IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0085 OF 2012
[High Court Criminal Case No. HAC 4 of 2012]

BETWEEN : **THE STATE**

Appellant

AND : **MOHAMMED ILIYAZ KHAN**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

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

Date of Hearing : **23 May 2019**

Date of Judgment : **06 June 2019**

JUDGMENT

Gamalath, JA

[1] Having read the reasons given by Prematilaka, JA, I agree with his decision on the appeal.

Prematilaka, JA

[2] This appeal arises from the dismissal of the appeal filed by the appellant in the High Court of Lautoka against the acquittal of the respondent by the Learned Magistrate. The respondent had been charged with one count of larceny by servant for the period from 31 January 2008 to 31 January 2010 and another count of theft for the period from 01 February 2010 to 09 September 2010. The details of offences given were as follows.

> '***First count***
>
> *Statement of offence*
>
> *Larceny by servant contrary to Section 274(a)(i) of the Penal Code.*
>
> *Particulars of offence*
>
> *Mohammed Iliaz Khan between the 31st day of January 2008 and 31st day of January 2010 at Lautoka in the Western Division being employed as a Manager by City Spares stole assorted motor vehicle parts valued at $ 50,353.51 the property of said City Spares.*
>
> ***Second count***
>
> *Statement of offence*
>
> *Theft contrary to Section 291(1) of the Crimes Decree No 44 of 2009.*
>
> *Particulars of offence*
>
> *Mohammed Iliaz Khan between the 1st day of February 2010 and 9th day of September 2010 at Lautoka in the Western Division dishonestly appropriated assorted motor vehicle parts valued $21,015.27 belonging to City Spares with the intention of permanently depriving the said City Spares.*

[3] According to the evidence led by the prosecution, the respondent had been employed by a motor spare parts shop named City Spares. The respondent had been the manager of the said spare parts shop during the relevant period. An audit had been carried out in the year 2010 which had revealed that a stock of spare parts worth $ 71, 368.78 had been taken away by manipulation of stock cards. Accordingly, it had been reported to the police and the respondent had been charged with larceny and theft of assorted spare parts to the total value of $ 71,368.78 during the said period. In the course of the trial the prosecution had

called 10 witnesses and produced 826 stock cards pertaining to 826 varieties of spare parts. The evidence had revealed that all those stock cards were falsified by entering wrong receipt numbers. The witnesses had given evidence that the false entries on the said stock cards were the hand writings of the respondent. The prosecution had also produced evidence that there were frequent cash deposits into the bank accounts belonging to the respondent. After the case for the prosecution was closed, the Magistrate had held that there was a case for the respondent to answer but he had opted to remain silent.

[4] Delivering his judgment on 10 April 2012, the Learned Magistrate had acquitted the respondent stating *inter alia* as follows

> *'However there was no evidence produced by the Prosecution to show that the accused in fact took any spare parts. The whole Prosecution case was all about falsifying stock cards by entering false details. The elements of larceny by servant or theft were not touched by the Prosecution. It should be noted that for the offence of larceny there should be an act of taking or carrying of resulting change of possession of a particular property which is capable of being stolen. Similarly for the offence of theft the Prosecution has to prove that the Accused dishonestly appropriated the property. There was no evidence to establish these elements and no witness said that the Accused stole spare parts valued at $ 71,368.78.'*

[5] Therefore, it is clear from evidence that the prosecution had sought to prove its case by circumstantial evidence in the absence of direct evidence to show that the respondent had taken away the goods in question from the stores. The Magistrate seems to have emphasised the fact that there was no direct evidence of the appellant having removed the goods from the stores as shown by the following paragraphs in his judgment. In the process the learned judge has failed to give consideration to the question as to what inferences could be drawn from the circumstantial evidence led at the trial and whether the charges against the respondent could have been proved by such evidence. He had placed a great deal of emphasis on direct evidence of the respondent having committed the offences charged as shown by the following paragraphs.

