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

CRIMINAL APPEAL NO. AAU 0013 of 2018
[In the High Court of Lautoka Case No. HAA 63 of 2017]

BETWEEN	:	**JAMES SATISH BACHU**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu and Ms. V. Diroiroi for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**28 October 2020**
Date of Ruling	:	**29 October 2020**

RULING

[1] The appellant had been arraigned in the Magistrates' Court of Sigatoka for one count of Obtaining Financial Advantage by Deception contrary to Section 318 (1) of the Crimes Decree, 2009. Pursuant to the trial, the learned Magistrate had found the appellant guilty of the offence in his judgment dated 17 October 2015. Accordingly, the appellant had been sentenced to a period of imprisonment of one year by the learned Magistrate on the 15 February 2016.

[2] Being aggrieved by the said conviction, the appellant had filed a notice of motion in the High Court seeking *inter alia* the following orders as he had failed to file an appeal within the time of 28 days prescribed in section 248(1) of the Criminal Procedure Act, 2009.

i. Leave be granted for enlargement of time to appeal,

ii. Leave be granted to the Appellant to file his grounds of appeal against his conviction

[3] The learned High Court judge in the ruling dated 03 November 2016 had considered the appellant's application for enlargement of time in terms of section 248(2) of the Criminal Procedure Act, 2009 and in the light of the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17 and granted the appellant leave to file his petition of appeal within 14 days of the ruling.

[4] Section 248 (2) and (3) of the Criminal Procedure Act, 2009 states that,

> *(2) The High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.*
>
> *(3) For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include —*
>
> *a. A case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;*
>
> *b. Any case in which a question of law of unusual difficulty is involved;*
>
> *c.A case in which the sanction of the Director of Public Prosecutions or of the commissioner of the Fiji Independent Commission Against Corruption is required by any law;*
>
> *d.The inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents.*

[5] In **Ledua v State** [2018] FJCA 96; AAU0071.2015 (25 June 2018) Calanchini P had said regarding the operation of section 248(3) of the Criminal Procedure Act, 2009 *vis-à-vis* **Kumar v State; Sinu v State** (supra) and **Rasaku v State** (supra) as follows.

> *'[7] It should be noted that section 248(3) provides that without prejudice to its generality, "good cause" is deemed to include certain specified matters therein stated, none of which apply to the present application. However the section is not exhaustive and in my judgment the matters listed in sub section (3) are not the only matters that should be considered by the court hearing the*

application. The learned High Court Judge has acknowledged that "good cause" would include appeal grounds that have merit. However, the question of good cause should also be considered in the context of the factors that should be considered for an enlargement of time application which were discussed by the Supreme Court in ***Kumar and Sinu –v- The State*** *[2012] FJSC 17; CAV 1 of 2009, 21 August 2012. Those factors are (i) the length of the delay, (ii) the reason for the failure to file within time, (iii) whether there is a ground of merit justifying the appellate court's consideration or, where there has been substantial delay, nonetheless is there a ground that will probably succeed and (iv) if time is enlarged, will the respondent be unfairly prejudiced. In a subsequent decision the Supreme Court in* ***Rasaku –v- The State*** *[2013] FJSC 4; CAV 9 of 2013, 24 April 2013 observed that:*

> *"These factors may not be necessarily exhaustive, but they are certainly convenient yard sticks to assess the merit of an application for enlargement of time. Ultimately it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of the court."*

[6] However, it is clear from the said ruling that the learned High Court judge had considered only the length of delay and the reason for the delay but not the merits of the appellant's grounds of appeal and prejudice to the respondent in allowing an extension of time of 14 days to file the petition of appeal. To that extent, the High Court judge had erred in not applying the correct principles of law regarding the appellant's application despite having cited them in the ruling.

[7] Be that as it may, the appellant had not complied with the ruling and failed to file his petition of appeal within 14 days. After a lapse of another 07 months, the appellant had sought leave of the High Court to file his appeal grounds by a notice of motion praying *inter alia* as follows.

> *'that the [Applicant] be granted leave to file Appeal Grounds under Order 8 Rule 2 of the High Court Rules 1988 and upon such terms and conditions as this Honorable Court deems just.'*

[8] The High Court judge had considered the appellant's application as one to file his petition of appeal despite being out of time by a substantial margin of 14 days granted on 03 November 2016. By his ruling delivered on 26 January 2018 the learned High Court judge had dismissed the appellant's application to file petition of appeal considering *inter alai* that the appellant had already been released from the correction

centre when the earlier ruling allowing his application for enlargement of time was delivered and thereafter, instead of the legal aid counsel who handled his earlier application, he had first opted to engage a private counsel failing which he had reverted to the Legal Aid Commission by 10 March 2017 but his second application had been filed only on 06 June 2017 (almost 07 months delay). The High Court judge had also not accepted his alleged medical condition as a reason for him not to comply with the ruling dated 03 November 2016.

[9] The appellant's current appeal to this court is against the second ruling delivered by the High Court on 26 January 2018 in terms of section 22 of the Court of Appeal Act as a second tier appeal.

[10] Section 21 of the Court of Appeal Act permits an appeal against conviction, sentence, and acquittal on a trial held before the High Court and an order refusing bail pending trial by the High Court. The right of appeal against a decision made by the High Court in its appellate jurisdiction is given in section 22 of the Court of Appeal Act.

[11] In a second tier appeal under section 22 of the Court of Appeal Act a conviction could be canvassed on a ground of appeal involving a question of law only [also see paragraph [11] of **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)] and a sentence could be canvassed only if it was unlawful or passed in consequence of an error of law or if the High Court had passed a custodial sentence in substitution for a non-custodial sentence.

[12] Calanchini P had discussed the scope of section 22 of the Court of Appeal Act *vis-à-vis* section 35 (1) and (2) in **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012) and held that there is no jurisdiction given to a single judge of the Court of Appeal under section 35 (1) of the Court of Appeal Act to consider such an appeal made under section 22 for leave to appeal as leave is not required under section 22 but a single judge could still exercise jurisdiction under section 35(2).

> *The significant point to note from these provisions is that there is an automatic right to appeal to the Court of Appeal from a decision of the High Court exercising its appellate jurisdiction from a magistrates' court on a*

> *question of law only. <u>Leave is not required under such circumstances. The appeal lies in respect of a question of law only. Since leave is not required there is no jurisdiction given to a single judge of the Court under section 35 (1) of the Court of Appeal Act to consider the appeal.</u>*
>
> *The position is that a single judge may nevertheless exercise the jurisdiction given under section 35 (2) of the Act:*
>
> > *"If on the filing of a notice of appeal or of an application for leave to appeal a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal."*
>
> *In the context of the present appeal, it remains open to me to discuss whether the Appellant's notice of appeal which is an appeal under section 22 of the Act (a) is bound to fail because there is no right of appeal or (b) is vexatious or frivolous.'*

[13] Calanchini P once again remarked in **<u>Rokini v State</u>** [2016] FJCA 144; AAU107.2014 (28 October 2016) that leave to appeal is not required under section 22 but a single judge of the Court of Appeal could act under section 35(2).

> *'[3] Section 22 is a stand-alone provision that sets out the appeal procedure for appeals from the High Court in the exercise of its appellate jurisdiction. Pursuant to section 22 (8) certain provisions of the Act apply to such appeals. <u>However leave to appeal is not required under section 22</u>. An appeal under section 22 is subject to the provisions of section 35 of the Act. Section 35 (2) provides:*
>
> > *"(2) If on the filing of a notice of appeal _ _ _ a judge of this Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal. _ _ _the Judge may dismiss the appeal."*

[14] However, in my view, upon filing an appeal under section 22 of the Court of Appeal Act a single judge is still required to consider whether there is in fact a question of law that should go before the full court, for designation of a point of appeal as a question of law by the appellant or his pleader would not necessarily make it a question of law. What is important is not the label but the substance of the appeal point. This exercise should be undertaken by the single judge not for the purpose of considering leave under section 35(1) but as a filtering mechanism to make sure that only true and real questions of law would reach the full court. If an appeal point taken

up by the appellant in pith and substance or in essence is not a question of law then the single judge could act under section 35(2) and dismiss the appeal altogether.

[15] Then in **Ledua v State** (supra) Calanchini P had identified what can be regarded as a question of law in relation to a decision on an application for enlargement of time in the High Court.

> *'[5] It is convenient to consider Ledua's grounds of appeal first before moving on to consider Vuli's notice of appeal. It must be recalled that the appeal to this Court is in respect of the decision of the High Court. There is no direct appeal in this case from the Magistrates Court to the Court of Appeal. It follows that the only ground of appeal, regardless of the number of ways in which it may be phrased, is whether the decision of the learned High Court Judge refusing an enlargement of time to enable Ledua to pursue his appeal against conviction was wrong in law. Put another way, the issue is whether the learned High Court Judge has applied the correct test for determining the application for an enlargement of time rather than whether he has applied the test correctly. In my opinion the first question involves question of law only and the second involves a question of mixed law and fact.*
>
> *'[8] In my judgment the issue that comes up for determination in the Court of Appeal is whether the Court below has applied the correct test for determining the application for an enlargement of time sought by Ledua in to prosecute his appeal. This constitutes a ground of appeal involving a question of law only and as a result the Court of Appeal has jurisdiction. Furthermore the issue is not frivolous or vexatious.'*

[16] The following general observations of the Supreme Court in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013) are helpful to identify a question of law in a given situation.

> *'[14] A summary of these cases show that questions that have been accepted as a point of law alone include causational issue in homicide cases, jurisdiction to try an offence, existence of a particular defence, mens rea for a particular offence, construction of a statute and defective charge. The list, however, is not exhaustive. In **Hinds** (1962) 46 Cr App R 327 the English Court of Appeal did not define the phrase 'a question of law alone', but suggested that the determination of whether a ground of appeal involves a question of law alone be made on a case by case basis.*

[17] However, the issue that has to be considered in this appeal, in my view, is even more fundamental. Before considering as to whether the High Court judge had applied the correct test for enlargement of time in the ruling dated 26 January 2018 (which can be the only question of law) this court has to consider whether a proper application for enlargement of time was there in the first place before the High Court.

[18] The appellant's second application before the High Court cannot be admittedly considered as an application under section 248(1) of the Criminal Procedure Act, 2009, for even the appellant had not attempted to invoke the jurisdiction of the High Court under that provision of law. The application had been made expressly under Order 8 Rule 2 of the High Court Rules 1988 which has no application to criminal proceedings. Therefore, the appellant had not invoked the jurisdiction of the High Court according to law and consequently the High Court lacked jurisdiction to deal with the appellant's second application. Thus, the appellants' application was null and void ab initio and the impugned ruling delivered on 26 January 2018 was a nullity having no effect in law.

[19] It is unfortunate that at least the counsel for the respondent had not brought this fundamental issue of want of jurisdiction to the notice of the High Court judge.

[20] Firstly, the ruling dated 26 January 2018 cannot be considered a 'decision' of the High Court within section 22 of the Court of Appeal Act, for it had been made on an legally invalid application and without the court being clothed with jurisdiction. Therefore, the resulting position is that no right of appeal had accrued to the appellant against the impugned ruling and the single judge of the Court of Appeal could make an order of dismissal of the appellant's appeal under section 35(2) of the Court of Appeal Act.

[21] Secondly, there is no legal provision permitting an appellant to apply for an extension of time already granted pursuant to an application made under section 248(2) of the Criminal Procedure Act, 2009 for further enlargement of time. In other words no further extension of time upon an enlargement of time could be sought or granted in terms of section 248(2) which is the only provision of law applicable to enlargement

of time to file an appeal outside the time frame of 28 days prescribed in section 248(1).

[22] Thirdly, once the High Court enlarged the period of limitation (*i.e.* 28 days) to another 14 days from on 03 November 2016, the period of limitation so extended ended on the completion of those 14 days. Thus, the validity of the order of enlargement of time lapsed with the completion of the 14 day period from 02 November 2016. Therefore, no further extension could be sought or granted on the basis of a non-existent order.

[23] Fourthly, section 53 of the Interpretation Act allows making an application for enlargement of time prescribed in section 248(1) of the Criminal Procedure Act, 2009 at any time even after the 28 day period.

> '*53. Where in any written law a time is prescribed for doing any act or taking any proceeding, and power is given to a court or other authority to extend such time, then, unless a contrary intention appears, such power may be exercised by the court or other authority although the application for the same is not made until after the expiration of the time prescribed.*'

[24] Therefore, the only way the appellant could have overcome his failure to file the petition of appeal within the enlarged time of 14 days of the ruling dated 03 November 2016 was to apply for an enlargement of time beyond the time frame of 28 days prescribed in section 248(1) of the Criminal Procedure Act, 2009 by way of a fresh application to the High Court which could then have decided whether to allow an enlargement of time in terms of section 248(3) and the principles set out in **Kumar v State; Sinu v State** (supra) and **Rasaku v State** (supra) or any other judicial pronouncements therein.

[25] Thus, in my view, the remedy for non-compliance with an order of enlargement of time (*i.e.* failure to file the petition of appeal within the extended time) is to file a new application for enlargement of time under section 248(2) of the Criminal Procedure Act, 2009.

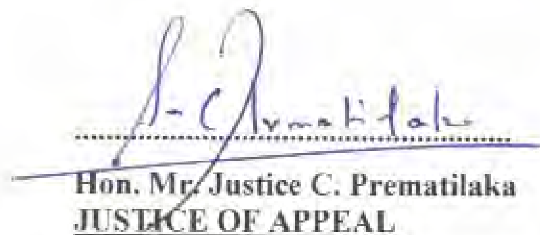
[26] In all the circumstances discussed above, I conclude that the appellant's appeal should stand dismissed under section 35(2) of the Court of Appeal Act as it is bound to fail because there is no right of appeal and at the least it is vexatious or frivolous.

02nd ground of appal

[27] In view of my decision on the first ground of appeal, the complaint in the second ground of appeal becomes redundant and need not be addressed.

Order

1. Appeal is dismissed under section 35(2) of the Court of Appeal Act.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL