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

CRIMINAL APPEAL NO. AAU 083 of 2022
[In the High Court at Lautoka Miscellaneous Case No. HAM 116 of 2020]
[Magistrates court at Lautoka case No.278 of 2020]

BETWEEN	**:**	**HAROON ALI SHAH**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Ms. S. Shameem for the Respondent**
Date of Mention	**:**	**11 January 2023**
Date of Ruling	**:**	**31 January 2023**

RULING

[1] The appellant had been arraigned in the Magistrates court at Lautoka for for failure to comply with orders contrary to section 69(1)(c) of the Public Health Act 1935 and Regulation 02 of Public Health (Infectious Diseases) Regulations 2020 allegedly committed on 28 March 2020.

[2] The matter is currently pending for judgment in the Magistrates court. The appellant had first made an application for no case to answer and the Magistrate had rejected it on 26 April 2022 and adjourned the case for judgment. Thereafter, he had made an application under section 266 of the Criminal Procedure Act, 2009 to state a case for the opinion on the matter of the High Court which too had been rejected by the

Magistrate on 28 June 2022 on the premise that no determination had yet been made and the application was premature and that it was not clear what determination the appellant had been dissatisfied with as required under section 266.

[3] It is clear that the appellant's said application had not been in respect of the no case to answer ruling by the Magistrate but on jurisdiction to try the appellant on the charge levelled against him.

[4] The appellant had then applied to the High Court for a ruling calling upon the Magistrate and the respondent to show cause why the case should not be stated in terms of section 270 of the Criminal Procedure Act, 2009 and sought a stay of the MC proceedings as well. The High Court on 19 September 2022 had rejected the appellant's application for lack of jurisdiction on the basis that existence of a determination by the Magistrate under section 260 (earlier section 329 of Criminal Procedure Code) is a condition precedent to the exercise of jurisdiction by the High Court under section 270. In **Land Transport Authority vs. Hemendra Vishwa, llango & Kailesh Prasad** [2003] HAM 31 of 2003 (12 November, 2003) Shameem J. had stated:

> *'Further section 329 pre-supposes that a determination has been made on a summons, charge or complaint. In this case no such determination was made, the learned Magistrate preferring to refer the matter to the High Court before she had made a decision on the application for withdrawal of charges.*
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> *In the circumstances I find that I have no jurisdiction to consider this application. If however the Magistrate proceeds to make a decision, the appellate and revisionary jurisdiction of this court may also be available to the parties and the court.'*

[5] The appellant had filed a notice of motion under section 22(2) and (3) of the Court of Appeal Act against the said ruling of the High Court seeking a stay of all proceedings in the Magistrates court pending determination of the appeal and leave to appeal against the High Court ruling. The question of law urged by the appellant is that Regulation 02 of Public Health (Infectious Diseases) Regulations 2020 came into effect on 30 March 2020 and did not exist on 28 March 2020 which was the date of the alleged offence.

Therefore, the appellant submits that there was offence at law as at the date of the alleged offence as stipulated in the charge sheet.

[6] In a second-tier appeal under section 22 of the Court of Appeal Act, a decision of the High Court 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)].

[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].

[8] However, designation of a ground 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 properly to 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).

[9] The phrase 'a question of law alone' is one of pure law to the satisfaction of the court, as opposed to one of law unaccompanied by any other ground of appeal [vide **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)]. Some examples of such questions of law could be found in **Naisua v State** (supra), **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).

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

[10] 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)].

[11] Therefore, if at least one of an appeal points 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 for example in **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020)], **Munendra v State** [2020] FJCA 234; AAU0023.2018 (27 November 2020) and **Dean v State** AAU 140 of 2019 (08 January 2021), **Verma v State** [2021] FJCA 17; AAU166.2016 (14 January 2021) and **Narayan v State** [2021] FJCA 143; AAU39.2021 (10 September 2021), **Wang v State** [2021] FJCA 146; AAU47.2021 (17 September 2021), **Sukanaivalu v Fiji Independent Commission Against Corruption (FICAC)** [2021] FJCA 171; AAU0092.2020 (22 October 2021)] and **Eileen Anderson v The State** AAU 031 of 2020 (29 December 2022).

[12] Under section 22 of the Court of Appeal the appellants cannot seek to re-open and re-argue the facts of the case in a second tire 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.

[13] I have little doubt that the issue raised by the appellant as highlighted above constitutes a question of law only. However, so far neither the Magistrates court nor the High Court had ruled on that. For that issue to become a ground of appeal involving a question of law only under section 22 of the Court of Appeal Act there must be a determination by the Magistrate and a decision by the High Court on the same. A theoretical issue, though technically a question of law only, cannot cloth the Court of Appeal with jurisdiction under section 22 of the Court of Appeal Act, for the

Court of Appeal would not indulge in a mere academic exercise by ruling on a hypothetical issue of law by-passing the other courts in the judicial hierarchy.

[14] The respondent had taken up the position that the impugned ruling of the High Court is an interlocutory order as the case is yet to be determined in the Magistrates court and therefore not appealable under section 22 of the Court of Appeal Act and the appeal must be dismissed pursuant to section 35(2) of the Court of Appeal Act. Therefore, whether there is a right of appeal against the impugned ruling dated 19 September 2022 by the High Court refusing to issue a stay on criminal proceedings of the proceedings under Case No. 278/20 at Lautoka Magistrate court and rejection of the appellant's application under section 270 of the Criminal Procedure Act, 2009 has to be decided first.

Whether there is a right of appeal against the impugned ruling

[15] In **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014) all three appellants applied in the High Court for a stay of proceedings in the Magistrates' Court on the ground of post charge delay. The applications were made under the inherent and supervisory jurisdiction of the High Court. All three applications for stay were refused by the High Court. The appellants appeal against the High Court judgments refusing stay of proceedings in the Magistrates' Court. The state submitted that a refusal of stay of proceedings is not a final judgment and therefore the appellants had no right of appeal. Gounder J held that all three appeals were bound to fail because the appellants had no right of appeal and accordingly, the appeals were dismissed under section 35(2) of the Court of Appeal Act. Gounder J stated:

> ***'Is there a right of appeal?***
>
> *[8] The Court of Appeal Act provides for three avenues to bring criminal appeals. Section 21(1) of the Court of Appeal Act applies to an appellant convicted on a trial held before the High Court. The appellants have not been convicted on a trial held before the High Court and therefore section 21(1) is not relevant.*
>
> *[9] Section 22(1) of the Court of Appeal Act concerns appeals from the High Court in its appellate jurisdiction. The stay applications were not heard*

by the High Court in its appellate jurisdiction. Section 22 (1) is not relevant.

[10] Section 3(3) of the Court of Appeal Act provides for a right of appeal from the final judgments of the High Court given in the exercise of its original jurisdiction.

[11] The High Court judgments refusing stay were given in its original jurisdiction. The issue is whether the judgments are final. The question whether a refusal of stay in criminal proceedings is a final judgment must be determined by the principles enunciated by the Full Court in Takiveikata v State Criminal Appeal No: AAU0030 of 2004S at pp 4-5:

> *"The Court noted that two schools of thought had developed as to what constituted a final judgment. These were categorised as "the order approach" and "the application approach". The "order approach" required the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end it was a final order, if it did not it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter would be finally determined whichever way the court decided the application.*

The Court concluded that it was preferable at least in the criminal jurisdiction for the court to maintain "the order approach."

[12] Applying 'the order approach', the question that must be asked is whether the order refusing stay of prosecution brought the proceedings to an end. The answer is obvious. The order refusing stay has not brought the proceedings to an end, as the trials are pending in the Magistrates' Court. It therefore follows the judgments of the High Court are not final. Of course if stay was granted, the proceedings in the Magistrates' Court would have come to end, and the order granting stay would have been final to give the State a right of appeal under section 3 (3) of the Court of Appeal Act.'

[16] In **Takiveikata v State** [2004] FJCA 39; AAU0030.2004S (16 July 2004) the Court of Appeal dealt with an appeal against the decision of the High Court judge fixing the trial date where the state had argued that it was an interlocutory decision not subject to appeal. The Court held:

'Section 3(3) of the Court of Appeal Act, as amended, provides as follows:-

"(3.) Appeals lie to the court as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court."

Section 21: which specifically relates to criminal appeals has no application to this case because there has not been a conviction.

The meaning of the term "final judgment" as used in section 3 has been a matter of dispute. The whole subject was considered in this court in the case of ***Josefa Nata v The State,*** *Criminal appeal No. AAU0015.2002S. In that case a submission made in the High Court that the crime of treason was not a crime under the law of Fiji had been rejected by the trial judge. That determination was made as a preliminary question and at the time the appeal was brought before the Court of Appeal the appellant had not been arraigned nor had assessors been empanelled. The State contended that the judgment of the Judge in the High Court was not a final judgment. The Court noted that two schools of thought had developed as to what constituted a final judgment. These were categorised as "the order approach" and "the application approach". The "order approach" required the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end it was a final order, if it did not it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter would be finally determined whichever way the Court decided the application.*

The Court concluded that it was preferable at least in the criminal jurisdiction for the court to maintain "the order approach". In consequence the court concluded that there was no final judgment before it.

The decision in Nata (supra) would exclude jurisdiction to hear the appeal.

In view of the conclusion at which we have arrived, that this Court does not have jurisdiction to entertain the proceedings before us the appeal will be dismissed.'

[17] The Court of Appeal in **Nata v The State** [2002] FJCA 75; AAU0015U.2002S (31 May 2002) considered a notice of motion filed on behalf of the state for an order that an appeal filed on behalf of the appellant be dismissed for want of jurisdiction. The appeal in question was brought against a judgment of the High Court in which the court had rejected a submission made on behalf of the appellant that the crime of treason, with which the appellant has been charged, was not a crime known to the law of Fiji. If the submission had been upheld, the charge would have been dismissed with

the consequence that the appellant would have been entitled to be acquitted. The Court of Appeal said:

> *'In the present case nothing turns on these considerations because we are concerned with a criminal matter which will eventually be tried by assessors. The trial cannot be split any more than could a civil case which was being tried by a jury. It is true that the question whether or not the crime of treason exists in Fiji was dealt with as a preliminary issue. It may be thought desirable that the applicable legislation should permit an appeal by leave from a judgment on a preliminary issue which goes to the heart of a criminal case. That is a course which is available in New Zealand and in at least some of the Australian states. But we can find no provision in the relevant legislation or in rules of court here which makes provisions of this kind. Certainly we were referred to none by counsel.*
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> *In those circumstances it seems to us to be preferable, at least in the criminal field, for the court to maintain the order approach, which found favour even in civil cases in former years in England, rather than the application approach. But even if one adopts the application approach as propounded by the Court of Appeal in Charan the order would not be final unless the entire cause or matter would be finally determined whichever way the Court decided the application. On that basis it matters not whether one adopts the order approach or the application approach. On neither basis is there here a final judgment with the consequence that an appeal does not lie under s.121 of the Constitution nor under s.21 of the Court of Appeal Act.'*

[18] In **Balaggan v State** [2012] FJLawRp 139; (2012) 2 FLR 92 (25 May 2012) the appellant applied to the Court of Appeal for two orders made by the High Court to be quashed and set aside. The High Court had made an order disqualifying the appellant's counsel from acting for the appellant in the trial, and another ruling on the transfer of the matter to Lautoka High Court. Calanchini, AP held:

> *(1) Criminal appeals to the Court of Appeal are restricted to the jurisdiction conferred by Part IV of the Court of Appeal Act. Under those circumstances, neither of the orders of the High Court come within s 21 of the Act.*
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> *(2) Where criminal proceedings are commenced in the High Court exercising its original jurisdiction and the matter proceeds to trial and the judge proceeds to pronounce judgment, that judgment is the final judgment. Every other application and every order made by the judge on the hearing of that application should be considered interlocutory.*

(3) The order refusing the application to transfer the matter was made in a criminal proceeding, was interlocutory in nature and no appeal lies to the Court of Appeal. The disqualification order was an interlocutory order made pursuant to the court's jurisdiction to determine whether a legal practitioner, as an officer of the court, should be permitted to appear for the accused at the trial. No appeal lies to the Court of Appeal.

[19] In **Chand v State** [2020] FJCA 221; AAU0130.2019 (9 November 2020), I came to a similar finding against an interlocutory order (see **Buadromo v Fiji Independent Commission Against Corruption** (FICAC) [2021] FJCA 14; AAU01.2021 (19 January 2021) and **Bimlesh Singh v State** AAU 079 of 2020 (20 January 2023) as well. I said as follows:

*'[15] It has been treated as settled law that the right of appeal against a decision of the Magistrates' court made under extended jurisdiction under section 4 (2) of the Criminal Procedure Act lies with the Court of Appeal pursuant to section 21 of the Court of Appeal Act [vide **Kirikiti v State** [2014] FJCA 223; AAU00055.2011 (7 April 2014), **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018)].*

*[16] However, this view is open to debate in the face of clear constitutional provisions. A discussion on this aspect of law can be found in **Tuisamoa v State** [2020] FJCA 155; AAU0076.2017 (28 August 2020).*

*[17] Assuming that the appellant's right of appeal against the dismissal of his application is to the Court of Appeal under section 21 of the Court of Appeal Act as the learned Magistrates was exercising extended jurisdiction [as also held in **Charan v State** [2020] FJCA 144; AAU179.2019 (24 August 2020)], the crucial question in this appeal is whether the order of dismissal of the appellant's application to transfer the case to the High Court could legitimately be the subject of an appeal to the Court of Appeal.*

[18] It is clear that the appellate jurisdiction of the Court of Appeal as enshrined in section 21 of the Court of Appeal Act could be invoked only against a conviction, sentence, acquittal or grant or refusal of bail pending trial.

