to appeal either on a question of law of general public importance, or on some other criteria. Parliament may think it appropriate to give consideration to making provision in the Courts Act for an appeal from the appellate jurisdiction of the Supreme Court of the Court to Appeal by leave in special cases.

When the appeal was dismissed the respondents applied for costs. In our opinion the normal rule that costs should follow the event should apply. The doubt about the jurisdiction of the Court of Appeal was brought to the attention of the appellant's counsel before the hearing, and counsel was in possession of the direction by Chief Justice Vaudin d'Imecourt. The appellant decided to take the chance that the Court of Appeal would hold a different view. The decision to proceed was a deliberate one, and there is no reason why the respondent should not be compensated with costs.

The formal Orders of the Court are :

1. Appeal dismissed.

2. Appellant to pay the Respondent's costs, to be taxed if not agreed.

DATED AT PORT-VILA, this ..... DAY of OCTOBER 1997

BY THE COURT

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J.W.von DOUSSA J. J.B. ROBERTSON J. K. MATASKELEKELE J. O. SAKSAK J.