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

CRIMINAL APPEAL NO.AAU 90 of 2020
[In the High Court at Suva Case No. HAA 016 of 2019]
[In the Magistrates court at Suva Criminal Case SCC (L) 30 of 2016]

BETWEEN	**:**	**REDDY & NANDAN LAWYERS**
		Appellant
AND	**:**	**SUVA CITY COUNCIL**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. A. V. Reddy for the Appellant**
	:	**Ms. P. Nand for the Respondent**
Date of Hearing	**:**	**13 October 2022**
Date of Ruling	**:**	**29 November 2022**

RULING

[1] The appellant had been charged in the Magistrates Court at Suva on a single count contrary to section 10 (2) of the Litter Promulgation (now Litter Act, 2008) committed on 02 August 2016 at Suva in the Central Division. The full details of the offence and particulars are as follows:

*'**Statement of Offence***

> *A person or corporate body or any other organization who both directly or indirectly deposits and abandons any litter in or on any public place commits an offence contrary to section 10 (2) of the Litter Promulgation.*

Particulars of Offence

> ***Reddy and Nandan Lawyers*** *of 29 Raojibhai Patel Street, Suva did on the 2nd day of August 2016 at about 5.26 pm at Suva in the Central Division, deposit and abandon litter namely, commercial refuse, in one black plastic bag, in a public place namely, Raojibhai Patel Street, Suva.'*

[2] At the end of the trial, the learned Magistrate had convicted the appellant as charged and sentenced the appellant on 21 May 2019 by imposing a fine of $1000.

[3] The appellant had appealed against conviction and sentence to the High Court and the learned High Court judge had on 26 May 2020 dismissed the appeal. The appellant had then appealed to the Court of Appeal on 28 July 2020. Thus, the appeal was 32 days out of time.

[4] It is generally in the interest of the administration of justice that there should be finality in litigation meaning that judgments should be treated as final after the period for bringing an appeal has expired so that parties know where they stand and matters taken as decided are not later re-opened at the whim, as it were, of the losing party. Any other approach introduces unacceptable uncertainty into the legal system. It should not be taken for granted that the Court will exercise its powers to enlarge time - leave will not be granted as a matter of course. It is not sufficient merely to postpone a decision to appeal until the applicant has researched the issues involved and until a date long after the appeal period has expired [see **Gallo v Dawson** [1990] HCA30; (1990) 93 ALR 479] .

[5] Therefore, the Rules of Court have to be observed and must not be disregarded or ignored [vide **Halsbury's Laws** (4th Ed) Vol 37 para 25; **Revici v Prentice Hall Inc** [1969] 1 All ER 772 (CA); **Samuels v Linzi Dresses Ltd** [1980] 1 All ER 803, 812 (CA)] and in order to justify a court extending time there must be some material before court (vide **Ratnam v Cumarasamy** [1964] 3 All ER 933 at 935) and if no excuse is offered, no indulgence should be granted [vide **Revici v Prentice Hall Incorporated and Others** (supra)].

[6] The discretion to extend time is given for the sole purpose of enabling the court to do justice between the parties which means that such discretion can only be exercised upon proof on the material before court that strict compliance with the rules will work injustice to the applicant [see **Gallo v Dawson** (supra)]. In addition, the practical utility of the remedy sought on appeal, the extent of the impact on others similarly affected, any impact on the administration of justice and any floodgates considerations have to be considered relevantly in exercising the court's discretion (see **R v Knight** [1998] I NZLR 583 at 589).

[7] The factors to be considered in the matter of enlargement of time have been held in Fiji to be (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide: **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[8] The length of the delay is considerable, for the appellate is a legal firm. The reason given is that the solicitor in carriage of this appeal in the law firm Reddy & Nandan Lawyers had overlooked the time frame assuming that it was 60 days. Oversight by instructing solicitor due to other professional commitment, misunderstanding as to when the time for the appeal start running, the appellant's solicitor's mistaken belief as to the appealable time, miscalculation of time etc. have been held to be unsatisfactory explanations for the delay [vide **Tuilaselase v State** [2022] FJSC 2; CAV 25 of 2018 (13 January 2022)]. Therefore, the explanation for the delay is unacceptable and unsatisfactory. Nevertheless, I shall proceed to consider whether there is merit for this appeal to be taken up before the full court along with other relevant considerations above mentioned. The respondent had averred that any enlargement of time will cause prejudice its interests.

[9] Thus, this has to be a second-tier appeal against conviction and sentence in terms of the Court of Appeal Act. 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. In a second-tier appeal under section 22 (1) of the Court of Appeal Act, a conviction could be canvassed on a ground of appeal involving a question of law only [see also paragraph [11] of **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017) and 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 [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014). It is therefore counsel's or an appellant's duty to properly identify a discrete question (or questions) of law in promoting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005).

[10] 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 [vide section 22(1)(A) of the Court of Appeal Act].

Jurisdiction of a single Judge under section 35 of the Court of Appeal Act

[11] 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) [*vide* **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012] and if the single 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 under section 35(2) of the Court of Appeal Act (vide **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)].

[12] Therefore, 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 [see **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014)].

[13] The appellant cannot seek a rehearing of the appeal heard before the High Court in the Court of Appeal. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the Court of Appeal to rectify any error of law or clarify any ambiguity in the law and not to deal with any errors of fact or of mixed fact and law which is the function of the High Court. That is the intention of the legislature and the court must give effect to that legislative intention.

[14] The grounds of appeal urged on behalf of the appellant against conviction and sentence which are a reproduction of the grounds of appeal urged before the High Court, are as follows:

> '***<u>Against conviction</u>***
>
> 1. *His Lordship failed to consider that the learned trial Magistrate erred in law and in fact in finding that the Prosecution had proven its case beyond reasonable doubt for the following reasons:*
>
>   a. *His Lordship failed to give consideration to the fact that the learned Magistrate failed to consider all the evidence provided by the defence.*
>
>   b. *His Lordship did not give sufficient consideration that the learned trial Magistrate failed to give proper weight to the statements made by the Prosecution's witness PW1 (Lavenia Dimaravu), who gave statements purporting the following:*
>
>   i. *That PW1 did not do a search to see what entity Reddy and Nandan Lawyers was.*
>   ii. *That PW1 admitted and accepted, that she did not quote the section of the by-law to show the offence of using a black plastic garbage bag.*
>   iii. *PW1 admitted that she did not take any statements from Patricia Nand (the Receptionist of Reddy and Nandan Lawyers).*
>   iv. *PW1 admitted that the owners of Reddy and Nandan Lawyers were not served personally.*
>   v. *PW1 admitted and accepted that she did not take and exhibit the contents of the black plastic bag nor was the contents presented in Court.*
>
>   c. *That the learned trial Magistrate erred in law and in fact in convicting the accused and not considering the material fact that the Prosecution did not prove the case beyond reasonable doubt with PW1 as a key witness.*

d. That the learned trial Magistrate erred in law and in fact in not considering that the Prosecution did not produce the following which creates reasonable doubt on its own:

i. The alleged documents in the garbage bag belonging to Reddy and Nandan Lawyers .
ii. The caution interview of Patricia Nand who allegedly confessed to the offence.
iii. Prosecution witness Ranjina Hicks who was present at the scene.
iv. He relevant section By-Laws that the Prosecution witness released on to charge Reddy and Nandan Lawyers .

Against sentence

2. That the learned trial Magistrate erred by not granting further time for the Accused to file mitigating factors.

3. That the learned trial Magistrate erred in law and in fact in sentencing the Appellant with the fine of $1000.00.

4. The accused reserves his rights to add or amend further grounds upon receipt of the record of the Magistrate's Court.'

[15] The appellant is a law firm practicing as a partnership under the name of Reddy and Nandan Lawyers. The appellant had been served with a Fixed Penalty Notice pursuant to Section 22 (1) of the Litter Act, alleging that the appellant had deposited and abandoned litter on a public street, an offence under section 10 (2) of the Litter Act. The appellant had not paid the said penalty and the matter proceeded to a hearing at the Magistrates Court where the appellant was represented by the two partners of the Law Firm. The Prosecution had presented the evidence of the Litter Prevention Officer who had served the Fixed Penalty Notice to the appellant. The appellant had remained silent, and led no evidence for the defence. The learned Magistrate on the 29 March 2019 had found the appellant guilty as charged and sentenced the appellant by imposing a fine of $1000. Aggrieved by the conviction and the sentence, the appellant had appealed to the High Court. The High Court had dismissed the appeal.