> *'On the other hand the Court cannot assume that the Accused took the items by falsifying the stock cards. There were Prosecution witnesses who worked with the Accused at the same spare parts shop during the periods pertaining to this case. <u>However none of them did say that the accused took the spare</u>*

parts or effected any change of possession of the missing stocks of spare parts.

'In the instant case the Accused is charged for stealing assorted motor spare parts. He is not even charged for stealing money or for falsification of accounts. There was no evidence whatsoever to incriminate the accused for stealing motor spare parts. Although the property had been in the custody of the Accused as the Manager of the said spare parts shop during the time pertaining to this case, there was no evidence to prove any movement of the property by the Accused.'

[6] This appears to be the gist of the complaint of the State. The sole ground of appeal in the petition of appeal dated 08 May 2012 was

'THAT the learned Trial Magistrate erred in law by failing to consider and apply the law relating to circumstantial evidence during the course of his analysis of the evidence led at the trial'

[7] The State had, thereafter, filed an amended petition of appeal dated 28 June 2012 (filed on 19 July, well before the first date of hearing on 21 August 2012) containing the sole ground of appeal as follows

'THAT the learned Trial Magistrate erred in law and in fact by failing to adequately consider and apply the law relating to circumstantial evidence during the course of his analysis of the evidence led at the trial'

[8] The respondent's counsel had objected to the amended petition of appeal on 19 July and had filed written objections dated 01 August 2012 on the basis that the amended petition of appeal was not in compliance with section 249(1) of the Criminal Procedure Decree, 2009 in as much as the appellant had failed (i) to identify the relevant passages complained of by reference to the transcript and (ii) to cite any case authorities where the trial magistrate had erred in law. On 21 August the state counsel had moved for time to respond to the said objections and the court had granted time till 18 September. On 18 September 2012, once again the state counsel had sought more time to file 'objections' to the respondent's objections and the counsel for the appellant had objected to that application for further time. Yet, in the record of the High Court provided to this court as agreed between the parties, I find the State's reply to the preliminary objection taken on behalf of the appellant by way of a written submission dated 18 September 2012, where the State had also sought a final amendment to the sole ground of appeal described as follows. However, the recorded proceedings are silent as to the filing of these

submissions or the outcome of the application for the final amendment of the ground of appeal.

> *'THAT the learned Trial Magistrate erred in law and in fact by failing to adequately consider the circumstantial evidence led at the trial of the matter during the course of his analysis of the evidence led at trial'*

[9] What had been recorded is that on 18 September 2012, judgment had been fixed for 03 October 2012 and accordingly, on that day the High Court Judge had dismissed the appeal on the basis that the amended petition of appeal had not complied with section 249(1) of the Criminal Procedure Decree and had further held while touching on the merits of the matter that

> *'Anyhow considering the judgment pronounced by the learned Magistrate and the evidence at the trial I find the Prosecution had not proved the elements of the offence hence I agree with the learned Magistrate.'*

[10] Therefore, it looks as if the High Court Judge had dismissed the appeal not only on the basis of the preliminary objection but also on merits of the case. Nevertheless, there is hardly any discussion of the merits of the case in the impugned judgment of the High Court except the bare statement *'Anyhow considering the judgment pronounced by the learned Magistrate and the evidence at the trial....'*

[11] The appellant had filed a timely application for leave to appeal against the dismissal of the appeal pursuant to section 22(1) of the Court of Appeal Act. Altogether, 03 grounds of appeal had been urged against the said dismissal of the appeal. On 02 March 2016 the Single Judge of the Court of Appeal had granted leave to appeal on the first and the third grounds of appeal. There is no renewal of the second ground of appeal by the appellant before this court.

<u>Grounds of Appeal</u>

[12] Therefore the grounds of appeal that would be considered in this appeal are as follows:

> *(i) That the learned Judge erred in law when he incorrectly applied the provisions of Section 249(1) of the Criminal Procedure Decree, 2009 to the State's petition of appeal from the Magistrate's Court to the High Court; The State's petition of appeal having been in full*

compliance with Section 249(1) of the Criminal Procedure Decree, 2009

(ii) That the learned Judge erred in law in dismissing the appeal brought by the State without first having heard the State on the merits of the Appeal brought by it."

