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

CRIMINAL APPEAL NO. AAU 41 of 2021
[In the High Court at Suva Case No. HAA 42 of 2019]
[In the Magistrates Court at Suva case No.CF 338/16]

BETWEEN : **RAKESH CHARAN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. S. Shameem for the Respondent**

Date of Hearing : **26 August 2022**

Date of Ruling : **29 August 2022**

RULING

[1] The appellant was charged with another (his wife) in the Magistrates court at Nausori on one count of possession of 57.5 grams of methamphetamine, an illicit drug contrary to section 5(a) of the Illicit Drugs Control Act 09 of 2004 on 09 May 2016 at Nausori in the Central Division.

[2] After trial he was convicted of the charge while his wife was acquitted. The appellant was sentenced to 05 years of imprisonment on 04 October 2019.

[3] The appellant had appealed to the High Court against conviction and sentence and in a well-considered judgment, the learned High Court judge had dismissed the appellant's appeal on 23 December 2020. His appeal to the High Court was on the following grounds of appeal against conviction:

*'**Ground 1***

THAT the Learned Magistrate erred in law and fact when he failed to allow adjournment pursuant to section 170(2) of the Criminal Procedure Act and in doing so the appellant was prejudiced due to lack of legal representation.

Ground 2

THAT the Leaned Magistrate erred in law and fact when he deprived the appellant to a fair trial as enshrined in section 15 of the Constitution in failing to take into account the appellant's defence and not giving the appellant the opportunity to place before the court its evidence of the disk.'

[4] The appellant has since filed a timely appeal against the judgment of the High Court on the following grounds of appeal:

'Ground 1

THAT the charge is defective and invalid.

Ground 2

THAT the appellant was deprived of the right to choose whether to be tried in the Magistrate Court or the High Court.

Ground 3

THAT the trial miscarried as a result of the appellant being unrepresented.'

[5] In addition the appellant is pursuing an application to lead fresh evidence and bail pending appeal application.

[6] 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 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).

[7] 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

[8] 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)].

[9] 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 [vide **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014) followed in many a subsequent decisions].

[10] Some examples of actual questions of law could be found in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013), **Morgan v Lal** [2018] FJCA 181; ABU132.2017 (23 October 2018), **Ledua v State** [2018] FJCA 96; AAU0071.2015 (25 June 2018) and **Turaga v State** [2016] FJCA 87; AAU002.2014 (15 July 2016).

[11] The appellant cannot seek a rehearing of the appeal 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.

01st ground of appeal

[12] The appellant has not taken up this appeal point at all in the High Court. His contention is that the charge sheet dated 11 May 2016 does not bear the seal/stamp of the Magistrates court but he is unable to submit how he was prejudiced in his defense as a result of it.

[13] In any event, it is clear that after this initial charge sheet filed against the appellant alone the in the Magistrates court, the DPP had filed an information dated 02 February 2017 in the High Court against the appellant and his co-accused. Therefore, after the matter was remitted to the Magistrates court, the trial proceeded either on the basis of the consolidated information or an amended charge sheet; not on the initial charge sheet which the appellant complains about.

[14] Thus, the appellant's complaint is frivolous and does not make out any question of law for determination of the full court.

02nd ground of appeal

[15] The appellant complains that he was deprived of the right to election *i.e*. whether to be tried in the Magistrates Court or the High Court. This ground of appeal was also not raised before the High Court.

[16] This ground of appeal is also frivolous, for it is now trite law that from a collective reading of section 5 of the Illicit Drugs Control Act and sections 5(2) and 7 of the Criminal Procedure Act, it is clear that the Magistrates Court has jurisdiction to try offences created under section 5 of the Illicit Drugs Control Act and impose any sentences upon an accused subject to the limitations prescribed under section 7 of the Criminal Procedure Act [vide **State v Laveta** [2019] FJCA 258; AAU65.2013 (28

November 2019) and **State v Mata** [2019] FJCA 20; AAU0056.2016 (7 March 2019)].

[17] Therefore, the appellant had no right of election as to the forum where he was going to be tried.

03rd ground of appeal

[18] This is similar to the first ground of appeal raised before the High Court. The High Court judge at paragraphs 6-18 of the judgment had dealt with it in great detail within the relevant factual context and ruled against the appellant's contention.

[19] The appellant has not demonstrated how the trial judge had erred in law with regard to his conclusion based on law and facts relating to the complaint. Therefore, the matter considered by the High Court was a mixed fact and law and not an issue of law alone.

[20] Therefore, on the one hand there is no question of law alone and on the other hand there is no error of law committed by the High Court in dealing with the appellant's grievance and thus, it is frivolous.

[21] Thus, the appellant's appeal under section 22 (1) of the Court of Appeal Act is liable to be dismissed in terms of section 35(2) of the Court of Appeal Act.

Appellant's application to lead fresh evidence

[22] The appellant had not made any application to lead fresh evidence in the High Court. His second ground of appeal was that the Magistrate erred in law and fact when he deprived him of a fair trial as enshrined in section 15 of the Constitution in failing to take into account his defense and not giving him an opportunity to place before the court his evidence of a 'disk'. His current application to lead fresh evidence is relation to this alleged disk.

[23] The High Court judge had considered the question of 'disk' in the following terms:

> *'20. Although the Appellant submits that he was not given an opportunity to produce evidence on a disc, it does not appear that the Appellant had in any instance put any question to the Prosecution witnesses in respect of a disk. Instead, he had only suggested to the witnesses that the drugs were not found in his physical possession. The Appellant had briefly mentioned about a disk being given to Nausori police station during his re-examination. However, no such disk was submitted by the Appellant in Court or he had not explained in his evidence the reason for not being able to produce such evidence'*

[24] I have examined the Magistrates court proceedings and find that all what the appellant had said in re-examination is that he had given a disk to OC in Nausori police station to prove that somebody planted it (the drugs).

[25] The co-accused who happened to be the appellant's wife had said in her evidence in the Magistrates court that a friend of the appellant named Zee had confessed to having planted drugs to get the appellant arrested and she had given a video recording of what happened before the incident to a police officer named Amani.

[26] However, no video recording/disk had been produced as part of the defense case and no police officer had been summoned to substantiate the defense on at least the bare existence of a video/disk containing the alleged confession by Zee.

[27] Thus, since the appellant and his wife claimed to have had concrete information as to who had planted drugs to frame the appellant they could have revealed the identity of that person to police and got the police to carry out necessary investigations to bring him to book. They do not appear to have do so.

[28] The Magistrate on his part had considered the assertions of both accused carefully and remarked that this position about a video recording/disk had not been put at all to any of the prosecution witnesses including 04 police officers during cross-examination. Thus, the matter regarding a disk had already been ventilated in the Magistrates court.

[29] The appellant had not pursued an application to lead any fresh evidence in the form of any such recording of a confession by the alleged third party of having planted drugs, in the appeal proceedings before the High Court. Even if he had done so, he is unlikely to have succeeded given the principles applicable to leading of fresh evidence set out in **Ladd v Marshall** [1954] 3 All ER 745 [for example see also **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017)]. The well-established general rule is that fresh evidence will be admitted on appeal if that evidence is properly capable of acceptance, likely to be accepted by the trial court and is so cogent that, in a new trial, it is likely to produce a different verdict (see **Singh v The State** Criminal Appeal No.CAV0007U of 2005S: 19 October 2006 [2006] FJSC 15].

[30] In these circumstances, the appellant is not entitled to pursue such an application in these proceedings in a second-tier appeal under section 22 of the Court of Appeal Act. In any event, since I have already held that the appeal should be dismissed for bring frivolous, no application to lead fresh evidence could be advanced. Without a substantive appeal on foot no fresh evidence application can exist or be considered independently.

[31] For the same reason, no application for bail pending appeal can be considered independent of a substantive appeal.

[32] Thus, the appeal should be dismissed in terms of section 35(2) of the Court of Appeal Act, for it is frivolous. As already stated above applications for fresh evidence and bail pending appeal too should stand dismissed.

Orders

1. Appeal (bearing No. AAU 41 of 2021) is dismissed in terms of section 35(2) of the Court of Appeal Act.
2. Application to lead fresh evidence is dismissed.
3. Bail pending appeal application is dismissed.

COURT OF APPEAL FIJI

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