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

CRIMINAL APPEAL NO. AAU 0019 of 2024
[In the High Court at Suva Case No. HAA 036 of 2023]

BETWEEN : **JOSAIA VOREQE BAINIMARAMA**

1st Appellant

SITIVENI TUKAITURAGA QILIHO

2nd Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. D. Sharma and Ms. G. Fatima for the Appellants**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **27 March 2025**

Date of Ruling : **01 April 2025**

RULING

[1] The 01st appellant had been tried in the Magistrates court with Attempt to pervert the Course of Justice contrary to section 190(e) of the Crimes Act 2009 and the 02nd appellant with Abuse of Office contrary to section 139 of the Crimes Act 2009.

[2] Both had been acquitted by the Magistrates court[1] on 12 October 2023. On 02 November 2023 the State had filed 8 grounds of appeal in the High Court against the

[1] **State v Bainimarama** [2023] FJMC 19; Criminal Case 347 of 2023 (12 October 2023)

acquittal. Having allowed the appeal on 05 grounds of appeal, on 14 March 2024 the Hon. Acting Chief Justice (hereinafter sometimes referred to as ACJ) - as His Lordship then was - sitting in the High Court exercising its appellate jurisdiction had found the 01st and 02nd appellants guilty and convicted them as charged[2]. Among other orders, the High Court directed the Magistrate to pronounce the 01st and 02nd appellants guilty as charged, convict them, and then proceeds to sentence them accordingly.

[3] On 18 March 2024, the appellants appealed to the Court of Appeal against the High Court decision seeking *inter alia* leave to appeal (if required) in terms of section 22(1) of the Court of Appeal Act. The Magistrate on 28 March 2024 purportedly acting under section 15(1)(j) of the Sentencing and Penalties Act (SPA) granted 'an absolute discharge' to the 01st appellant and imposed a fine of $1500.00 on the 02nd appellant with a default sentence of 30 days' imprisonment without recording a conviction conditional upon the payment of the said fine, in terms of section 15(1)(f) of the SPA. On 28 March 2024, the respondent once again appealed the said sentence decision by the Magistrate to the High Court. The appellants made an application for recusal of the Hon. Acting Chief Justice from the hearing into the sentence appeal based on the remarks made by the ACJ. The ACJ heard and dismissed the said recusal application on 02 May 2024 but no formal ruling was delivered. The ruling into the sentence appeal was delivered on 09 May 2024[3] where the Magistrate's sentencing orders were set aside and the 01st appellant was sentenced to 01 year of imprisonment while the 02nd appellant was sentenced to 02 years of imprisonment. Both appellants appealed their respective sentences and the refusal of the recusal application to the Court of Appeal on 15 May 2024. Bail pending appeal applications too were filed on 23 July 2024.

[4] The 01st appellant has already served his sentence and is now out of prison. The 02nd appellant is said to be nearing the completion of serving his sentence. The counsel for the appellants informed this court at the hearing that they would not proceed with the sentence appeals or bail pending applications. As far as the 01st appellant is

[2] **State v Bainimarama** [2024] FJHC 169; HAA036.2023 (14 March 2024)
[3] **State v Bainimarama** - Judgment and Sentence [2024] FJHC 278; HAA016.2024 (9 May 2024)

concerned, the sentence appeal and the bail pending appeal application are only of academic interest. The 02nd appellant's position is also not much different.

[5] Therefore, what is before this court now is the appellants' appeal against convictions. However, the counsel for the appellants submitted that the reversal by the High Court of the sentence orders made by the Magistrate (which effectively led to non-convictions of the appellants) involves the interpretation of section 15(1)(j) and 15(1)(f) of the SPA and therefore, may affect the earlier findings of guilty and convictions entered by the High Court in appeal against both appellants. According to the counsel, similar reasoning and logic would apply to the refusal of the recusal application by the High Court before it considered the sentence appeals in as much as the High Court in its sentence judgment set aside the Magistrate's sentence orders (which negated the findings of guilty and convictions by the High Court).

Section 22/second tier appeal under the Court of Appeal Act

[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[4]. 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][5].

[7] 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[6]. 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[7].

[4] see also paragraph [11] of **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)
[5] See also **Anderson v The State** [2024] FJCA 126; AAU031.2020 (26 July 2024)
[6] see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014)
[7] **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005)

[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[8]. Some examples of such questions of law could be found in several decisions[9].

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

[9] 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)[10] 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[11].

[10] 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[12], a proposition followed in a number of later decisions[13].

[11] Under section 22 of the Court of Appeal Act 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.

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[8] **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)
[9] See for example **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); **Turaga v State** [2016] FJCA 87; AAU002.2014 (15 July 2016); **Anderson v State** [2022] FJCA 203; AAU031.2020 (29 December 2022)
[10] **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012)
[11] **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)
[12] **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014)
[13] See for example **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) and **Sukanaivalu v Fiji Independent Commission Against Corruption (FICAC)** [2021] FJCA 171; AAU0092.2020 (22 October 2021)

[12] The appellants' counsel has placed three matters for consideration of this court at this stage in order to decide whether they are pure questions of law or not. If not, the appeal would be dismissed. If so, the appeal will proceed to the full court on those questions of law and any matters incidental thereto as identified by this court.

Was there a misapplication of Browne v Dunn[14] *(not Brown v Dunn)* ***Rule by the High Court?***

[13] The common law rule in *Browne v Dunn* states that where a party intends to lead evidence that will contradict or challenge the evidence of an opponent's witness, it must put that evidence to the witness in cross-examination. It is essentially a rule of fairness - that a witness must not be discredited without having had a chance to comment on or counter the discrediting information. It also gives the other party notice that its witness's evidence will be contested and further corroboration may be required.

[14] How the High Court had understood and applied the common law rule in *Browne v Dunn* with regard to the 01st appellant could be seen at paragraphs 33 to 37 of the judgment dated 14 March 2024. The 01st appellant-then Prime Minister of Fiji-faced the allegation under count 01 that he attempted to pervert the course of justice by telling Sitiveni Tukaituraga Qiliho, then Commissioner of Police of the Republic of Fiji (the 02nd appellant) to stay away from the USP investigations that was reported under CID/HQ PEP 12/07/2019.

[15] On oath, the 01st appellant had denied the allegation against him and said that he did not tell the 02nd appellant to stop any police investigation. As per the HC judgment, the thrust of the 01st appellant's defence was that he was not aware of the police investigation in CID/HQ PEP 12/07/2019, which concerned alleged mismanagement of USP funds by senior executives of the USP Council but he was only aware of public gatherings by USP staff and student who were threatening to boycott classes and exams if their demands were not met at the height of the Covid-19 pandemic in Fiji, and the police were ready to arrest and prosecute those who breached the Covid-

[14] (1893) 6 R 67

19 restriction. The 01st appellant had said that this was the USP police investigation he was aware of, not that concerning CID/HQ PEP 12/07/2019.

[16] The HC judgment further goes on to say that none of the police witnesses were cross-examined on the issue concerning the police investigation into the possible breaches of the Covid-19 restrictions at the USP, as reported in defence exhibit No. 1 and the respondent has submitted that by failing to cross-examine the police witnesses on the matters raised in defence exhibit No. 1, the 01st appellant had breached the rule in *Browne v Dunn.* The respondent has also referred the High Court to **Kumar v State**[15] in support of its contention that the testimony of the 01st appellant should not be believed due to the breach of *Browne v Dunn* rule by the defence.

[17] The High Court judgment has quoted paragraph [26] of *Kumar* to highlight that as a general rule, defence counsel should put to witnesses for the State/Crown for comment any matter of significance which is inconsistent with or contradicts the witness's account and which will be relied upon by the defence. However, the single Judge of this court in *Kumar* went on to discuss the scope of the application of *Browne v Dunn* rule in much more detail as follows:

> *'[23] In discussing the defence evidence the trial judge had dealt with Brown v Dunn Rule [**Browne v Dunn** (1893) 6 R 67 at 70-71] as well in the context of Setareki's evidence that the complainant fell down on the floor when she entered the flat/house and she was drunk and lifeless and the appellant pulled and dragged her into his room. The appellant's evidence was that the complainant did not fall down, but she tripped backwards while climbing the steps but she managed to hold on to him but that position had not been put to Setareki. It appears that this is not a matter the prosecuting counsel had raised but the trial judge on his own had picked it up for comments to the assessors.*
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> *[24] The trial judge had said that the failure to put such questions could be used to draw an inference that the appellant did not give that account of events to his counsel but warned the assessors that before they drew such an inference they should consider other possible explanations for the failure of the counsel to put questions about the different versions. The trial judge had then proceeded to explain some possible reasons for the trial counsel's failure and again cautioned the assessors that they should consider whether there are other reasonable explanations for the failure to ask Setareki about the*

[15] [2023] FJCA 42; AAU137.2020 (8 March 2023)

different versions and warned that they should not draw any adverse inference against the appellant's credibility unless there is no other reasonable explanation for such failure.

[25] *In **Hoffer v R** [2021] HCA 36; 95 ALJR 937; 395 ALR 1; 291 A Crim R, the only issue was whether it had been established beyond reasonable doubt that the appellant knew that each of the complainants was not consenting or was reckless as to whether she was consenting. During the course of the appellant's cross-examination at trial, it became apparent that certain of his evidence which was inconsistent with or contradicted that of the complainants had not been put to them by defence counsel for comment. Towards the end of these areas of cross-examination the prosecutor put to the appellant that two aspects of his evidence which had not been put to the complainants were, in effect, of recent invention. Defence counsel did not pursue objections to these suggestions of recent invention and the trial judge did not give the jury directions as to the use which could be made of this evidence.*

[26] *……..In **MWJ v The Queen** (2005) 80 ALJR 329 at 333 [18]; 222 ALR 436 at 440-441, it was noted that in many jurisdictions this rule has been held to apply in the administration of criminal justice.*

[27] *As said in **R v Birks** (1990) 19 NSWLR 677 at 688 in criminal proceedings, **it is not uncommon for matters which have not been put to the appropriate Crown witness to emerge from the evidence of an accused person, including during the course of cross-examination. It was said in MWJ that an obvious course which may be taken is to recall the witness so that the omission can be corrected.** This may be preferable and may be undertaken without injustice, depending on the course the trial has taken. However, course sometimes taken by the prosecution is to cross-examine the accused as to the omission. The cross-examination undertaken is not limited to drawing the attention of the accused to the fact of the omission, so as to highlight the matter for the jury. It extends to the reason for the omission. The evident purpose of the cross-examination is to impugn the credit of the accused by suggesting that the matter is of recent invention. Gleeson CJ observed in **R v Birks** (supra) at p 690, that **it is one thing for the cross-examiner to point to the unfairness to a witness who has not had the opportunity to comment, it is quite another to suggest that the result of a failure to observe the rule of practice is that a person should not be believed.***

[28] *King CJ observed in **R v Manunta** [1989] SASC 1628; (1989) 54 SASR 17 at https://jade.io/citation/2672334/section/1297052 that an examination of an accused person which proceeds by reference to there being but one reason why a matter has not been put to a witness is "fraught with peril" because there may be many explanations for the omission which do not reflect upon the credibility of the accused. The examples are defence counsel misunderstanding the accused's instructions or where forensic pressures may have resulted in looseness in the framing of questions or the possibility that defence counsel has chosen not to advance certain matters upon which he or she had instructions because they were unlikely to assist the defence.*

*[29] Accordingly it was held in **Hoffer v R** (supra) inter alia that:*

> *'[34] Where there remains a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for a line of questioning directed to impugning the credit of an accused. Except in the clearest of cases, where there are clear indications of recent invention, an accused person should not be subjected to this kind of questioning. The potential for prejudice to an accused is obvious.*
>
> *[37] A trial judge should be alert to the problems associated with cross-examination. They should be raised with counsel at an early point. Where the cross-examination has occurred, it will be necessary for the trial judge to warn the jury about any assumption made by the cross-examiner, to draw attention to the possible reasons why the matter has not been put and to direct the jury as to whether any inferences are available.'*

*[30] The High Court also held in **Hoffer v R** (supra):*

> *'[42] The questioning undertaken by the prosecution of the appellant departed from the standards of a trial to which an accused is entitled and the standards of fairness which must attend it[24]. The questioning was such as to imply that the appellant was obliged to provide an explanation as to why matters had not been put to C1 or C2. This suggested he possessed information which he had not given counsel by way of instructions. The unfairness in this regard was compounded when the appellant was not permitted by the trial judge to provide an answer and by defence counsel not informing the court that he had those instructions. The attack upon the appellant's credit by assertions of recent invention was based upon an assumption which was not warranted. All of these matters were highly prejudicial to the appellant.*
>
> *[47] The prejudice to the appellant was not addressed by the trial judge, as it should have been. It was necessary that the trial judge put the omissions in perspective, discount any assumption as to why they occurred by reference to other possibilities and warn the jury about drawing any inference on the basis of a mere assumption. Absent such directions there was a real chance that the jury may have assumed that the reason for the omission was that the appellant had changed or more recently made up his story.'*
>
> *[Emphasis mine]*

[18] It does not appear from the HC judgment that the Magistrate was alert to the fact that the 01st respondent's position under oath had not been put to the prosecution witnesses and she had failed to raise it immediately with defence counsel. Neither, has the Magistrate recalled the relevant prosecution witnesses for examination by all parties on the 01st appellant's stance. The prosecution had accepted defence exhibit

No.1 as a historical fact and put to the 01st appellant that he had been talking about CID HQ PEP 12/07/19 when he made that suggestion to the 02nd appellant and not the investigation into the COVID protocol breaches at USP during a protest there. However, it does not appear that the prosecuting counsel had gone so far as to make any adverse suggestions as to the credibility of this position or sought an explanation or reason for the omission. The defence counsel too does not seems to have indicated to court that he had the instructions on the 01st appellant's position. In the end, the Magistrate had accepted the appellant's explanation for what he told the 02nd appellant. It is in this complex matrix, the High Court had to carefully consider and apply *Browne v Dunn* rule with caution.

[19] Thus, the rule in *Browne v Dunn* is subject to many qualifications. The law has progressed by leaps and bounds since *Browne v Dunn* (1893). The High Court had determined that *Browne v Dunn* rule had been breached by the 01st appellant when he failed to put his position on the Covid-19 police investigation to the State witnesses for comments and concluded that the effect of the omission is that *'01st appellant's version of events and evidence is tainted by the word "unfairness", and its weight and value, as a consequence, somewhat decreases'*, and concluded that the Magistrate erred in law and in fact when she accepted the 01st appellant's evidence. The underlying implication appears to be that due to the alleged breach of *Browne v Dunn rule*, not only the weight and value of 01st appellant's evidence decreases but makes his testimony almost incredible as to amount to an outright subsequent invention worthy of rejection. The High Court had also referred to the no case to answer ruling of the Magistrate where she had held that the 01st appellant did know of CID/HQ PEP 12/07/2019. In addition, the High Court had concluded that even without the breach of *Browne v Dunn rule*, the 01st appellant knew or ought to have known about the mismanagement by senior officials at the USP Council thus imputing knowledge (constructively) to the 01st appellant of what was happening at the USP Council meetings.

[20] A single Judge of this court once again dealt with the application of *Browne v Dunn* rule in a later Ruling[16] as follows:

> *'[44] The appellant had also referred to* ***Browne v Dunn*** *rule under this ground of appeal…..*
>
> *[45] The respondent has submitted that where there remains a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for a trial judge to rely on lack of puttage to impugn the credit of an accused. The respondent has examined possible instances where the trial judge had erroneously concluded that he was entitled to accord less weight to the appellant's testimony or rely on lack of puttage to impugn his credibility…..The respondent submits that the manner in which the trial judge had dealt with these instances of lack of puttage by defense counsel arguably constitutes an irregularity in the conduct of the trial but it is not reasonably arguable that this irregularity constitutes a miscarriage of justice within section 23(1)(a) of the Court of Appeal Act and could not have affected the result of the trial in the light of overwhelming strength of the circumstantial case.*
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> *[46]* ***Browne v Dunn*** *[(1893) 6 R 67 at 70, 76 – originally a civil case) rule is a rule of practice that requires the counsel to put the substance of the contradictory evidence to the opposing witness during cross-examination, so that the witness might comment on it. This rule of practice ensures that a witness has the opportunity to explain a matter of substance if the opposing party intends to later contradict or discredit the witness in relation to it. This failure is known as 'lack of puttage' in Australia.*
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> *[47] In* ***HKSAR v CHAN Hing Kai*** *CACC 65/2017/[2019] HKCA 172 (24 January 2020) Zervos JA in the Court of Appeal in Hong Kong examined the application of* ***Browne v Dunn*** *rule in criminal cases and said that there are two aspects to this rule namely (i) it is a rule of practice or procedure designed to achieve fairness to witnesses and a fair trial between the parties (ii) it is a rule relating to weight or cogency of evidence and summarized the relevant principles as as follows:*
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> 1. *The rule in Browne v Dunn is a rule of professional practice and of fairness designed to allow witnesses to confront and respond to any proposed challenges to their evidence.*
> 2. *The rule does not apply to criminal proceedings in the same way or with the same consequences as it does in civil proceedings, due to the accusatorial nature of criminal trials and the different obligations placed on the prosecution and defence.*
> 3. *The rule admits to flexibility and requires considerable care and circumspection in it application.*
> 4. *The extent of the obligations that arise under the rule in a particular case will be informed by the nature of the defence case and the forensic context of the trial. A cross-examiner must not only disclose that the*

[16] **Isoof v State** [2024] FJCA 18; AAU0011.2022 (2 February 2024)

evidence of the witness is to be challenged, but also how it is to be challenged.

5. *Where counsel does not comply with the rule, the trial judge has a discretion as to how to remedy any unfairness that may result and the actions he takes will depend on the circumstances of the case.*

6. *Measures should be employed to avoid having to direct the jury about a breach of the rule, such as, drawing the attention of counsel to the need to put matters to the witness, and permitting a witness to be recalled to be cross-examined and questioned on the matters omitted. Other measures may also be available depending upon the nature of the breach of the rule and the circumstances of the case.*

7. *Where an apparent failure to comply with the rule is followed by judicial comment to the jury, it is important to consider the substance of the comment, the purpose of which may differ depending on the circumstances.*

8. *Where the trial judge considers that it is necessary to direct the jury about the effect that failure to comply with the rule may have on their assessment of the contradictory evidence, the judge should:*

    i. *outline the rule in Browne v Dunn and its purpose;*

    ii. *tell the jury that, under the rule, the witness should have been challenged about the relevant matters, so that he or she had an opportunity to deal with the challenge;*

    iii. *tell the jury that the witness was not challenged, and thus was denied the opportunity to respond to the challenge; and*

    iv. *tell the jury that they have therefore been deprived of the opportunity of hearing his or her evidence in response.*

9. *Only in exceptional cases should the trial judge consider directing the jury that an adverse inference as to credibility may be drawn against the accused in consequence of a breach. It is one thing to remark upon the fact that a witness or a party appears to have been treated unfairly, but it is another thing all together to comment that the evidence of a person should be disbelieved, perhaps as a recent invention, because it raises matters that were not put in cross-examination to other witnesses by that person's counsel. Such a direction will only be appropriate where the circumstances surrounding the failure to put the allegation to the witness raise a "prominent hypothesis" that the contradictory evidence is a recent invention or is otherwise a fabrication.*

10. *Such a direction is fraught with difficulty and should only be given with considerable care and circumspection and must be accompanied with an explanation that other inferences may be drawn on why a party failed to comply with the rule with examples of those inferences.*

[48] *Trial judges must be careful not to embark on impermissible reasoning founded upon lack of puttage (see **Abourizk v The State** CAV 012 of 2019 (28 April 2022). An examination of an accused person which proceeds by reference to there being*

*but one reason why a mater has not been put to a witness is 'fraught with peril' (per King CJ in **R v Manunta** (1989) 54 SASR 17]. King CJ observed that there may be many explanations for the omission which do not reflect upon the credibility of the accused, for example the defence counsel misunderstanding the accused's instructions or forensic pressure resulting in looseness in framing questions or not advancing certain matters deliberately upon which he had instructions but they were unlikely to assist the defence.*

*[49] The appeal court should put to one side and disregard those irregularities which plainly could not, either singly or collectively, have affected the result of the trial and therefore cannot properly be called miscarriages. A miscarriage is more than an inconsequential or immaterial mistake or irregularity (vide **R v Matenga** [2009] 3 NZLR 145]. An error or irregularity which could not have affected the result of the trial will not amount to a miscarriage of justice and inconsequential error, including an inconsequential error of law, is not a miscarriage (vide **Hoffer v The Queen** [2021] HCA 36 (10 November 2021).*

[Emphasis mine]

[21] **Blackstone's Criminal Practice** (1993) at F7.4 (pages 1852 & 1853) on the other hand states:

*'**Effect of Failure to Cross-Examine***

A party who fails to cross-examine a witness upon a particular matter is respect of which it is proposed to contradict him or impeach his credit by calling other witnesses tacitly accepts the truth of the witness's evidence in chief on that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard. The proper course is to challenge the witness while he is in the witness-box or, at any rate, to make it plain to him at that stage that his evidence is not accepted (Hart (1932) 23 Cr App R 202). Thus in Bircham [1972] Crim LR 430, counsel for the accused was not permitted to suggest to the jury in his closing speech that the co-accused and a prosecution witness had committed the offence charged, where the allegation had not been put to either in cross-examination.

……nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to. (Browne v Dunn (1893) 6 R 67, per Lord Halsbury at pp. 76-7, followed in Fenlon (1980) 71 Cr App R 307)
See also para. 610(g) of the Code of Conduct of the Bar of England and Wales: a barrister must not by assertion in a speech impugn a witness whom he has had an opportunity to answer the allegation. There is no hard-and-fast rule, however, that cross-examination of a witness is a necessary preliminary to impeaching his credit. Thus, if the point upon which the witness is to be impeached is manifest, as when the story he tells is incredible, it is unnecessary to cross-examine him upon it: the most effective cross-examination would be to ask him to leave the box (Browne v Dunn, per Lords Herschell LC and Morris). Application of the rule may also be unnecessary in the case of a witness whose evidence is purely corroborative of the evidence of another witness whose

evidence in chief has already been challenged in cross-examination. It is a sensible practice, however, to secure the assurance of the trial judge, and the agreement of the party calling the witness, that failure to cross-examine in such circumstances will not be taken as a tacit acceptance of the witness's evidence. The rule has also been held to be inapplicable in the case of proceedings in magistrates' courts (O'Connell v Adams [1973] RTR 150).'

[22] **Archbold Criminal Pleading Evidence & Practice** (2020) at 8-216 (page 1609) states:

'If, in a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness for the defence it is right and proper that the witness should be challenged when in the witness-box or, at any rate, that it should be made plain while the witness is in the box that his evidence is not accepted: Hart (1932) 23 Cr. App. R. 202, CCA (alibi witnesses not cross-examined at all); and R. (Wilkinson) v DPP, 167 J.P. 229, QBD (Stanley Burnton J) (defendant not cross-examined). See also, Browne v Dunn (1893) 6 R. 67 at 76-77, HL, and Flanagan v Fahy [1918] 2 I.R. 361 at 388-389. Counsel is, however, entitled to invite the jury to reject the evidence of a defence witness where he has adopted a "raised eyebrow" approach, but had not explicitly put to the witness that he is lying: Lovelock [1997] Crim. L.R. 821, CA. See also Nissa [2009] EWCA Crim 189.'

[23] Section 180 of the Criminal Procedure Act 2009 allows for an application to be made by the prosecutor to recall witnesses or adduce evidence in reply to rebut any new matters introduced by the defence. Section 116 of the Criminal Procedure Act 2009 also provides for the prosecutor or the defence to recall and re-examine any person who has already been examined, where the evidence of such person appears to the court to be essential to the just decision of the case. In my view, these two provisions singularly and jointly seek *inter alai* to mitigate the hardship of *Browne v Dunn* rule in its original form which if literally applied in criminal cases may well result in eroding the universally accepted principles of the prosecution alone carrying the burden of proof beyond reasonable doubt in criminal cases and presumption of innocence. The High Court judgment has no reference to these two provisions and the counsel who argued the appeal before the High Court does not seem to have drawn the attention of the High Court to these provisions and the decision in **Isoof v State** (see foot note 16) either. In any event, the prosecution had not made any application under sections 116 or 180 of the Criminal Procedure Act.

[24] I am of the view that whether the *Browne v Dunn* rule was properly applied and whether the inference drawn therefrom on the 01st appellant's testimony of lack of knowledge about CID/HQ PEP 12/07/2019 investigation (which he allegedly attempted to stop) is justified or not, are matters of law to be examined by the full court. If the answer is in the negative, the full court will then have to decide whether the misapplication of *Browne v Dunn* rule resulted in a miscarriage of justice within section 23(1)(a) of the Court of Appeal Act and whether it could or could not have affected the High Court decision to overturn the acquittal of the 01st appellant in the light of overall strength of the prosecution case, if that be the case. A miscarriage is more than an inconsequential or immaterial mistake or irregularity. An error or irregularity which could not have affected the result of the trial will not amount to a miscarriage of justice and inconsequential error, including an inconsequential error of law, is not a miscarriage. Even if there has been a miscarriage of justice, unless it is a substantial miscarriage of justice, it will not lead to a successful outcome *i.e.* overturning the convictions.

[25] An incidental question of law would be how far a Magistrate or a judge is bound by his or her view formed at the close of the prosecution case and the weight, if any, that could be attached to a finding of a *prima facie* case made at the close of the prosecution case on the ultimate finding of guilty and conviction at the end of the trial after the conclusion of the defence case. A further question of law is to what extent the appellate court is permitted and would interfere with the factual findings of a trial judge who has had the benefit of seeing trial proceedings including the demeanor of witnesses as spelt out by numerous legal authorities in the Commonwealth and Fiji.[17] In ***Robinson Helicopter***, French CJ, Bell, Keane, Nettle and Gordon JJ put the allowance for the advantage of the trial judge thus at [43]: *...a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by "incontrovertible facts or uncontested testimony", or they are "glaringly improbable" or "contrary to compelling inferences".* In ***Lee v Lee***, however, the

[17] See for example **Robinson Helicopter Company Inc v McDermott** (2016) 331 ALR 550, **Lee v Lee** (2019) 266 CLR 129 and, in a criminal context, **Pell v R** (2020) 376 ALR 478); **ABT17 v Minister for Immigration and Border Protection** [2020] HCA 24**; Queensland v Masson** (2020) 381 ALR 560 and for an interesting discussion on this topic see the article **'The problem with fact finding'** by Anthony Cheshire SC at https://www.austlii.edu.au/au/journals/NSWBarAssocNews/2020/101.pdf

High Court put this allowance somewhat more narrowly. Thus Bell, Gageler, Nettle and Edelman JJ stated at [55]: *Appellate restraint with respect to interference with a trial judge's findings unless they are "glaringly improbable" or "contrary to compelling inferences" is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts*.

[26] As for the 02nd appellant, his counsel submitted that *Browne v Dunn* rule was totally irrelevant to the 02nd appellant's case. The allegation against the 02nd appellant was that he directed the Director of Criminal Investigations Department Serupepeli Neiko and Inspector Reshmi Dass to stop investigations into the police complaint involving CID/HQ PEP 12/07/2019, in abuse of the authority of his office, which was an arbitrary act prejudicial to the rights of University of the South Pacific which is the complainant in CID/HQ PEP 12/07/2019. According to the Magistrate's sentence order, the *Browne v. Dunn* rule regarding defence exhibit No. 02 did not apply to the 02nd appellant, for his innocence was determined on something entirely different. The 02nd appellant had admitted that he had used the words *"Stop what you are doing"*, but he had also added that he caveated that by saying as he always does, *"Stop what you are doing and give me a brief".* This position had apparently been put to State witnesses at the trial.

[27] However, the High Court had dealt with the alleged breach of the *Browne v Dunn* rule, and its potential effects on the weight and value to be placed on the 02nd appellant's evidence at length from paragraphs 39 to 62 of the judgment. It appears to me that according to the HC judgment, the alleged breach of *Browne v Dunn* rule had arisen in the following way.

[28] The 02nd appellant had apparently said that prior to 15 July 2020, he never knew of the USP police investigation recorded in CID/HQ PEP 12/07/2019 and the only USP police investigation he knew about was the possible breach of Covid-19 restrictions at the USP during a student/staff gatherings, as recorded in defence exhibit No. 01. He

said that he only knew about the police investigation in CID/HQ PEP 12/07/2019 when Neiko (PW25) told him about it on 15 July 2020. As per the HC judgment, none of the police witnesses were cross-examined on behalf of the 02nd appellant on the issues concerning the police investigation into the possible breaches of the Covid-19 restrictions at the USP, as reported in defence exhibit No.01. Therefore, it seems that the alleged breach of *Browne v Dunn* rule had arisen not on defence exhibit No.02 but on defence exhibit No.01.

[29] The correctness of these seemingly inconsistent assertions by the Magistrate and the High Court could only be verified by reading the certified appeal records at the full court hearing.

[30] The High Court had applied the identical reasoning recorded in respect of the 01st appellant and the full brunt of *Browne v Dunn* rule on the 02nd appellant as well by concluding that the rule in *Browne v Dunn* had been breached by the 02nd appellant when he failed to put his narrative of Covid-19 police investigation to the State witnesses for comments. Accordingly, the High Court had determined that the 02nd appellant's version of events and evidence was somewhat tainted by his 'unfairness' to the prosecution, and consequently the weight and value of his evidence somewhat decreased and thus, the Magistrate erred in fact and in law, when she accepted his evidence, given *Browne v Dunn* rule and her 'solid' reasoning in her "no case to answer" ruling against the 2nd respondent. Further, as in the case of the 01st appellant, the High Court had concluded that even without the breach of the *Browne v Dunn* rule, by acceding to the 01st appellant's directive to stop investigating CID/HQ PEP 12/07/2019, the 02nd respondent had obviously abused the authority of his office because the investigation into CID/HQ PEP 12/07/2019 did not stop outright from 15 July 2020 but suffered a *"slow death"* from that date. The High Court had rejected the 02nd appellant's evidence that he did not know the existence of police file CID/HQ PEP 12/07/2019 in the same way the High Court rejected the 01st appellant's evidence to the same effect by accepting the prosecution evidence against him.

[31] With regard to the 02nd appellant's appeal, I would not repeat the legal analysis of the scope and application *Browne v Dunn* rule in modern times (as I have already done in

some detail regarding the 01st appellant's appeal) and my own reasoning earlier as to the questions of law arising from the application of *Browne v Dunn rule* and on incidental issues arising therefrom as far as the High Court judgment is concerned. These are matters for the full court to examine and come to a final conclusion with the aid of the complete appeal records. For now, I am inclined to allow the 02nd appellant's appeal to proceed to the Full Court on whether there was any misapplication of *Browne v Dunn* rule.

Was the High Court right in the interpretation of section 15(1)(j) and 15(1)(f) of the SPA?

[32] As I have already stated the Magistrate on 28 March 2024 purportedly acting under section 15(1)(j) of the Sentencing and Penalties Act (SPA) granted 'an absolute discharge' to the 01st appellant and imposed a fine of $1500.00 on the 02nd appellant with a default sentence of 30 days' imprisonment without recording a conviction conditional upon the payment of the said fine, in terms of section 15(1)(f) of the SPA. This is following the High Court having found both appellants guilty and convicted them and sent the matter back to the Magistrate with a direction to *'pronounce the 01st and 02nd appellants guilty as charged and convict them accordingly'* and pass sentences. On an appeal by the respondent against the Magistrate's sentence orders, the High Court on 09 May 2024 quashed the sentences passed on the appellants by the Magistrate and resentenced the 01st appellant to an imprisonment of 01 year and the 02nd appellant to an imprisonment of 02 years.

[33] In doing so, the High Court stated *inter alia* that the Magistrate being a subordinate judicial officer should have followed the High Court decision to find both appellants guilty of their respective charges and record convictions. Further, the High Court argued, in my view more substantially, that in granting the 01st appellant an absolute discharge pursuant to section 15 (1) (j) of the Sentencing and Penalties Act 2009, the Magistrate had not considered the fact that this option was not available to her given that the High Court had already convicted him on count 01. Furthermore, the High Court had said that by invoking section 15 (1) (f) of the Sentencing and Penalties Act 2009 and imposing a fine of $1,500 without recording a conviction on the second

respondent, the Magistrate had not considered the fact that this option was not available to her given that the High Court had already convicted him also on court 02.

[34] On the other hand the appellants have submitted that the High Court has made a serious error of law because even though a person may be convicted by the court based on the facts of the case, the sentencing court has a discretion under the Sentencing and Penalties Act not to record a conviction. They have also argued that not recording a conviction is a completely different discretion given to a sentencing court statutorily. They have cited the examples of cases like **State v Tomasi Bainivalu** Criminal Case No. 203 of 2023 (30 October 2023) (unreported) and **Attorney-General of Fiji v Naidu** [2023] FJHC 460; HBC202.2022 (18 July 2023) [which was the same case as **Attorney-General of Fiji v Naidu** [2022] FJHC 735; HBC202.2022 (22 November 2022)]. They have also called in aid section 183 of the Criminal Procedure Act and section 16 of the SPA. Section 183, however, is only applicable to trials before the Magistrates court and not to the appellate powers of the High Court.

[35] The Magistrate had followed the decisions in ***Naidu*** and **Chandra v State** [2022] FJHC 778; HAA028.2022 (16 December 2022) in the case of the 01st appellant in order to act under section 15(1)(j) of the SPA. She had also followed ***Chandra*** and ***Bainivalu*** in acting under section 15(1)(f) of the SPA with regard to the 02nd appellant. She cannot be faulted for paying due respect to these two decision as they were delivered by the High Court and could be excused if she felt bound by those decisions.

[36] In ***Naidu's*** case the High Court on November 2022 found the respondent guilty of contempt scandalising the court and convicted him accordingly but left the sentencing for another day. By 2023, the High Court judge who found the respondent guilty and convicted him had resigned. Another High Court judge had taken over the case who had (in my view correctly) determined that the court lacks power to intervene to set aside the judgment of 22 November 2022 either under the High Court Rules or the inherent jurisdiction even when the parties consent because the correct forum to set aside a binding judgment that has reached finality after judicial determination of guilt

is the appellate court and not the trial court. However, the court decided in the end that having regard to all the circumstances of the case, it had decided not to record a conviction and dismiss the charge of contempt scandalizing the court against the respondent because the power to make an order to dismiss the charge without recording a conviction is expressly provided by section 15 (1) (j) of the SPA.

[37] In ***Chandra,*** the Magistrate found the appellant guilty and convicted him accordingly and was fined $200.00 in default 20 days' imprisonment with a mandatory disqualification from driving for 03 months. The appellant appealed the sentence arguing that a non-conviction order should have been made applying the correct test for assessment of a non-conviction order in terms of section 16(1) of the SPA. The High Court allowed the appeal against sentence and the conviction entered against the appellant was set aside and a non-conviction order was entered. The appellant was directed to pay the sum of $600.00 as a fine in addition to the already paid $200.00. The High Court thought that an order not to record a conviction or dismiss a charge is a discretion given to the sentencer as per sections 15(1) (e), (f), (i) or (j) read with section 16(1) of the SPA.

[38] It seems that in both ***Naidu*** and ***Chandra*** the High Court had assumed that section 15(1) vests the sentencing court the power and authority to alter a conviction already duly entered. However, the plain reading of section 15(1) suggests that the range of sentencing orders under section 15(1) (a) – (k) of the SPA could be considered only if a finding of guilty has been recorded but not no conviction has been entered. Section 16 of the SPA primarily deals with how to determine whether a conviction should be recorded or not and once that decision is made, a sentencing court may select a suitable option under section 15(1). Once a conviction is recorded, it could only be set aside or affirmed by an appellate court. However, even after recording a conviction, the same court may select an appropriate sentencing option among those given in section 15(1) and meet out a suitable sentence. If the court that finds an accused guilty thinks it fit not to record a conviction then a different sentencing options under section 15(1) could be resorted to.

[39] If a different construction is to be placed as argued by the appellants on the powers under section 15(1) of SPA, it would introduce a great deal of chaos to the administration of justice in criminal or quasi-criminal matters. It would *inter alia* result in the same court or even the lower court (as in this case) interfering with an already recorded conviction at the stage of sentencing under the guise of acting under section 15(1) of the SPA negating and pre-empting the appeal process and usurping the appellate jurisdiction. I do not think that the legislature ever intended such an outcome. Therefore, in my view the High Court has not erred in this respect.

[40] Nevertheless, despite the provisional view I have expressed, the true scope of section 15 (1) of the SPA is a matter of great impotence and raises a matter of law that should be clarified by the Full Court with an authoritative pronouncement. Therefore, I am inclined to allow this issue also to reach the Court of Appeal. In any event, neither ***Naidu*** nor ***Chandra*** are binding authorities as far as the Court of Appeal is concerned.

Should the High Court judge have recused himself?

[41] The appellants have submitted that the ACJ had predetermined the issue of sentence even before hearing the appeal against sentence by the remarks made on 03 April 2024 against the Magistrate. For obvious reasons, I do not intend to repeat those alleged remarks here. Suffice it to say that they were directed at the Magistrate and not the appellants. No doubt, those remarks may collectively be construed as a scathing criticism of the Magistrate with regard to the sentences she had passed on the appellants while in the same process removing the convictions altogether reordered against the appellants by the High Court in appeal. Whether, the Magistrate could have legally done so is the matter to be canvassed by the Court of Appeal under the second ground of appeal.

[42] The recusal application had been dismissed on 02 May 2024 without any written ruling. However, I do not find any of those serious remarks or anything even remotely coming close to them in the sentence judgment delivered by the High Court on 09 May 2024. The reasons for quashing the Magistrate's sentence order have been articulated without emotions in a logical and judicial manner from paragraphs 09 to

13 of the sentence judgment and then the process followed leading up to the ultimate sentences imposed on the appellants are given from paragraphs 15 to 39. I do not find any error in that process or the eventual sentences imposed. Perhaps, that is why the appellants have not challenged the sentences so imposed.

[43] In fact, I find that the respondent also had earlier applied for recusal of the Magistrate because she had presumably suggested in the course of the conversation in open court with the prosecutor on 10 March 2023 on the appellants' bail application that they may one day become prime minister and commissioner of police again, and a reasonably informed bystander would apprehend bias on the part of the Magistrate. The Magistrate, however, held in her ruling that a reasonably informed bystander appraised of the comment in its context, the nature of the application made, and the submissions that were being made in support of that application, would not apprehend bias and refused the recusal application[18]. The appellants have submitted that there was no written ruling refusing the recusal application on their behalf by the High Court.

[44] In **Chief Registrar v Khan** [2016] FJSC 14; CBV0011.2014 (22 April 2016) the Supreme Court engaged in a detailed discussion on the test of bias *vis-à-vis* an application for recusal.

> *'39. The law in this area has become settled over the years. The leading case in Fiji is the Supreme Court's judgment in **Koya v The State** [1998] FJSC 2. Ironically the suggestion that the judge in that case might have been impartial came from Mr. Khan! The court noted that there were two schools of thought. In **R v Gough** [1993] AC 646, the House of Lords had held that the test to be applied was whether there was "a real danger or real likelihood, in the sense of possibility, of bias". On the other hand, in **Webb v The Queen** [1994] HCA 30, the High Court of Australia had held that the test to be applied was whether "a fair-minded but informed observer might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case". The Court in **Koya** thought that there was little, if any, practical difference between the two tests.*
>
> *40. Having said that, the problem with the **Gough** test which **Webb** identified was that it placed "inadequate emphasis on the public perception of the irregular conduct". It was "the court's view of the public's view, not the court's own view, which [was]*

[18] **State v Bainimarama** - Recusal Ruling [2023] FJMC 7; Criminal Case 347 of 2023 (10 March 2023)

determinative". That persuaded the Court of Appeal in England in ***Re Medicaments and Related Classes of Goods (No 2)*** *[2001] 1 WLR 700 to say at [85]*

> *" ... that a modest adjustment of the test in* ***Gough*** *is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland.* ***The court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased****."*

The House of Lords in ***Porter v Magill*** *[2002] 2 AC 357 approved that statement of principle, and in my view,* ***that test should represent the law in Fiji****. On a fair reading of the Commissioner's ruling, that is the test he applied.*

41. All this begs the question of what constitutes bias. Plainly bias arises where the judge has an interest in the outcome of the case which he is to decide. To all intents and purposes, the existence of bias in such a case is presumed. The Court of Appeal appeared to think that because the Commissioner did not have an interest in the outcome of the proceedings, this was not a case in which he needed to recuse himself. I say that because the Court of Appeal in its judgment cited the principal cases in which that proposition was established – ***Dimes v The Proprietors of the Grand Junction Canal*** *(1852) 3 HL Cas 759 and* ***R v Camborne Justices ex parte Pearce*** *[1955] 1 QB 41 – before going on immediately to say that the allegation of bias was unfounded.*

42. So what about cases like the present one in which the judge did not have an interest in the outcome of the case? No hard and fast rules can be laid down as it all depends so much on the facts of the particular case. Some useful guidance was given by the Court of Appeal in England in ***Locabail (UK) Ltd v Bayfield Properties Ltd*** *[2002] 2 WLR 870. The court said at [25]:*

> *" ... a real danger of bias might well be thought to arise ... if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; ... or if, for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be." (Emphasis supplied)'*

[45] The Supreme Court in ***Khan*** went onto consider the Commissioner's ruling refusing the recusal application and determined that he had applied the correct test above approved and then the court turned to see whether, on that test (which the

Commissioner had correctly applied), he should have recused himself. The Supreme Court considered whether there were any issues of fact to be decided by the Commissioner and concluded that the fair-minded and informed observer would not think that what had happened in April 2011 meant that that there was a real danger that in November 2013 the Commissioner would allow that – even unconsciously – to affect his ability to decide the complaints impartially. The court also held that the question is not what *Mr. Khan* thought the fair-minded and informed observer would think but what *the court* thinks the fair-minded and informed observer would think. Accordingly, the court concluded that there was no need for the Commissioner to recuse himself.

[46] However, in this case there was no ruling delivered by the High Court on the recusal application. Therefore, it is not possible for the appellate court to see whether the High Court had applied the correct test and if so, on that test the refusal of the recusal application was right. Thus, it would be very difficult, if not almost impossible for the appellate court to ascertain whether the remarks made on 03 April 2024 would – even unconsciously – have affected the ACJ's ability to decide the sentence appeal impartially on 09 May 2024 except that crucially there is not a trace of such bias against the appellants in the sentence judgment. In fact the imputed criticism was levelled earlier not against the appellants but at the Magistrate. How far those remarks would have adversely affected the appellants is difficult to be ascertained. At that stage there were no factual issues to be decided by the High Court either. Because, what matters is not what the appellants thought the fair-minded and informed observer would think but what the High Court thought the fair-minded and informed observer would think. In any event, the determination of question of applying the test correctly would involve not a pure question of law but a question of mixed law and fact which is not within the scope of section 22 of the Court of Appeal Act, at this stage.

[47] In **Ledua v State** [2018] FJCA 96; AAU0071.2015 (25 June 2018) Calanchini P had identified one instance of 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. He said:

> *'[5] .....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.'

[48] Thus, I am inclined to allow only this question of law namely whether the High Court had applied the correct test in refusing the recusal application, to be taken up before the Full Court. I am also conscious of the fact that there is an incidental question of law as to whether the High Court had a duty to give reasons for the refusal as this court had recognised the duty to give adequate reasons in a number of instances[19].

[49] This court summarised the law relating to duty to give reasons as follows[20].

'[27] Therefore, while it goes without saying that the giving of adequate reasons lies at the heart of the judicial process and therefore a ***duty to give reasons*** *exists, the scope of that duty is not to be determined by any hard and fast rules. Broadly speaking, reasons should be sufficiently intelligible to permit appellate review of the correctness of the decision and the requirement of reasons is tied to their purpose and the purpose varies with the context. Trial judge's reasons should not be so 'generic' as to be no reasons at all but they need not be the equivalent of a jury instruction or summing-up to the assessors. Not every failure or deficiency in the reasons provides a ground of appeal, for the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial.*

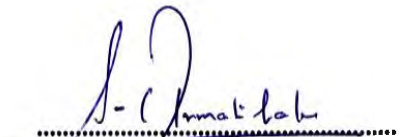
[28] If in the opinion of the appeal court, the deficiencies in the reasons prevent or foreclose meaningful appellate review of the correctness of the decision or if the trial judge's reasons are not sufficient to carry out the mandate of the appellate court i.e. to determine the correctness of the trial decision (functional test), the trial judge's failure to deliver meaningful reasons for his decision constitutes an error of law within the meaning of section 23 of the Court of Appeal Act. However, if no substantial miscarriage of justice has occurred as a result, the deficiency will not justify intervention under section 23 and will not vitiate the conviction or acquittal, for such an error of law at the trial level, if it is so found, would be cured under the proviso to section 23 of the Court of Appeal Act.[21]

[19] See for example **Professional Security Services Ltd v The Labour Officer [**2024] FJCA 224; ABU099.2023 (28 November 2024)
[20] **Prasad v State** [2023] FJCA 280; AAU45.2022 (18 December 2023)
[21] See also **Bala v State** [2023] FJCA 279; AAU21.2022 (18 December 2023); **Chand v State** [2023] FJCA 286; AAU064.2022 (22 December 2023)

[50] However, depending on the answers to the earlier questions of law, these questions of law may or may not be only of academic interest.

Order of the Court:

1. Appellants' appeal may proceed to the Full Court on the questions of law identified in this Ruling.



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

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