[19] Even if one were to argue that section 21 should be read with section 3(3) of the Court of Appeal Act dealing with general jurisdiction of the Court of Appeal, section 3(3) enables appeals to this court as of right only from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court. Thus, the impugned order of the learned Magistrate clearly does not come under section 3(3) either.

> *[20] In any event in **Balaggan v State** [2012] FJLawRp 139; (2012) 2 FLR 92 (25 May 2012) Calanchini AP as single judge had held that criminal appeals to the Court of Appeal are restricted to the jurisdiction conferred by Part IV of the Court of Appeal Act effectively ruling out the general jurisdiction under section 3(3). The full court in **State v Chand** [2015] FJCA 64; AAU0085.2012 (28 May 2015) had held that the interpretation of Calanchini P was the correct interpretation.*
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> *[21] Therefore, I determine that the impugned ruling/order of dismissal of the appellant's application by the learned Magistrate to transfer the case to the High Court when the High Court had already invested the Magistrates court with jurisdiction under section 4(2) of the Criminal Procedure Act, 2009 is only an interlocutory order and therefore, not appealable. It does not come under Part IV of the Court of Appeal Act. Therefore, I find that the appellant has no right of appeal against the impugned ruling of the learned Magistrate dated 26 July 2019 and his appeal also has no merits as discussed above.'*

[20] The recent decision by the Court of Final Appeal of The Hong Kong Special Administrative Region in **HKSAR v Yee Wenjye** [2022] HKCFA 6 is also an authority to the proposition that refusal to order a stay of proceedings is not a final decision as it does not dispose of the matter and also because the merits of the decision could be reviewed by the appellate court, if the accused is eventually convicted (it has been authoritatively held that an appeal against a conviction can be brought on the ground that the trial should have been stayed).

[21] Therefore, in the light of those judicial precedents I hold that the impugned order of the High Court judge dated 19 September 2022 refusing to stay the proceedings in the Magistrates court is only an interlocutory order and not a decision or a final judgment as contemplated under section 22 of the Court of Appeal Act. This is the conclusion one could arrive at whether you apply 'order approach' or 'application approach' though at least for criminal matters 'order approach' had been preferred. The impugned ruling of the High Court has not brought the criminal proceedings against the appellant to an end. Nor has it determined the entire cause or matter finally. The case against the appellant in Lautoka Magistrates court is yet to be determined.

[22] For the same reasons, I would also conclude that the rejection of the appellant's application by the High Court for lack of jurisdiction on the basis that existence of a determination by the Magistrate under section 260 is a condition precedent to the exercise of jurisdiction by the High Court under section 270 is also an interlocutory order and not a final judgment. The High Court had said as much in the ruling as follows:

> *'18……..In the circumstances I find that I have no jurisdiction to consider this application. If however the Magistrate proceeds to make a decision, the appellate and revisionary jurisdiction of this court may also be available to the parties and the court.'*

[23] As matters stood then before both courts, I do not see any error in the ruling dated 28 June 2022 by the Magistrate and the ruling dated 19 September 2022 by the High Court. Once the Magistrate rules on the appellant's objection to the validity of proceedings *inter alia* based on *'no offence at law'* argument and delivers the final judgment, the appellant has a right of appeal against that judgment to the High Court and from there to the Court of Appeal, as the case may be, in terms of the relevant provisions of the law.

[24] Furthermore, a single judge this court has no jurisdiction to stay criminal proceedings in a lower court pending appeal [vide **Buadromo v Fiji Independent Commission Against Corruption** (FICAC) [2021] FJCA 14; AAU01.2021 (19 January 2021) where I have extensively discussed this issue]. Whether even the full court has that power is also doubtful.

[25] Therefore, I hold that the appellant has no right of appeal against the interlocutory ruling of the High Court judge dated 19 September 2022 and in any event, I have no jurisdiction to stay criminal proceedings pending appeal even if the appellant's appeal deserves to go before the full court on the question of law. Thus, his application for a stay of MC proceedings is refused and his appeal should stand dismissed in terms of section 35(2) of the Court of Appeal Act.

Order of the Court:

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

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