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

**CRIMINAL APPEAL NO. AAU 056 of 2021**
**[In the High Court at Suva Case No. HAA 74 of 2019]**
**[In the Magistrates Court at Sigatoka]**

| | | |
|---|---|---|
| **BETWEEN** | : | **JOSUA NATAKURU** |
| | | ***Appellant*** |
| **AND** | : | **THE STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Prematilaka, RJA** |
| **Counsel** | : | **Appellant absent** |
| | : | **Ms. S. Shameem for the Respondent** |
| **Date of Hearing** | : | **06 June 2023** |
| **Date of Ruling** | : | **12 June 2023** |

# RULING

[1] The appellant had been arraigned in the Magistrates' Court at Sigatoka with one count of Common Nuisance contrary to section 376 (1) (b) of the Crimes Act 2009 (as amended). The charge alleged that the appellant on 09 January 2014 swore and passed remarks to Corporal 1303 Atunaisa Tiva, an act not authorized by law and caused annoyance to the said Corporal 1303 Atunaisa Tiva.

[2] The appellant had pleaded not guilty and the case had proceeded to trial. After the prosecution closed its case the appellant had made a 'no case to answer' application and submissions. The learned Magistrate had upheld the application for no case to answer and acquitted the appellant. Thereafter, he had made an application for costs and compensation which, after hearing both the parties, the learned Magistrate had dismissed.

[3] Aggrieved by the Magistrate's refusal the appellant had filed a timely appeal in the High Court against the said decision on the following grounds of appeal. However, he had pursued only (b), (d) and (e) at the hearing of the appeal.

> *'(a) The learned Magistrate had acted upon a wrong principle.*
>
> *(b) The learned Magistrate failed to take into account material considerations.*
>
> *(c) The learned Magistrate had mistaken the facts.*
>
> *(d) The learned Magistrate had allowed extraneous or irrelevant matters to guide and affect him.*
>
> *(e) The learned Magistrate had failed to properly exercise his discretion in all the facts and circumstance of the case when dismissing the application.'*

[4] The learned High Court judge in the judgment dated 21 January 2021 had dismissed the appellant's appeal and the application to lead fresh evidence and thereupon he had preferred a second tier appeal to this court on the following grounds of appeal.

> *'(a) The learned judge erred in law when he failed to hold that the learned Magistrate had failed to judicially exercise his discretion to grant cost under section 150(3) of the Criminal Procedure Act, 2009.*
>
> *(b) The learned judge erred in law when he refused the appellant's application for further evidence made under section 257 of the Criminal Procedure Act, 2009.*
>
> *(c) The appellant reserves his right to file further grounds upon receiving the copy of the court record.'*

***Scope under section 22 of the Court of Appeal Act***

[5] The appellant's appeal to this court is against the High Court judgment delivered on 18 January 2022 in terms of section 22 of the Court of Appeal Act as a second tier appeal. In a second tier appeal, a conviction could be canvassed on a ground of appeal involving a question of law only [also see **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)]. 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].

[6] Though, leave to appeal is not required under section 22, a single judge could still exercise jurisdiction under section 35(2) in order to determine whether the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal [vide **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012) and **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)]. In doing so, a single judge is 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 [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014)]. It is therefore a counsel's or an appellant's duty to properly identify a discrete question (or questions) of law in prosecuting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005).

[7] What is important is not the label but the substance of the appeal point. This exercise is 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 [vide **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020) and **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014)].

[8] 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)].

[9] In a second tier appeal under section 22 of the Court of Appeal an appellant cannot seek to re-open and re-argue facts or mixed fact and law of the case or re-agitate findings of pure facts or mixed fact and law. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the court 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 this court must give effect to that legislative intention.

***Ground of appeal (a)***

[10] The appellant appears to have consolidated grounds of appeal (b), (d) and (e) urged in the High Court under appeal ground (a) filed before this court.

[11] The learned High Court judge had analysed grounds of appeal (b), (d) and (e) together in the context of section 150 of the Criminal Procedure Act, 2009 in detail and concluded as follows:

> *33. I have perused the copy record and also the above mentioned paragraphs, there is nothing to suggest that the learned Magistrate had erred in the exercise of his discretion. The ruling on costs is based on the evidence adduced by the appellant and the law.*
>
> *34. The learned Magistrate had correctly exercised his discretion to refuse the application for costs. There is nothing in the copy record or in the ruling delivered by the learned Magistrate that the discretion exercised was manifestly wrong and/or not judicially exercised. All the grounds of appeal are dismissed due to lack of merits.*

[12] Thus, this ground of appeal clearly involves mixed fact and law and not law alone. The appellant had failed to establish that the prosecutor had no reasonable grounds for bringing the proceedings or had unreasonably prolonged the mater. Thus, in any event there is no reason to interfere with the High Court judge's decision.

***Ground of appeal (b)***

[13] With regard to the appellant's application for fresh evidence, the High Court judge had analysed the appellant's affidavit, the documents proposed to be led as evidence and the justification for such evidence in reference to the law applicable to lead fresh evidence in appeal. It appears that the appellant's application for fresh evidence in the form of proposed documents relate in some way to his application for cost canvassed

under the previous ground of appeal. After an exhaustive analysis of all facts and law, the High Court judge had concluded as follows:

> *'23. It is obvious to me that the above application is an afterthought of the appellant. After considering the application to adduce further evidence and the submissions made this court is not able to grant the orders sought.'*

[14] It is abundantly clear that the second ground of appeal to is not on a pure question of law. It is inextricably interwoven with facts. It is a matter of mixed fact and law. In any event, I do not see any basis to doubt the soundness of the High Court judgment.

[15] It is pertinent to place on record that the appellant never appeared before this court. Other than his notice of appeal, he had filed no submissions to substantiate his grounds of appeal. Since receiving his notice of appeal the matter was mentioned 06 times (*i.e.* from 03 June 2022 to 06 June 2023) in open court in his absence. By 03 June 2022, the appellant had been out of prison and he had attended the CA Registry on 01 June 2022 and was made fully aware of this appeal. However, he had failed to prosecute the appeal with due diligence even thereafter. Since then all efforts on the part of the Registry and the DPP had not yielded any results in tracing his whereabouts though he had been reportedly last seen in Lautoka. Nevertheless, this court fully considered his grounds of appeal in coming to its decision.

***Order of the Court:***

1. Appeal (bearing No. AAU 056 of 2021) is dismissed in terms of section 35(2) of the Court of Appeal Act.

COURT OF APPEAL FIJI

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

**Solicitors:**

Appellant absent
Office for the Director of Public Prosecutions for the Respondent