[16] Section 10 of the Litter Act is as follows:

'*10.- (1) A person or corporate body or any other organisation who, both directly or indirectly deposits and abandons any dangerous litter in or on any public place commits an offence.*

(2) A person or corporate body or any other organisation who both directly or indirectly deposits and abandons any litter in or on any public place commits an offence.

(3) If a person or corporate body or any other organisation is charged with having committed an offence against subsection (1) and the court decides that the litter which is the subject of the charge is litter but not dangerous litter, that person may be convicted of an offence against subsection (2).

(4) If any person or corporate body or any other organisation commences the act of depositing litter, in any public place and that litter comes to rest in a place other than a public place, that person or corporate body or any other organisation may nevertheless be convicted of an offence against this section.'

[17] Section 22 of the Litter Act on Fixed Penalty Notice provides as follows:

'22. (1) Notwithstanding the requirements of the Criminal Procedure Code, but subject to the succeeding provisions of this section, it shall be lawful for an officer to institute proceedings in respect of the alleged commission of an offence against sections 7(1)(b), 8(5), 10(2), 11, 12(1) and 12(2) by serving personally upon the person alleged by him to have committed the offence a fixed penalty notice.'

[18] The Fixed Penalty Notice served on the appellant read as follows:

'***Fixed Penalty Notice and Notice to Attend Court***

To Reddy & Nandan Lawyers of 29, Raojibhai Patel Street, take notice that you are alleged to have breached Section 10 (2) of the Litter Promulgation 2008 in that you, deposited and abandoned litter in one black plastic bag at Raojibhai Patel Street on the 02nd day of August 2016 at about 5.26 pm. The fixed penalty is $ 40.00 and if you admit the offence you must within 30 days after the date upon which this notice was served on you, pay the $ 40.00 at the Cashier's Office, Suva City Council, between the hours 8.30 am and 3.30 pm Mondays to Fridays. And thereupon all liabilities for this offence will be discharged and no further action will be taken.

However, if you fail to pay the fixed penalty of $ 40.00 or deny the charges You Are hereby Summoned to appear at the Magistrate Court at Suva on the 16th day of September 2016 at 9.00 am to answer the charge(s) set out hereunder.'

[19] The counsel for the appellant conceded that the grounds of appeal as formulated are not questions of law alone but of mixed fact and law and therefore not justiciable under section 22 of the Court of Appeal Act. However, he raised one question of law orally relating to the requirement of personal service of the Fixed Penalty Notice as prescribed in section 22 (1) of the Litter Act.

[20] The appellant's counsel's argument is that in terms of section 22(1) of the Litter Act, personal service is a must and any other service is not proper. In other words, he contends that the only mode of service of the fixed penalty notice is personal service.

[21] It is common ground that the Fixed Penalty Notice had not been served on either of the two partners of the said law firm. It had been served on one Patricia Nand, a law clerk at the firm as the partners were not available at that time of the day. It was not the position of the defense that the said notice was never brought to the notice of the partners. Nor was Patricia Nand's status and her position challenged as the person in charge of the law firm at the relevant time. Thus, the respondent argues that the service was duly carried out, proper and not defective.

[22] However, when the Criminal Procedure Act, 2009 (CPC) has provided for proceedings by fixed penalty notice which are equally applicable to proceedings under the Land Transport Act and other similar laws such as the Litter Act. Under sections 73(1)(b) of the CPC, the fixed penalty notice could be affixed to the vehicle in a conspicuous position. Thus, the CPC permits an alternative method of serving the fixed penalty notice to personal service. It is pertinent to remember in respect of an alleged offence against the Litter Act, the institution of proceedings may be undertaken under the provisions of the Criminal Procedure Act as well. Thus, the legislature has not limited the method of serving a fixed penalty notice to personal service. Depending on the nature of other laws under which proceedings by fixed penalty notice is allowed, the mode of service could be other than personal service.

[23] The Magistrate in his well-considered judgment had delved into all possible arguments and given convincing reasons as to why he rejected this position and accepted that there had been a proper service of the Fixed Penalty Notice and due compliance with section

22(1) of the Litter Act. The High Court judge had agreed with those reasons and the Magistrate's conclusion that 'personal service' on 'corporate body' or 'any other organisation' must be interpreted as service on a person in charge of such entity. I think this is the correct approach to section 22 (1) of the Litter Act and I agree with the interpretation placed by the Magistrate on section 22 (1).

[24] It is noteworthy that although section 10(2) of the Litter Act refers to 'a person', 'corporate body' or 'any other organisation', when section 22(1) permits an officer to lawfully institute proceedings for an offence under section 10(2) by serving a fixed penalty notice personally it mentions only 'the person' who is alleged to have committed the offence. Even in the case of a natural person, section 22(1) does not say that fixed penalty notice 'shall' or 'must' be served personally on that person. It only makes it lawful and legal to do so. Thus, personal service is not mandatory in the case of 'corporate body' or 'any other organisation', because not only are they not natural persons but also it may not always be possible to serve a fixed penalty notice personally on all the partners or office bearers of 'any other organisation' such as a law firm or all the directors of a 'corporate body' such as a company. If personal service were to be insisted upon on all such partners or directors all the time, the laws that have provided for proceedings by fixed penalty notice will become unworkable.

[25] On the other hand, section 22(1) cannot be given a literal interpretation *i.e.* to intend the Legislature to have meant what they have actually expressed or to deduce the intention of Parliament from the language used, if the real legislative intention is to be given effect to. A construction that would reduce the legislation to futility should be avoided and a construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result should be adopted. Thus, section 22(1) should be given a purposive interpretation. The High Court judge had described the purpose of personal service of the Fixed Penalty Notice as follows. I agree with those observations:

> *8. ……..... Section 22 (1) has not explicitly defined the mode of service to corporate bodies and organizations……. The purpose of serving personally upon the person who has allegedly committed the offence is to make sure the Fixed Penalty Notice reaches him or her properly. It*

> *enables that person to pay the fixed fine if he or she wishes to do so and prevent proceeding further. The suspect must be given an opportunity to pay the fixed penalty before the institution of the proceedings in the Magistrate's Court. The learned Magistrate has found that serving to the person in charge of an organization, in the event the owners were not present, is sufficient to satisfy the requirement under Section 22 (1) of the Litter Act.*

[26] The service of fixed penalty notice on Patricia Nand who was in-charge of the Reddy & Nandan Lawyers at the relevant time had certainly served the purpose of section 22(1). There is no denial of the fact that the partners were aware of the fixed penalty notice or they were prevented from complying with the notice.

[27] Therefore, neither the Magistrate nor the High Court judge had erred in their conclusions that serving the fixed penalty notice on Patricia Nand who was in-charge of the Reddy & Nandan Lawyers at the relevant time, was due and proper service of the said notice in terms of section 22(1) of the Litter Act.

[28] However, there is a more fundamental question in the conviction of Reddy & Nandan Lawyers. Admittedly, Reddy & Nandan Lawyers is a partnership and not a body corporate or a natural person. Its partners engage in the practice of law under the name and style of Reddy & Nandan Lawyers. Therefore, can it sue and be sued in its partnership name? Generally, in criminal law only a natural person or the juristic person such as a body corporate could be convicted and sentenced. Therefore, the counsel for the appellant submitted that Reddy & Nandan Lawyers could not have been prosecuted or sentenced but the prosecution should have instituted criminal proceedings against partners of Reddy & Nandan Lawyers. The counsel for the respondent did not express any view on this legal issue.

[29] I think, this is a question of law only and should be allowed to be taken-up before the full court despite the delay in the appeal.

[30] The appellant had also contested the sentence imposed by the learned Magistrate on Reddy & Nandan Lawyers. As the High Court judge had observed there is no sentencing error in the sentence in terms of section 10(2) of the Litter Act. According

to the Schedule in the Litter Act for the first offence under section 10(2) the fine is $200 for individuals and $1000 for corporate body. There is no specific fine prescribed for 'any other organisation'. Should the same fine for corporate body be applicable to 'any other organisations' such as partnerships as well? If so, there is nothing wrong with the sentence. In my view, it is the case.

[31] However, I think this is also a matter that the full court may clarify.

Order of Court:

1. Appeal may proceed to the full court on the questions of law highlighted above on the conviction and sentence.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL