

IN THE COURT OF APPEAL  
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 10 OF 2014  
(High Court Criminal HAC 137 of 2010)

BETWEEN : MAHENDRA PAL CHAUDHRY  
*Appellant*

AND : THE STATE  
*Respondent*

Coram : Calanchini P

Counsel : Mr A K Singh for the Appellant  
Mr M Korovou for the Respondent

Date of Hearing : 7 July 2014

Date of Decision : 15 July 2014

DECISION

- [1] The Appellant was charged with three offences against the Exchange Control Act Cap 211 (The Act). The first offence was the offence of failing to surrender foreign currency contrary to section 4 of the Act and section 1 of Part II of the Fifth Schedule

of the Act. The second offence was the offence of dealing in foreign currency otherwise than with an authorized dealer without permission contrary to section 3 of the Act and section 1 Part II of the Fifth Schedule of the Act. The third offence was the offence of failing to collect debts contrary to section 26 (1) (a) of the Act and section I Part II of the Fifth Schedule of the Act.

*Introduction*

- [2] Following a two day trial by Judge sitting with assessors, the Appellant was found guilty on all three counts by the unanimous opinion of the assessors. The learned High Court Judge agreed with the unanimous opinion of the assessors and formally convicted the Appellant in his judgment delivered on 4 April 2014. In his sentencing judgment delivered on 2 May 2014 the learned trial Judge ordered that the Appellant pay a fine equivalent to FJD\$2 million by 30 June 2014 in default of which he was to serve a term of imprisonment of 15 months with a non-parole term of 12 months. The Appellant was also ordered to comply with the Act and offer all of his foreign funds held abroad to an authorized dealer by 31 July 2014. In default of this order, the Appellant would be in continuing breach of the Act and liable to further prosecution. There were further ancillary orders made by the learned Judge that are not directly relevant to the present proceedings.
- [3] The Appellant filed a notice of appeal and grounds of appeal on 16 April 2014. The date of filing post dated the judgment by which the conviction was entered but predated the sentencing judgment. As a result an Amended Notice and grounds of appeal against conviction and sentence was filed on 8 May 2014. The appeal against conviction and sentence has been filed within the time prescribed by section 26 of the Court of Appeal Act Cap 12.
- [4] In the proceedings that are presently before me, there are three applications by the Appellant. The first is an application for a stay of conviction and sentence pending the determination of the appeal. This application was made by summons filed on 21 May 2014.

- [5] The second application was for leave to appeal against conviction and sentence. This application was made by summons filed on 1 July 2014 and only formalises what was already before the Court when the amended notice and grounds of appeal was filed.
- [6] The third application was for an order granting an urgent hearing of the appeal. This application was not made by summons but was made ex tempore from the bar table by Counsel for the Appellant during the course of a mention hearing on 13 June 2014.
- [7] The stay application was supported by two affidavits sworn by Mahendra Pal Chaudhry on 21 May and 2 June 2014 respectively. The Respondent did not file affidavit material. The Appellant filed written submissions on 6 June 2014 and the Respondent filed answering submissions on 17 June 2014. A reply submission was subsequently filed on 26 June 2014 on behalf of the Appellant. Counsel for the Appellant provided the Court with a copy of "*Speaking Notes*" summarizing the primary submissions on the stay application during the course of the hearing of the applications. At the hearing both Counsel addressed the Court in some detail on the issues raised by their written submissions.
- [8] At the outset it should be noted that Counsel for the Appellant informed the Court on 30 June 2014 that the Appellant had paid the fine in compliance with the first order made by the learned trial Judge. The stay application, however, remained on foot in respect of the conviction and the balance of the sentencing orders.

*Leave to appeal*

- [9] It is appropriate to consider first the application for leave to appeal. As noted earlier in this decision, the amended appeal filed by the Appellant is against both conviction and sentence. Pursuant to section 21(1) of the Court of Appeal Act the Appellant must first obtain the leave of the Court unless the ground of appeal against conviction involves a question of law alone. If the ground of appeal involves a question of fact alone, or a question of mixed law and fact the Appellant must first seek leave to appeal. An application for leave to appeal may be heard by a single judge of the Court pursuant to section 35(1) of the Court of Appeal Act. In the case of any appeal against sentence the Appellant must first obtain leave to appeal from the Court.

Again, a single judge may determine an application for leave to appeal against sentence.

*Grounds of appeal*

[10] It is at this stage convenient to set out the grounds of appeal relied upon by the Appellant in his amended Notice of Appeal. However before proceeding to reproduce the 10 grounds of appeal, nine of which are relied upon in the appeal against conviction and one is in respect of the appeal against sentence, I am compelled to comment briefly on the drafting of those grounds. Rules 35(4) and 36 (1) of the Court of Appeal Rules provide that a notice of appeal shall precisely specify the grounds (including, if any, questions of law) upon which the appeal is brought. The notice of appeal does not in each ground precisely specify the issue relied upon or raised by the ground. For each ground there is a heading and then a narrative. It is difficult to determine with precision what is in issue. Some grounds appear to raise two or more issues. The Court's task has been made more difficult since neither the Appellant's primary submissions nor the speaking notes discuss the grounds of appeal that have been drafted in general narrative terms in the amended notice of appeal. As a result I shall refer to the heading of each ground as stating the issue or issues raised by that ground. They are:

1. *Judicial bias and the denial of the constitutional right to a fair trial in breach of section 15(1) of the 2013 Constitution.*
2. *Jurisdictional error of law.*
3. *Errors of law on requirement to open a bank account overseas and to hold funds in that account.*
4. *Error of law on application of section 39(3) of the Exchange Control Act and breach of section 15(12) of the 2013 Constitution.*
5. *Error of law on application of section 36(1) of the Exchange Control Act.*
6. *Error of law in holding the alleged offences were strict liability offences.*
7. *Error of law on application of section 3 of the Exchange Control Act.*

8. *Error of law on application of section 4 of the Exchange Control Act and failing to prove an essential element of the alleged offence.*
9. *Error of law on application of section 26(1) of the Exchange Control Act and failing to prove an essential element of the alleged offence.*
10. *Error of law in application of the delegation of powers as prescribed under section 39(4) of the Exchange Control Act.*
11. *Error of law and application of irrelevant and prejudicial matters used to arrive at sentence."*

[11] Although the notice of appeal purported to list a total of 10 grounds of appeal, ground No.5 was in error listed as ground No.4 and hence there are two grounds shown as ground No.4. The end result is that there are ten grounds of appeal against conviction and one ground of appeal against sentence. As for the ten grounds of appeal against conviction, there are two issues to be determined in respect of each ground. The first is whether the ground involves a question of law alone. If the answer is yes, then leave to appeal is not required. If the answer is no then it is necessary to determine whether any and if so which of the grounds of appeal relied upon by the Appellant raises an arguable point worthy of a contested hearing before the Court of Appeal.

[12] All the grounds of appeal, except for the first ground, are described in the amended Notice of appeal as raising an error of law. However, it needs to be clearly stated that the mere fact that the ground of appeal is stated in the notice to raise an error of law does not necessarily mean that the ground involves a question of law alone. In Hinds -v- R (1962) 46 Cr. App. R 327 Winn J at page 331 when commenting on section 3(a) of the Criminal Appeal Act 1907 (UK) (the terms of which were similar to the present section 21(1) (a) of the Court of Appeal Act) noted:

*"The court is very clearly of the opinion that the proper construction of those words (against conviction "on any ground of appeal which involves a question of law alone)" is that there must be, in order that the right given by that subsection can be claimed a ground of appeal raised which is a question of law, and that the section cannot be effectively invoked merely by raising a ground which the grounds of appeal or the submissions of counsel at any later stage describe as a ground of law."*

[13] At the hearing of the application Counsel for the Respondent indicated that the Respondent conceded that ground 2 (in so far as it related to jurisdiction) ground 5 (should read 6 relating to strict liability), ground 6 (should read 7) relating to a misdirection in law) and ground 10 (should read 11 relating to sentence) involved questions of law only for which leave was not required. It was accepted by Counsel for the Respondent that the questions whether leave was required and whether leave should be granted were questions for the Court. As a result both Counsel were then invited to address the Court on all the proposed grounds of appeal.

[14] Before considering the grounds, it must be kept in mind that if leave to appeal is required, the test that is applied is not onerous. The Appellant need only show on the material that is available at the leave stage (i.e. the summing up, the judgment and the sentencing decision) that the ground of appeal under consideration raises an arguable point. If the single judge concludes that the ground of appeal does not raise an arguable point he may simply dismiss the application for leave to appeal on that ground or those grounds and leave it to the Appellant to give notice that he wishes to renew his application for leave to appeal before the Court of Appeal (i.e. a three judge panel) pursuant to section 35 (3) of the Court of Appeal Act. Alternatively the single Judge may dismiss the appeal itself on the grounds that it is vexatious or frivolous or bound to fail under section 35 (2) of the Court of Appeal Act.

#### *Ground 1*

[15] Turning now briefly to the grounds of appeal. Counsel for the Appellant acknowledged that ground 1 raises a question of mixed law and fact. Leave to appeal on this ground is required. Has the Appellant raised an arguable point in ground 1? The Appellant alleges that he has been denied his right to a fair trial under section 15 (1) of the Constitution. Such a right has existed under the common law well before the introduction of the right in its constitutional form. Section 15 (2) to section 15 (12) are specific requirements that must be satisfied to give effect to the general right to a fair trial under section 15(1). However the specific requirements are not necessarily exhaustive.

[16] The first two allegations that are raised by the Appellant in ground 1 are vague and general. The allegations relate to various interlocutory applications filed from February 2013 to 2 May 2014. It is claimed that the trial judge denied the Appellant a fair trial on account of his expressing disfavor and discourtesy towards Counsel for the Appellant and by refusing to "*objectively consider*" those interlocutory applications. There are no particulars provided. In the absence of such particulars I am not able to determine whether this part of ground 1 raises an arguable point and leave to appeal is refused.

[17] This ground also raises allegations concerning interlocutory decisions and their effect on the sentencing judgment. Those allegations will be considered under ground 11 being the application for leave to appeal against sentence. Any other reference to the sentencing judgment in ground 1 will also be considered under the ground challenging the sentence. The allegations relate more to the exercise of the sentencing discretion rather than to the right to a fair trial.

[18] The principal issue raised by ground 1 is the claim that the trial judge had prejudged evidentiary matters. The claim arises out of observations made by the learned Judge in an interlocutory ruling delivered on 6 March 2014 and which was exhibited as MPC 8 to the affidavit sworn by the Appellant and filed on 21 May 2014. Objections were taken to paragraphs 27 and 28 of that Ruling. Those paragraphs state:

"27 *No matter how the applicant may regard his funds in Australia and no matter what their provenance the fact is that they represent foreign exchange held by a Fijian resident and as such they are caught by the terms of Act.*

28 *Mr Reynold's QC submissions are well researched, novel and ingenious but unfortunately they are misconceived. The funds being abroad, the legislation creates the "nexus" and this limb of the applicant's argument has no merit."*

[19] In that Ruling the learned Judge was considering a number of applications raised in two separate notices of motion. The aim of the applications was essentially to bring the prosecution of the Appellant to an end.

[20] Counsel for the Appellant submitted before me that the learned Judge had made findings of fact that related to the charges before the trial had commenced and before evidence had been adduced.

[21] Counsel for the Respondent submitted that the facts to which the Appellant referred were subsequently admitted in the document headed "*Agreed Facts*" (exhibit MPC 1 to the Appellant's affidavit) with particular reference to agreed fact No. 26 which states:

*"All foreign currency including Australian dollars and New Zealand dollars are specified currency under ECA."*

[22] Counsel for the Appellant acknowledged that there was subsequent agreement but claimed that the agreement on the facts was reached some time after the Ruling delivered by the Judge. He submitted that the Ruling still demonstrated pre-judgment which affected the Appellant's right to a fair trial. The point is arguable and leave is granted to argue that question before the Court of Appeal.

[23] Ground 1 also raises an issue concerning the learned trial Judge's attendance at "*Director of Public Prosecutions Workshops*." There are no particulars provided and by itself is not indicative of any form of bias. This aspect of ground 1 is dismissed under section 35 (2) of the Court of Appeal Act.

#### *Ground 2*

[24] Ground 2 raises two issues, both of which appear to be concerned with the application of the Exchange Control Act. This ground of appeal is best considered by reference to paragraphs 2.2 and 2.3 of the amended notice of appeal:

*"2.2 The trial judge erred in law by holding the Exchange Control Act had extra territorial application with respect to banking transactions in foreign bank accounts when the same did not relate to any contracts of exchange within the jurisdiction of the Exchange Control Act as applied in Fiji.*

*2.3 The trial judge erred in law by holding the Applicant was required to obtain the necessary permissions under section 3, 4 and 26 when there was no transaction and/or contract of exchange with any Fijian currency and/or any matters*



*requiring the necessary consents from Fijian authorized dealers or the Reserve Bank of Fiji."*

[25] The Court has not been greatly assisted by the written submissions in respect of this ground of appeal. It is not clear whether this ground of appeal relates to earlier interlocutory rulings given by the learned judge or to the directions given by him to the assessors in his summing up. To the extent that both grounds appear to raise questions of law mixed with fact, leave is required.

[26] In his submissions before me Counsel relied on paragraphs 17 and 18 of the summing up which he submitted did not adequately set out the ingredients of the offence under section 26 of the Exchange Control Act. Although there is no reference to the expression "*specified currency*" which is the expression used in section 26 and which is defined in section 4(2), there is agreement that Australian dollars are specified currency. Whether the direction is sufficient to describe the ingredients of the offence is a question of law and whether the learned Judge has correctly related the evidence to the law are connected issues. There is an arguable point and leave is granted.

*Ground 3*

[27] Ground 3 raises issues of mixed law and fact. In his submissions before me Counsel submitted that paragraphs 11 and 12 did not correctly identify the ingredients of the offence and did not correctly relate the ingredients of the offence to the evidence. Whilst the Judge did not expressly refer to the definition of authorized dealer, it had been expressly agreed that the Appellant was not an authorized dealer (Fact 7). Whether the trial Judge should have given directions on "*the entitlement to procure*" is a question of law. In addition to the extent that the ground also raises a question of mixed law and fact, leave is required and is granted.

*Ground 4*

[28] In this ground the Appellant claims that the learned trial Judge misdirected the assessors in respect of section 39 (3) of the Exchange Control Act. Whether paragraph 13 of the summing up correctly states the effect of section 39 (3) is a question of law and leave is therefore not required.

*Ground 5 (Ground 4)*

- [29] Ground 5 raises an issue concerning the directions given to the assessors on the application of section 36(1) of the Exchange Control Act. This ground is related to the offence charged under section 26 of the Act. It raises a question of mixed law and fact and is arguable. Leave to appeal is granted.

*Ground 6 (Ground 5)*

- [30] This ground raises a question of law alone; i.e. whether the direction given in paragraph 22 to the effect that the offences were "*offences of strict liability*" was a correct statement of the law.

*Ground 7 (Ground 6)*

- [31] Whether the direction to the assessors concerning the status of funds placed in banks was correct raises a question of law since it was agreed that the Appellant had placed funds in financial institutions in Australia and New Zealand.

*Ground 8 (Ground 7)*

- [32] This ground raises an issue of mixed law and fact. There is first a direction on the ingredients of the offence under section 4 of the Exchange Control Act. This raises a question of law. However in paragraphs 11 and 12 the learned Judge gives directions on the evidence and the law. To the extent that leave is required it is granted.

*Ground 9 (Ground 8)*

- [33] This ground raises a further issue in relation to the offence under section 26 (1) of the Exchange Control Act. It is submitted that the learned Judge failed to direct the assessors that the Respondent was required to establish beyond reasonable doubt that the Appellant had a right to receive specified currency and that he delayed such receipt of specified currency. Whether the directions on the law given to the assessors by the learned Judge in paragraph 17 of the summing up adequately stated the law is a question of law and leave is not required.

*Ground 10 (Ground 9)*

- [34] This ground raises an issue concerning the delegation of the Minister's powers under the Act to the Reserve Bank and whether such powers can be exercised by the

Governor. In this case the question does necessarily involve questions of mixed law and fact. An arguable point has been raised and leave is granted.

*Ground 11 (Ground 10)*

- [35] For the reasons identified by the Appellant in ground 1 and identified in ground 10 as set out in the Notice of Appeal, leave is granted to appeal against sentence.
- [36] Before moving to consider the remaining applications it is necessary to emphasize that in any application for leave to appeal against conviction and/or sentence, a single judge deciding the application under section 35(1) of the Court of Appeal Act, is not deciding the appeal nor in any way assessing the merit of any particular ground. So long as the ground of appeal raises an arguable point, leave will be granted. It does not matter that a ground may be weak with little chance of success. That is a matter for the Court of Appeal to determine. In relation to a ground of appeal that raises a question of law alone leave is not required at all. It would only be when the judge formed the view that the ground raising a question of law only was vexatious or frivolous that the appeal would be dismissed under section 35 (2) of the Court of Appeal Act. That is not the case in this application.
- [37] It should also be noted that for the reasons just stated above, the rulings on the various grounds of appeal are not necessarily relevant to the two remaining applications which fall to be determined on mostly unrelated considerations.

*Application for stay*

- [38] The Appellant has applied for a stay of conviction and sentence pending the determination of the appeal. This application raises a preliminary question of jurisdiction and in particular whether the Court of Appeal sitting in the criminal jurisdiction has the power to grant a stay of conviction and sentence pending appeal following a trial in the High Court. A further question arises as to whether a single judge of the Court of Appeal has the jurisdiction under section 35 of the Court of Appeal Act to determine such an application.
- [39] It is necessary to indicate that the jurisdiction which the Court of Appeal exercises in respect of any application must be founded on a provision in the Court of Appeal Act

or the Court of Appeal Rules. In R -v- Jeffries [1969] 1 QB 120 the Court of Appeal held at page 124:

*“Whatever may be the powers of courts exercising a jurisdiction that does not derive from statute, the powers of this court are derived from, and confined to, those given by the Criminal Appeal Act of 1907.”*

[40] It is apparent from a reading of the Criminal Appeal Act 1907 (UK) that the Court of Appeal in Fiji still exercises a jurisdiction in criminal appeals that to a large extent replicated the jurisdiction of the former Court of Criminal Appeal in England. The changes to the jurisdiction, practice and procedure of the Court of Appeal in England sitting in its criminal jurisdiction that have been made by subsequent Acts (e.g. in 1968 and 1981) have not been replicated in Fiji. This Court has no inherent jurisdiction and the right to appeal itself is a creature of statute.

[41] The Court of Appeal Act Cap 12 is an Act for the establishment of a Court of Appeal and to make provision for appeals thereto. It is divided into 5 Parts. Parts I and II are introductory and of general application. Part III sets out the provisions relating to the exercise of the Court’s jurisdiction in civil appeals. Part IV sets out the provisions relating to the exercise of the Court’s jurisdiction in criminal appeals.

[42] It was not disputed by Counsel that the Appellant’s appeal against conviction and sentence was a criminal appeal. The right to appeal against conviction and or sentence is given to a convicted person following a trial in the High Court pursuant to section 21 of the Court of Appeal Act which is contained in Part IV of the Act. If there is jurisdiction to stay a conviction and sentence pending the hearing of the appeal, it must be found in Part IV of the Court of Appeal Act.

[43] Since the application came before me sitting as a single Judge of the Court of Appeal, the starting point in determining the question of jurisdiction is section 35(1) of the Court of Appeal Act which states:

*“35(1) A judge of the Court may exercise the following powers if the Court:-*

*(a) to give leave to appeal to the Court;*

- (b) *to extend the time within which notice of appeal or of an application for leave to appeal may be given;*
- (c) *to allow the appellant to be present at any proceedings in cases where he or she is not entitled to be present without leave;*
- (d) *to admit an appellant to bail;*
- (e) *to cancel an appellant's bail on good cause being shown;*
- (f) *to recommend that legal aid be granted to an appellant."*

[44] It is obvious that a single judge of the Court does not have the jurisdiction to determine the application for stay of conviction and sentence pending appeal. Unless the jurisdiction is given by the statute, the jurisdiction does not exist.

[45] A further question that necessarily follows is whether the Court of Appeal has the jurisdiction under Part IV of the Act to order a stay of conviction and sentence pending appeal. It was conceded by Counsel for the Appellant that there is no express power to that effect given to the Court of Appeal under Part IV.

[46] In the summons filed on 21 May 2014 it is stated that the application is made pursuant to section 3 (3) of Part I of the Fifth Schedule of the Exchange Control Act and sections 28, 3(2) (a) (b) and 20 (f) of the Court of Appeal Act and the Court of Appeal Rules.

[47] In my judgment, the reliance on section 3 (3) of Part I of the Fifth Schedule of the Exchange Control Act by the Appellant for the purposes of the present application is misplaced. The opening words of section 3(3), "*For the purposes of this paragraph*" – is a reference to paragraph 3 (referred to by the Appellant as section 3) which is concerned with the retention by an executive authority of an article which is reasonably believed to be evidence of the commission of an offence until the final determination of the proceedings. Section 3 (3) is concerned with the issue of when proceedings are deemed to be finally determined for that purpose. It is not related to the jurisdiction of the Court of Appeal to grant a stay of conviction or sentence pending appeal. It is simply related to the retention of evidence.

[48] In his submissions before me Counsel for the Appellant placed considerable reliance on section 28 of the Court of Appeal Act. Section 28 is also in Part IV of the Act. It

is headed "*Supplemental Powers of Court*" and it can reasonably be implied that section 28 relates to the supplemental powers of the court for the purposes of criminal appeals. Although it is lengthy, it is appropriate to reproduce the section in its entirety on account of the reliance placed on it by the Appellant:

- "28. *In the exercise of their jurisdiction under this Part the Court of Appeal may, if they think it necessary or expedient in the interests of justice –*
- (a) *order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and*
  - (b) *order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of Court, or in the absence of rules of Court making provision in that behalf, as they may direct, before any judge of the Court or before any officer of the Court or magistrate or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and*
  - (c) *receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in case where the evidence of the husband or wife could not have been given at the trial except on such application; and*
  - (d) *where any question arising in the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in manner provided by rules of Court for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner as far as they think fit to adopt it; and*
  - (e) *appoint any person with special expert knowledge to act as assessors to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case, and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of appeal on appeals in*

*civil matters and issue any warrants necessary for enforcing the orders or sentence of the Court.*

*Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial."*

[49] The words of the section upon which the Appellant relies are found in the paragraph which follows section 28(e) being:

*"and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters \_ \_ \_"*

[50] The Appellant submits that the Court of Appeal has the power in civil appeals to grant a stay of execution of a judgment or order pending appeal and that in accordance with section 20 a single judge of the Court of Appeal may exercise that power of the Court. As a result and by virtue of the words quoted above the Court of Appeal on an appeal in a criminal matter has the same powers and so does a single judge of the Court.

[51] Counsel for the Appellant conceded that he was unable to support that submission with any authority from either this jurisdiction or as a result of any decision of the English Courts. It was also acknowledged that there is no reference in the index to any recent edition of "*Archbold Criminal Pleading Evidence and Practice*" to stay in criminal appeals in the context of stay pending appeal.

[52] In my judgment the words under consideration do not have the effect of equating the statutory jurisdiction of the Court of Appeal in civil appeals with the statutory jurisdiction exercised by the Court of Appeal in criminal appeals. I have reached this conclusion based first on a strict interpretation of section 28 itself and secondly on a consideration of the powers exercised by the Court of Appeal in civil matters under the Court of Appeal Act.

[53] Section 28 sets out five specific supplemental powers to be exercised by the Court of Appeal when it is considered necessary or expedient in the interest of justice. They are (1) the power to order the production of documents, exhibits or other things, (2) the power to order the attendance and examination of compellable witnesses, (3) the

power to receive the evidence if tendered, of any competent but not compellable witness, (4) the power to appoint a special commissioner and (5) the power to appoint any person with special expert knowledge to act as assessor. It is only after these five specific supplemental powers have been listed that the general power expressed by the words "*any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters*" appear. In my judgment the intention of the section was to give to the Court of Appeal a criminal matters the same powers that are exercised by the Court of Appeal in civil matters with respect to the admission of evidence and would include the power to apply, for example, the provisions of the Civil Evidence Act 2002.

[54] If the words in section 28 that are under consideration are to be given a wider meaning then that meaning must be determined by reference to the powers given to the Court of Appeal in civil matters in Part III of the Court of Appeal Act. Those powers are set out in section 13 of the Act which is headed "*Powers of Court of Appeal in civil appeals*" and states:

*"13 For all the purposes of and incidental to the hearing and determination of any appeal under this Part \_\_\_ the Court of Appeal shall have all the power, authority and jurisdiction of the High Court and such power and authority as may be prescribed by rules of Court."*

[55] In my judgment the purpose of this section is to give to the Court of Appeal during the course of its hearing and determination of any civil appeal the same power, authority and jurisdiction as the High Court possesses under the High Court Act Cap 13 and the High Court Rules for the hearing and determination of civil proceedings. Its purpose is not to give to the Court of Appeal jurisdiction which it possesses in civil appeals a jurisdiction which it does not possess in criminal matters. In my opinion the Appellant cannot rely on section 13 for the claim that section 28 gives either a single judge or the Court the jurisdiction to entertain an application for a stay of conviction and sentence in a criminal appeal.

[56] Finally, on this point, it is quite clear that Part III is in effect a stand alone Part for the purpose of civil appeals and Part IV is a stand alone Part for criminal appeals. The



provisions of the Act that apply in common to both civil and criminal appeals are set out in Part II of the Act. If the drafter had intended that the Court of Appeal should enjoy the same jurisdiction, powers and authority in respect of both criminal and civil appeals, there would have been no need for a separate Part III and Part IV.

[57] For all of the above reasons I find that there is no jurisdiction to hear the application for a stay and as a result the application is dismissed.

*Urgent Appeal hearing application*

[58] As I indicated earlier in this decision, there was no formal written application seeking an order for an urgent hearing of the Appeal. The application was made from the bar table as late as 13 June 2014. There was no affidavit filed specifically for the purpose of the application.

[59] There is no express jurisdiction for a single judge to hear such an application. However in view of the accepted principle that any court or tribunal has an inherent jurisdiction to at least regulate and control its own proceedings, I indicated to Counsel for the Appellant that I was prepared to hear and determine the application pursuant to section 7 of the Act which states:

*“The Court of Appeal shall sit at such places from time to time as the President may determine.”*

[60] The present practice of the Court of Appeal is to sit in four sessions lasting approximately one month each year. The next session of the Court is fixed for September 2014. The Appellant seeks a hearing date for his appeal that would not only pre-date the next session but also pre-date 17 August 2014. In making the application the Appellant is seeking priority and urgency ahead of a large number of appeals that are in the callover list awaiting a hearing date.

[61] For the purposes of this application there is just one sentence in the affidavit filed on 21 May 2014 which may be said to offer some support for the application. In paragraph 33 it is stated:

*"I am Leader of the Fiji Labour Party and intend to contest the Parliamentary elections scheduled for September 2014 with the support of the Fiji Labour Party membership and the public at large."*

[62] I am also prepared to take judicial notice of the fact that the Fiji Labour Party is a registered political party under *"The Political Parties (Registration, Conduct, Funding and Disclosures) Decree 2013."* In his submissions before me Counsel for the Appellant claimed that if an urgent hearing was not granted, then the Appellant would be deprived of his constitutional right to contest the elections under section 56 of the Constitution. There are two points that arise from that submission. The first is that even in the event that an urgent hearing was granted, that in itself does not change anything. The eligibility of the Appellant is not determined by the timing of the appeal hearing but by the outcome of the appeal. I do concede however that a timely appeal is necessary in order for the determination of the appeal to be made known before 17 August 2014.

[63] Secondly, section 56 of the Constitution does not give a person a constitutional right to be a candidate. Section 56 (2) provides that a person may be a candidate for election to Parliament only if a number of conditions of which there are eight are satisfied. The use of the word *"may"* and the requirement to satisfy eight conditions are more indicative of a privilege than a right. It is not a right to be claimed in the same sense as a right or freedom for which provision is made in the Bill of Rights in Chapter 2 of the Constitution.

[64] Be that as it may, it appears to me that the Appellant's ability to offer himself as a candidate for election is conditional upon him satisfying the conditions set out in section 56 (2) of the Constitution. It appears not to be disputed that at the present time as a result of his conviction in the High Court the Appellant is not eligible to be a candidate on account of section 56 (2) (g) which states:

*"A person may be a candidate for election to Parliament only if the person:*

- (a) - (f) \_\_\_\_\_
- (g) *has not, at any time during the eight years immediately before being nominated, been convicted of any offence under any law for which the maximum penalty is a term of imprisonment of 12 months or more; and*
- (h) \_\_\_\_\_."

[65] Whether that impediment remains is dependent upon the outcome of the appeal. If the appeal against conviction is successful the impediment may be removed. However the removal of the impediment should not be determined by a decision denying the Appellant the opportunity to prosecute a timely appeal. It is for that reason that the application is granted.

[66] It is important that I make a further comment concerning this application. Counsel for the Appellant in making his application submitted that it should be granted because the appeal had strong chances succeeding. The decision to grant the application has been made on other grounds. The relative merits of any ground of appeal have not been considered. The decision to grant the application should not be taken as indicating that I have formed any view whatsoever about the chances of the appeal succeeding.

[67] The appeal will be decided by the Court of Appeal consisting of a panel of three appeal judges strictly in accordance with sections 23 (1) (a), 23(2) (a) and 23 (3) of the Court of Appeal Act.

[68] *Summary*

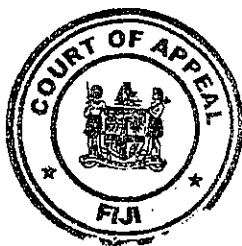
Leave to appeal against conviction is granted for those grounds that raise questions of mixed law and fact on the basis that they raise an arguable point. The leave given in respect of ground 1 is limited. The appeal against conviction on grounds raising a question of law alone is to proceed on the basis that they are neither frivolous nor vexatious. Leave to appeal against sentence is granted.

[69] The grounds of appeal have not been properly drafted. The Appellant is required to file and serve a further amended notice and grounds of appeal in compliance with Rule 35 (4) and Rule 36 (1) of the Court of Appeal Rules. Counsel should ensure that the amended notice states concise grounds of appeal. The issue raised by each ground must be clearly stated so as to avoid the time-wasting effect of prolix and overloaded grounds of appeal. Reference should be made to Archbold 2011 at page 1115 (para. 7 – 179) or the equivalent reference in any other edition.

[70] The application for a stay of conviction and sentence is dismissed on the grounds that the Court of Appeal has no jurisdiction to grant such a stay in criminal matters. The application for priority and an urgent appeal hearing is granted.

**Orders:**

- (1) *Leave to appeal is granted where required.*
- (2) *Application for stay of conviction and sentence pending appeal is dismissed.*
- (3) *Application for urgent hearing is granted.*
- [4] *The Appellant is to file and serve further amended notice and grounds of appeal by 4.00p.m. on Friday 18 July 2014.*
- [5] *The appeal is listed for mention on Monday 21 July 2014 at 9.30a.m. for the purpose of fixing a hearing date and a schedule for the filing of written submissions.*
- [6] *Counsel are required to advise the Court on Monday 21 July 2014 at the mention as to the date nominations close to stand as a candidate at the elections in 2014.*



*W. Calanchini*  
\_\_\_\_\_  
HON. MR JUSTICE CALANCHINI  
PRESIDENT, COURT OF APPEAL