[13] I shall now proceed to consider the first ground of appeal.

'That the learned Judge erred in law when he incorrectly applied the provisions of Section 249(1) of the Criminal Procedure Decree, 2009 to the State's petition of appeal from the Magistrate's Court to the High Court; The State's petition of appeal having been in full compliance with Section 249(1) of the Criminal Procedure Decree, 2009.'

[14] Section 249 (1) of the Criminal Procedure Act, 2009 is as follows

'Form and contents of petition

249. — (1) Every petition shall contain a concise statement of the grounds upon which it is alleged that the decision of the Magistrates Court has erred on the facts of the case or the applicable law.'

[15] The single judge ruling refers to the ground of appeal challenged by the respondent as follows.

'THAT the learned Trial Magistrate erred in law and in fact by failing to adequately consider the circumstantial evidence led at the trial of the matter during the course of his analysis of the evidence led at trial'

[16] This is the final amended version presented by the appellant in its written submissions dated 18 September 2012. However, the appellant had not filed the final version of the ground of appeal (02nd amended ground of appeal) not later than 03 days with leave of court before the date of hearing as required by section 249(4) of the Criminal Procedure Act, 2009. Nor has the High Court considered or allowed the final version of the ground of appeal to be filed of record.

[17] Gates, J (as His Lordship then was) in **Goundar v State** [2001] FJ Law Rp 61; [2001] 2 FLR 254 (3 August 2001) in relation to section 311 (4) and 317 (1) of the Criminal Procedure Code which are substantially similar to sections 249(4) and 254(2) of the Criminal Procedure Act, 2009 said

> *'At the appeal hearing I gave leave for the filing of an amended Petition of Appeal. This should have been filed by the Respondent "not later than three days before the date fixed for the hearing of the appeal..." [section 311(4) of the CPC] so that the Deputy Registrar could comply with section 314(e) of the CPC and "serve notice of such filing and supply the Respondent with a copy of the document containing such additional grounds of appeal". I indicated I would allow Ms Fagbenro for the Respondent further time to reply if she were embarrassed by the late filing. In the event, she did not require further time. However it is important for counsel to bear in mind, the filing of additional grounds should be done in good time to allow, in fairness, for a full response from their opponents.* ***The cost of an adjournment of an appeal if necessary may have to be borne by an Appellant in such cases*** *[section 317 CPC].'*

[17] Nevertheless, it appears that given the facts of the case and the impugned judgment of the Magistrate, the sole ground of appeal as amended and submitted to the High Court on 18 September best encapsulates the real concern of the appellant. However, the High Court Judge had considered the second version of the ground of appeal as shown by the judgment. The difference between the two versions is found in the words '*.... consider the circumstantial evidence....*' (final version) and '*... consider and apply the law relating to circumstantial evidence ....*' (second version).

[18] However, this difference does not make a significant impact on the matter in issue before this court. What section 249(1) of the Criminal Procedure Act, 2009 requires is that a petition of appeal should contain a concise statement of the grounds upon which the Magistrate has allegedly erred on the facts of the case or the applicable law. Clearly, section 249(1) does not require a petition of appeal to contain parts of evidence or a discourse of the relevant law in the same detail as found in a written submission. Nevertheless, it was held by Gates, J (as His Lordship then was) in **State v Flour Mills of Fiji Ltd** HAA0009 of 2001: 30 August 2002 [2002] FJHC 310 as follows and the respondent was awarded $800 as costs to alleviate the hardship to the respondent and ensure greater accountability on the part of the appellant.

> *'The grounds of appeal simply stated, "That the trial Magistrate had erred in law in awarding costs at the preliminary inquiry". These grounds do not state why the Magistrate was wrong. It is always helpful, indeed necessary, for grounds of appeal to set out succinctly the nature of the error, so as to enable the Respondent to respond, and the appeal court to comprehend the*

*nature of the Appellant's complaints: see Section 311 (1) of the CPC; **Practice Direction "Applications for Leave to Appeal"** (1970) 54 Cr. App. R. 280 at p 282; **R. v Nicco (1972) Crim. L.R. 420; Joveci Josefa v The Police [1946-55] 4 Fiji L.R.; Fiu Varea v R** (unreported) Suva Supreme Court Crim. App No. 69/84; 9 November 1984.'*

[19] In **Josefa v Police** [1953] FJLawRp 8; [1946-1955] 4 FLR 71 (17 April 1953) Hyne, C.J. observed said as follows

'It would be helpful, however, if on future occasions the provisions of section 342(1) of the Criminal Procedure Code be strictly complied with. The section in question reads:-

"Every petition shall contain in a concise form the grounds upon which it is alleged that the Magistrate from whose decision the appeal is lodged has erred."

The following observations are based on comments by Du Parcq J. in Rex v Fielding 26 Cr.App.R. p.211. Particulars must be given in the grounds of appeal. If misdirection is complained of it must be stated whether the alleged misdirection is one of law or of fact, and its nature must also be stated. If omission is complained of it must be stated what is alleged to have been omitted. The prosecution is entitled to know precisely what case they have to meet, and it should not be necessary for the Court to go through the record to find out what may be the subject of complaint.

I feel sure that Counsel will have regard to these observations when next preparing an appeal to this Court from a decision of a Magistrate.'

[20] In **Chute v The State** HAA0063 of 97: 27 February 1998 [1998] FJHC 25 Scott J said

'Although I allowed Mr. Kohli to advance his arguments on these additional grounds of appeal the correct procedure for the filing of additional grounds was not followed and I therefore remind practitioners (including the office of the Director of Public Prosecutions) once again of the need to comply with the provisions of Sections 310 and 311 of the Criminal Procedure Code (Cap. 21) when filing appeals and when seeking to file additional grounds.

'By Section 310(1) original petitions must be filed within 28 days of the decision appealed against. Under the proviso to the section the period of 28 days may be enlarged upon application to the High Court if, inter alia, there has been a delay in providing a copy of the record of the proceedings in the Magistrates Court (Section 310(2)(d)). Taken together, the Section and its proviso have the effect of excluding the need to file holding petitions pending the receipt of the record. In particular the formula whereby a petition including only a general ground vaguely alleging errors of law and

fact and "reserving the right to file additional grounds upon receipt of the record" is to be avoided. There is no such right and such general grounds are in breach of the requirements of Section 311(1).'

'Where, a petition having already been fled, there is a wish, as in this case, to supplement the grounds the leave of the High Court must first be obtained no less than 3 days before the date fixed for the hearing of the appeal (Section 311(4)). Without such leave being properly obtained it is not lawful to argue grounds not contained in the original petition (Section 311(6)). In future I shall need a deal of persuading to overlook breaches of these provisions of the Code.'

[21] In my view, the above judicial pronouncements are equally applicable to the appeals made to the High Court from the Magistrate Court under the Criminal Procedure Act, 2009 in so far as additional grounds or amended grounds are concerned. In **Nakato v State** AAU74 of 2014: 24 August 2018 [2018] FJCA 129 it was held

*'..... This court does not have the benefit of having clear and concise grounds to deal with in this appeal. I consider it appropriate to quote from **Archbold** [2010 Edition, 7-164] with regard to the need for the careful preparation of concise grounds of appeal as highlighted by Lord Chief Justice of England and Wales in the guide that was published by the Registrar of Criminal Appeals in October 2008 titled, 'Guide to Commencing Proceedings in the Court of Appeal (Criminal Division)' where it is stated as follows;*

"As Lord Judge C.J. points out in his forward, the guide provides "invaluable advice as to the initial steps for commencing proceedings" in the criminal division. His Lordship then underlines the importance of well drafted grounds of appeal, which "assist the single judge when considering leave and serve to shorten any hearing before the full court", whereas "ill-prepared and prolix documents necessarily lead to wasted time spent on preparation and unnecessarily protracted hearings."

[22] The appellate courts are not expected to go on a voyage of discovery to find out and comprehend the nature of the appellant's complaints. Viewed in the light of those decisions, I am of the view that the sole ground of appeal as amended from time to time does not measure up to the quality and standard required or conform to the requirements in terms of section 249(1) of the Criminal Procedure Act.

[23] Therefore, there is no merit in the first ground of appeal as the High Court Judge was justified in stating that the sole ground of appeal was not in compliance with section 249(1) of the Criminal Procedure Act.

[24] However, the mere fact that a petition of appeal does not comply with section 249(1) of the Criminal Procedure Act would not attract an automatic dismissal of it. There is no provision in the Criminal Procedure Act empowering the High Court to do so. The legislature has not prescribed a summery dismissal of the appeal for non-compliance or inadequate compliance with section 249(1) of the Criminal Procedure Act.

[25] Applications for additional or amended grounds of appeal outside the provisions of section 249(4) causing hardship and embarrassment to the respondent may be dealt with under the mechanism provided in section 254(2) which permits the High Court to make such order as to the costs to be paid by either party to an appeal as it may seem just. Gates, J (as His Lordship then was) in ***Goundar*** (supra) and ***Flour Mills of Fiji Ltd*** (supra) had recourse to awarding of cost to alleviate the hardship caused by such an amendment to the respondent.

[26] A summary dismissal of a petition of appeal is allowed only under section 251 (2) of the Criminal Procedure Act. It is well established that the power of summery dismissal is a special jurisdiction and should be exercised strictly and sparingly only on the grounds set out in the relevant provision of law as the effect of the section where applied and implemented is to deprive the appellant of the ordinary right to hearing (see **Singh v Reginam** [1983] FJLawRp 17; [1983] 29 FLR 86 (23 March 1983). In **Logavatu v Reginam** Criminal Appeal 16 of 1980: 27 June 1980 [1980] FJCA 19 where section 294(2) of the Criminal Procedure Code which is similar section 251(2) was considered, it was held that

> *'In our view section 294(2) of the Criminal Procedure Code should be used only where it is patently clear to a judge that the appeal is limited to the grounds that the conviction was against the weight of evidence or that the sentence was excessive. Where there are other matters raised, or which appear on the face of the record indicative that the conviction may be vitiated then the section should not be used and the appeal should be heard and determined in the normal way.'*

[27] In any event once the notice of hearing is served on the respondent in terms of section 252 of the Criminal Procedure Code, no appeal could be summarily dismissed under section 251(2) without giving an opportunity to the appellant to be heard. Because, it is

assumed that by that time the High Court Judge, as compelled by section 251(1), has perused the petition of appeal and the record and decided not to act under section 251(2).

[28] In the instant case the High Court Judge on 12 June 2012 had directed that notice be served on the respondent and the both the appellant and the respondent had been represented by counsel on the notice returnable date *i.e.* 28 June 2012. Therefore, the matter had clearly proceeded beyond the point of summary dismissal under section 251(2) of the Criminal Procedure Act.

[29] Thus, the order of dismissal of the appeal by the High Court Judge cannot be justified under section 251(2) of the Criminal Procedure Code.

[30] Flowing from the above discussion, I could now conveniently consider the second ground of appeal which goes as follows

> *That the learned Judge erred in law in dismissing the appeal brought by the State without first having heard the State on the merits of the Appeal brought by it."*

[31] In addition, the appeal had been twice fixed for hearing after serving the notice of hearing and both parties had been present in court. The counsel for the respondent admits in his written submissions that the hearing was only to determine the preliminary objection. Therefore, neither party had any indication that the High Court Judge was going to rule on the merits of the appeal.

[32] Section 256 (1) sets out what the High Court should do at the hearing. In **Rogers v State** AAU0072 of 2014: 05 December 2014 [2014] FJCA 205, the Court of Appeal recognized that in terms of section 252 if the matter is not summarily dismissed, the registrar shall enter the matter for hearing and the respondent is to be notified of the same and that section 256(1) of the Criminal Procedure Decree provides for a right to be heard in an appeal.

'Powers of High Court

256. — (1) At the hearing of an appeal, the High Court shall hear —

(a) the appellant or the appellant's lawyer; and

(b) the respondent or the respondent's lawyer (if the respondent appears); and

(c) the Director of Public Prosecutions or the Director's representative (if there is an appearance by or for the Director)...'

[33] It is common ground that the High Court Judge had not given an opportunity to both the appellant and the respondent or their counsel to make submissions on the merits of the appeal. In other words there is a gross violation of the principle *audi alteram partem* (or audiatur et altera pars) as enshrined in section 256 (1). In **Turaga v State** AAU002 of 2014: 8 March 2018 [2018] FJCA 17 the Court of Appeal specifically considered a ground of appeal to the effect that the High Court Judge had erred in law when he dismissed the applicant's application without hearing the applicant contrary to section 256(1)(a) of the Criminal Procedure Decree and held with the appellant and sent matter back to the High Court for rehearing.

[34] Moreover, the High Court Judge's statement in the impugned judgment that *'Anyhow considering the judgment pronounced by the learned Magistrate and the evidence at the trial I find the Prosecution had not proved the elements of the offence'* cannot be justified in the absence of any discussion of the merits and reasons whatsoever for agreeing with the Learned Magistrate.

[35] Therefore, the second ground of appeal should succeed.

[36] The respondent has also argued that no appeal to this Court could lie against the impugned judgment of the High Court under the proviso to section 22(1) of the Court of Appeal Act and therefore the present appeal should be dismissed *in limine*. Section 22(1) is as follows

*'**22**.-(1) Any party to an appeal from a magistrate's court to the Supreme Court may appeal, under this Part, against the decision of the Supreme Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only (not including severity of sentence):*

Provided that no appeal shall lie against the confirmation by the Supreme Court of a verdict of acquittal by a magistrate's court.'

[37] Section 256(2) inter alia states that

> *'(2) The High Court may —*
>
> *(a) confirm, reverse or vary the decision of the Magistrates Court; or*
>
> *(b) ……*

[38] It is undisputable that that the High Court cannot act under section 256(2) unless it had already adhered to section 256(1). In this instance the High Court had not acted under section 256(1) and heard the parties before the delivery of the judgment. Yet, the High Court Judge had agreed with the decision of acquittal of the Magistrate and dismissed the appeal. In those circumstances, that agreement cannot in law amount to a confirmation of the verdict of acquittal by the Magistrate. Therefore, I reject the respondent's position that this court has no jurisdiction to entertain this appeal.

[39] Therefore, in all circumstances of the case, acting under section 22(3) of the Court of Appeal Act I would remit the case to the High Court to determine the appellant's appeal afresh including its merits according to law as expeditiously as possible. However, if an application is made by the appellant outside the time period set out in section 249(4) of the Criminal Procedure Act to file any additional or amended ground or grounds of appeal, the High Court may consider acting under section 254(2) of the Criminal Procedure Act regarding cost, if necessary, to be paid to the respondent by the appellant upon such application being allowed to alleviate any hardship or embarrassment caused thereby.

Bandara, JA

[40] I concur with the Judgment of Prematilaka, JA and agree with the reasons given and orders proposed.

The Orders of the Court are:

1. Appeal allowed.
2. Judgment of the High Court dated 03 October 2012 is set aside.
3. Appellant's appeal against the acquittal of the respondent by the Magistrate Court dated 10 April 2012 is remitted to the High Court for determination by way of rehearing.

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Justice W. Bandara
JUSTICE OF APPEAL