IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0004 OF 2023
[On Appeal from the Court of Appeal No: AAU0083 of 2022]

BETWEEN : **HAROON ALI SHAH**

Petitioner

AND : **THE STATE**

Respondent

Coram : The Hon. Mr. Justice William Calanchini, Judge of the Supreme Court
The Hon. Mr. Justice William Young, Judge of the Supreme Court
The Hon. Mr. Justice Alipate Qetaki, Judge of the Supreme Court

Counsel: Petitioner in Person
Mr. Seruvatu, S. for the Respondent

Date of Hearing: 7th October, 2024

Date of Judgment: 29th October, 2024

JUDGMENT

Calanchini, J

[1] I have read the draft judgment of Qetaki J and agree with his conclusion and his reasons. I have also read the observations of Young J and agree with his comments.

Young, J

[2] I agree with orders proposed by Qetaki J and will explain why in my own words.

[3] The petitioner faced charges in the Magistrates Court at Lautoka alleging breaches of s 69(1)(c) of the Public Health Act 1935 and reg 2 of the Public Health (Infectious Diseases) Regulations 2020. The offences were said to have been committed on 28 March 2020 and involved alleged breaches of COVID restrictions.

[4] The prosecution came on for hearing on 1 April 2022. At the conclusion of the prosecution case, the petitioner made a no case to answer submission. The basis of the no case submission was that the restrictions were not legally in force at the time of the alleged offending. The no case submission was rejected by the Magistrate in a ruling delivered on 26 April 2022. The petitioner elected not to give evidence, and the Magistrate reserved her decision.

[5] On 17 May 2022, the applicant invited the Magistrate to state a case for the opinion of the High Court which, in effect, challenged the correctness of the Magistrate's decision that there was a case to answer. This application was made under s 266(1) of the Criminal Procedure Act 2009 which provides:

> After the hearing and determination by any Magistrates Court of any summons, charge or complaint, if either party to the proceedings is dissatisfied with the determination as being —
>
> (a) erroneous in point of law; or
>
> (b) in excess of jurisdiction, or
>
> the party may make written application to the Magistrates Court within 1 month from the date of the determination, for the Magistrates Court to state and sign a special case setting forth the facts and the grounds of such determination for the opinion on the matter of the High Court.

To be noted is that the right to apply for a case to be stated arises only after the "*determination*" of a "*charge*". At the point in time when the petitioner involved s 266, the charges against him had not been determined as the Magistrate had not delivered her reserved judgment.

[6] The Magistrate refused to state a case. The petitioner applied under s 270 of the Act for the High Court by way of challenge to this refusal. This application was rejected by Sharma J, The petitioner's appeal against the judgment of Sharma J was dismissed by Premitalaka RJA under s 35(2) of the Court of Appeal Act 1949.

[7] The petitioner now seeks leave to appeal against the judgment of Premitalaka RJA.

[8] At no point in the argument did the petitioner advance a credible basis on which we could interpret and apply s 266 as meaning anything other than what it plainly says – that the case stated procedure is available only after the determination of a charge. Nor has the petitioner advanced any credible basis on which we could conclude that the rejection of his no case submission amounted to the determination of the charges against him. This is demonstrated clearly in the careful and thorough judgment of Qetaki J.

[9] As the case stated procedure can only be invoked "after hearing and determination" of charges, and the charges against the petitioner had not been determined when he applied to the Magistrate to state a case for the opinion of the High Court, his application was misconceived. For this reason, the Magistrate's refusal to state a case, Sharma J's dismissal of the challenge to that refusal and Premitalaka RJA's dismissal of the appeal were plainly correct.

[10] The petition is therefore devoid of merit and should be dismissed.

[11] There is one other point that warrants mention.

[12] In the course of the hearing before us but only in response to questions from the bench and somewhat reluctantly, the petitioner said that after the judgment of Premitalaka RJA, the Magistrate had dismissed the charges against him. This means that the prosecution had been resolved in his favour. So even if we had a basis for construing s 266 as allowing

the case stated procedure to apply pre-determination of charges, the dismissal of the charges against the petitioner meant that there would no longer be anything to argue about in relation to the Magistrates Court proceedings. In those circumstances, I confess to some surprise that the dismissal of the charges was not mentioned in the petitioner's written submissions.

Qetaki, J

Introduction

[13] This is a petition for special leave to appeal the ruling of a single judge of the Court of Appeal (per Justice Prematilaka, RJA) dated 31st January 2023. The learned single judge ruled:

(a) that the appellant has no right to appeal against the interlocutory ruling of the High Court judge dated 19 September 2022;

(b) that he has 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, and

(c) for refusing the application for a stay of the Magistrates Court proceedings and holding that the appeal should stand dismissed in terms of section 35(2) of the Court of Appeal Act.

Factual situation

[14] The appellant with three others had been charged in the Magistrates Court at Lautoka for failing to comply with orders contrary to section 69(1)(c) of the Public Health Act 1935 and Regulation 2 of the Public Health (Infectious Diseases) Regulations 2020 allegedly committed on 28 March 2020. According to the information, all of the accused *"entered into Greater Lautoka Area and fail to comply with the order issued by Permanent Secretary for Health and Medical Services prohibiting entry into said Greater Lautoka Area".*

[15] During the course of the trial and after the Magistrate had ruled that there was a case to answer, the appellant made an application under section 266 of the Criminal Procedure Act 2009 for the Magistrate to state a case for the opinion of the High Court on a question of law. The application for stay was filed in the form of a letter dated 17 May 2020 from the Petitioner to the Resident Magistrate, Court No.3, Lautoka Magistrates Court, and part of the letter, states:

> *"I respectfully request that the learned Magistrate State a case for the High Court's consideration in the following terms.*
> *"Does the Magistrate's Court have jurisdiction to try and/or convict for an offence that is not operative at Law during the alleged date of commission of the said alleged offence as contained in the particulars of the charge."*

[16] The application was rejected by the Magistrate on 28 June 2022 on the basis, firstly, that the Court has heard the matter but has not made a final determination or decision. Secondly, on the issue of dissatisfaction, it was not clear what determination/issues has the appellant been dissatisfied with in terms of section 266 of the Criminal Procedure Act 2009.

[17] The appellant then applied by notice of motion supported by affidavit, under section 270 of the Criminal Procedure Act 2009 to the High Court for orders –

(i) that the learned Magistrate show cause why the case should not be stated;

(ii) that the learned Magistrate hold all proceedings until the determination of the High Court application, and

(iii) such other orders permissible to be made under section 270.

[18] The High Court issued a stay order of proceedings in the Magistrates Court on 4th July 2020, until the determination of the application before it. The applicant submits that the reference to Gazette No.32 is erroneous as the charge and the information/particulars did not mention the Gazette notice. Finally, the High Court rejected this application on 19

September 2022 for lack of jurisdiction on the basis that there was no final judgment of the Magistrate from which an appeal could be made.

[19] The appellant then filed a notice of motion under section 22(2) and (3) of the Court of Appeal Act against the ruling of the High Court, seeking a stay of proceedings in the Magistrates Court pending determination of the appeal and leave to appeal against the High Court ruling. The question of law put forward by the appellant is that Regulation 2 of the 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 on which the alleged offence was committed. The appellant contends that in law, no offence was in existence at the date of the alleged charge.

Discussion

In the Magistrates Court

[20] The learned Magistrate dismissed the application made under section 266 of the Criminal Procedure Act 2009, based on the following:

(i) The applicant did not satisfy the statutory requirements that there must have been a determination by the Magistrate, and there are no reasons specified as to the applicant's dissatisfaction with the determination of the Magistrate.

(ii) The charge has yet to be finally determined. The fact that the Court is of the view that there is a case to answer does not mean that the Court has made a determination. The application for case stated is made prematurely.

(iii) While the applicant has stated a case on a point of law, it is not clear on which particular point of law he is dissatisfied with. The applicant, when invited, failed to clarify his position in Court, and relied on his

letter of 17th May 2020. He submitted that the Magistrates Court had no discretion but to state a case.

(iv) The charge for Failure to Comply with Order is clear by law. That the alleged offence took place on the 28th March 2020, and Gazetted on 3rd of April 2020, and the restriction came into force on 19 of March 2020.

The High Court Decision

[21] The learned judge declared that the High Court has no jurisdiction to hear the application filed by the appellant, and dismissed it for lack of jurisdiction; it set aside an earlier order of stay dated 4th July 2020 in the Magistrates Court and ordered that the Magistrate proceed with the determination of the case, for the reason that, no final determination had been made by the learned Magistrate , which is a prerequisite, to an application for a case stated under section 266 of the Criminal Procedure Act 2009. There is no decision by a Court which is either reviewable or appealable for the High Court to exercise its jurisdiction. Also, the requirements under section 266 has to be met in order to avoid delay in the finality of charges and the fragmentation of the trial: **see Asif Ali v State** [2018] FJHC 794; HAA01.2018 (22 August 2018).

Decision of Court of Appeal (Single judge)

[22] The Court of Appeal dismissed the appeal in accordance with section 35(2) of the Court of Appeal Act, based on the following reasons:

(A) Firstly, in light of judicial precedents, the decision of the High Court dated 19 September 2022 refusing to stay proceedings in the Magistrates Court is only an interlocutory order and not a decision of a final judgment contemplated under section 22 of the Court of Appeal Act. The impugned ruling of the High Court has not brought the criminal proceedings to an end; nor has it determined the entire cause or matter finally: **HKSAR v Yee Wenjye** [2022] HKCFA 6, which is an

authority for the proposition that refusal to order a stay proceeding 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. The case against the appellant at the Lautoka Magistrates Court is yet to be determined.

(B) Secondly, that a single judge has no jurisdiction to stay criminal proceedings in a lower court pending appeal: **Buadromo v Fiji Independent Commission Against Corruption** (FICAC) [2021] FJCA 14; AAU01.2021 (19 January 2021).

Case for the Petitioner

[23] The petitioner argued that he had informed the learned Magistrate, that the charge, as last amended was defective, due to the fact that there was no offence in law at the material time. The petitioner submits that the Magistrate was oblivious to the provisions of section 44(5) of the Constitution and did not avail herself of its provision. That his Lordship the High Court judge also failed to address his mind to the compelling provisions of section 14 of the Constitution, and was oblivious to section 44(5) of the Constitution. That although the application by the petitioner was not exactly a constitutional redress application, it nevertheless called his Lordship to consider the petitioner's constitutional right was being trampled upon. The petitioner submits that the most glaring error committed by his Lordship was to embark on the appeal provisions under section 246 of the Criminal Procedure Act 2009 in the face of an application under section 270 of the Act. That his Lordship factored the words *"final determination"* when there is no such qualification in the statute, and failed to analyse what the word *"tried"* in section 14 of the Constitution meant. Finally, the petitioner submits that his Lordship failed to consider section 37 of the Court of Appeal Act, and it was open to him to refer the matter directly to the Court of Appeal.

[24] The petitioner submits that the appeal to the Court of Appeal from the High Court in its appellate jurisdiction, required no leave of a single judge of appeal. That the learned single judge committed a glaring error, in that while dealing with an ancillary application for

stay of proceedings in the lower court dismissed the entire appeal. The appeal should have been put before the full court. Here, the learned single judge was again oblivious to section 14 of the constitution, to the prejudice of the petitioner. It was open to the single judge to dismiss the application to stay and submit the substantive appeal to the full Court. His Lordship considered the same and dismissed the appeal in its entirety. A definitive pronouncement should be made as to how the Courts should treat a fundamental provision in the Constitution which seeks to protect a basic right.

[25] The petitioner seeks the following relief/orders: (a) An order directing an acquittal on the offence as charged; (b) Alternatively, an order directing the State to file a *nolle prosequi*; (c) An order/declaration that the Courts must deal with a constitutional issue first and foremost before progressing further with the charge at hand; (d) A declaration that upon dismissal of an application/leave to Appeal before a single judge it is open to the aggrieved party to take the matter to full Court of Appeal pursuant to section 35(3) of the Court of Appeal Act;(e) An order/declaration that the High Court having unlimited jurisdiction does not lack jurisdiction to deal with constitutional matters on appeals referrals from Magistrate's Courts notwithstanding the absence of finality of the case at hand.

Analysis of Petitioner's Case, Grounds of Appeal and Legal Issues

[26] From the outset, it is observed that the petitioner's submissions, in general, challenges the decisions/rulings of the trial Magistrate, the High Court, and the Court of Appeal (single judge), although the petitioner in paragraph 1 of the Petition states:

> *"Your Petitioner prays for Appeal to the Supreme Court of Fiji from the Judgment of a single Judge of Court of Appeal namely Mr. Justice C. Prematilaka, the Resident Justice of Appeal, dated the 31st January, 2023. Wherein His Lordship held thus: Appeal is dismissed in terms of section 35(2) of the Court of Appeal Act."* (underlining is for emphasis)

[27] The Court will largely confine itself to the grounds and submissions that relate to the decision of the learned single judge of the Court of Appeal, as otherwise, matters that have been raised in the Magistrates Court and High Court will be reopened for discussion,

which is not the intention or purpose of a petition for grant of special leave to appeal. The petitioner's submissions are in general terms, and in isolation, or not connected to the ground of appeal to which it is meant to relate to or support. There are nine grounds of appeal urged by the petitioner. No or little effort is evident, to linking the submissions to the respective grounds they are meant to support, to assist the Court in assessing and evaluating the submissions and the grounds of appeal. It has been left to the Court to match the submissions with a relevant ground, which they may potentially support. A rather unsatisfactory situation as it burdens the Court with a task that ought to have been attended to by the petitioner. The submissions fail to indicate and demonstrate effectively, how the grounds and supporting arguments, fit in or measure up to the criteria set by statute for the grant of special leave under section 7(2) of the Supreme Court Act.

[28] On the other hand, the respondent submits that there was no error of law by the learned judge of the Court of Appeal in dismissing the petitioner's appeal under section 35(2) of the Court of Appeal Act. For an 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 charges laid. At the time of the appeal, neither the Magistrates Court nor the High Court had ruled on the issue raised by the petitioner. That the learned judge of appeal was correct by not ruling on a hypothetical issue of law, by-passing the other courts in the judicial hierarchy. The learned judge of appeal had not erred in law by not granting a stay. The Court has no jurisdiction to stay criminal proceedings in a lower court pending appeal: **Buadromo's** case (supra).

Constitutional Right

[29] The petitioner had raised issues concerning his basic rights under section 14 of the Constitution, that it was breached and that the Courts were oblivious to section 44(5) of the Constitution. The petitioner submits and expects from this Court a definitive pronouncement as to how the Courts should treat a fundamental provision in the Constitution which seeks to protect a very basic right. The right alleged to be breached is, to be considered in the context and circumstances of this petition, and particularly with

regard to the procedures adopted by the petitioner in the Magistrates Court. Section 14(1) (a) of the constitution states:

> *"A person shall not be tried for- (a) any act or omission that was not an offence under either domestic or international law at the time it was committed or omitted…."*

[30] There has been no determination by any Court that the offences for which the petitioner was charged with, was not an offence under either domestic or international law, when they were allegedly committed. This in my view, is an issue the trial at the Magistrate Court could potentially have resolved or determined, and that has not been concluded as a determination has not been made. The petitioner has invoked the case stated procedure, prematurely, which stalls the determination of the proceedings in the Magistrates Court towards a final determination of the charges. The petitioner, further invokes section 44(5) of the Constitution.

[31] Section 44(5) states:

> *"If in any proceedings in a subordinate court any question arises as to the contravention of any of the provisions of the provisions of this Chapter, the member presiding in the proceedings may, and must if a party to the proceedings so requests, refer the question to the High Court unless, in the member's opinion (which is final and not subject to appeal), the raising of the question is frivolous or vexatious."*

[32] The petitioner has not adequately explained how these provisions affect him in the circumstances of this case, and how it impacts on the requirements under section 7(2) of the Supreme Court Act, noting that the section does not confer an automatic right for referral to the High Court, as the member residing has to form an opinion or make a determination.

[33] The petitioner had alluded to his constitutional right under section 14(1) of the Constitution being violated and trampled upon, which may be inferred as the reason for his insistence on the procedure of a case stated under section 266 of the Criminal

Procedure Act 2009, which was denied, and subsequently the filing of a section 270 application to the High Court. The legal barrier to the granting of an order for stay of proceedings by way of case stated, is that there is no final determination upon which an application under 266 or 270 could be based. There are other ways that a petitioner could follow to safeguard and protect his right under section 14(1) of the Constitution. For instance, the petitioner could seek constitutional redress under section 44(1) and (2) of the Constitution, if the petitioner considers that his right protected under section 14 (1) (a) of the Constitution has been or likely to be contravened in relation to him. The right to make an application under section 44(1) is without prejudice to any other action with respect to the matter that the petitioner may have. Further, the petitioner has a right to lodge a complaint with the Human Rights and Anti-Discrimination Commission, continued under section 45(1) of the Constitution, alleging that his right under section 14(1) of the Constitution has been denied, violated, infringed or is threatened. The onus is on the petitioner to take the initiative for section 44(1) and (2); and section 45(5) of the Constitution to be activated or operationalised, to address the petitioner's situation or case.

[34] The learned Magistrate has made an interlocutory determination on the *"no case to answer application",* and relies in part on the Gazette Notice published under the authority of the relevant Permanent Secretary. With regard to the effect and application of such notice, section 4 of the Interpretation Act 1967 states:

> *"Every Act shall be published in the Gazette, shall be a public Act and shall be judicially noticed."*(Underlining is for emphasis).

[35] Section 63 of the same Act provides:

> *"All printed copies of the Gazette, purporting to be printed by the Government Printer, shall be admitted in evidence by all courts in all legal proceedings whatsoever without any proof being given that such copies were so published and printed and shall be taken and accepted as evidence of the written law, appointments, notices, and other publications, therein printed and of the matters and things contained in such written law, appointments, notices and publications respectively."*(underlining is for emphasis)

Grant of Special Leave

[36] Section 98(3) (b) of the Constitution provides that this court has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal. Section 98(4) of the Constitution provides that no appeal may be brought to this Court from a final judgment of the Court of Appeal unless the Court grants leave to appeal. Section 98(5) sets out the powers of the Court which it could exercise in its appellate jurisdiction.

[37] Section 7(2) of the Supreme Court Act, requires that, in relation to criminal matters, this Court must not grant leave to appeal unless-

> *"(a) a question of general importance is involved;*
> *(b) a substantial question of principle affecting the administration of criminal justice is involved; or*
> *(c) substantial or grave injustice may otherwise occur."*

[38] The threshold for granting special leave by the Supreme Court is very high as set out in **Livai Matalulu and Another v Director of Public Prosecutions** [FJSC 2; (17 April 2003):

> *"The Supreme Court is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this Court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice."*

[39] Under section 22(2) of the Court of Appeal Act,

> *"A decision of the High Court in the exercise of its revisional jurisdiction or on a case stated, under the provisions of the Criminal Procedure Act*

2009, shall be deemed to be a decision of the High Court in such appellate jurisdiction as aforesaid."

Grounds of Appeal

[40] **Ground 1:** *The learned judge of the Court of Appeal erred in law and in fact in holding that your Petitioner had submitted that the charges against him was an offence at law when in fact your Petitioner had submitted that the impugned charge was not an offence in law at the material times.*

[41] The ground challenges the statement of the single judge, who in his Ruling had stated at end of paragraph [5] that "*the appellant submits that there was offence at law as at the date of the alleged offence as stipulated in the charge sheet."* The learned Magistrate, in her decision had stated that:

> *"The charge of failure to comply with order is clear by law. The alleged offence took place on 28th of March 2020.While the law was published by way of gazette on 3rd of April 2020, the restrictions came into force on the 19th of March 2020 as clearly stated in the Gazette. Therefore, to state that the Court does not have jurisdiction to hear or try the matter is a frivolous application by the Applicant."*

[42] The legal status of a Gazette Notice and its contents has been discussed earlier in this judgment. However, it appears that the petitioner did not quite understand the statement made by the learned single judge at paragraph [5] of his ruling, which, if taken in context makes legal sense, although it may appear that the statement contradicts the position of the petitioner on the face of it. The petitioner has not shown how the ground meets the criteria set by section 7(2) of the Supreme Court Act. The ground is dismissed.

[43] **Ground 2:** *The learned judge erred in law and in fact that notwithstanding that your Petitioner's appeal was on a point of law and required no leave to go before the full Court of Appeal, His Lordship dismissed the appeal under section 35(2) of the Court of Appeal Act thereby causing a substantial miscarriage of justice.*

[44] This ground raise issues of jurisdiction and challenges the single judge's decision to dismiss the appeal before him, and to hold that the Court of Appeal has no jurisdiction to hear the matter in terms of section 35(2) of the Court of Appeal Act. The Ruling of the single judge (from paragraph [5] to [14]) in my view has adequately and clearly articulated on the reasons for his decision, which I agree with. The appeal to the Court of Appeal is by way of motion under section 22 (2) and (3) of the Court of Appeal Act. It is a second-tier appeal under section 22, where a decision of the High Court could be canvassed on a ground of appeal involving a question of law only: **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017).

[45] 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 28th March 2020 which was the date of the alleged offence. Leave is not required under section 22 of the Court of Appeal Act and a single judge has no power to consider an appeal made under section 22. However, a single judge could exercise jurisdiction under section 35(2): **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2016), and if the single judge 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), as it has done in this case: **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016).

[46] In this matter, the single judge had little doubt that the issue raised by the appellant constitutes a question of law, the difficulty is that, neither the Magistrates Court nor the High Court had ruled on the issue. In order that an issue becomes a ground of appeal involving a question of law in line with section 22, there must be a determination by the Magistrate and a decision by the High Court on the issue, and I agree with the sentiments expressed by the single judge, who said:

> *"[13] ……. A theoretical issue, though technically an issue 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."*

[47] This seems to me fairly sums up the circumstance of this appeal. This ground is dismissed. There is no miscarriage of justice.

[48] **Ground 3:** *The learned judge erred in law and in fact in holding that your Petitioner's appeal was on a mixed fact and law appeal when it was not so.*

[49] It is common ground that designation of a ground of appeal as a question of law by the appellant or pleader would not necessarily make it a question of law: see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014). The onus and duty is on the appellant personally or through counsel, to ensure that the questions of law arising from a judgment of a Court below to be formulated as a question of law, for the purpose of a section 22 appeal. If at least one of an appeal grounds/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, as done in this case. There are numerous authorities to support that proposition, including: **Nacagi v State** [2014] FJCA 54; Misc. Action 0040.2011 (17 April 2014) followed in **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020) and **Munendra v State** [2020] FJCA 234; AAU0023.2018 (27 November 2020). The appellant cannot seek to reopen and reargue the facts of a case in a second tier appeal. The jurisdiction of the Court of Appeal under section 22 is a narrow one, which is to rectify and 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. This ground is dismissed. There is no miscarriage of justice.

[50] **Ground 4:** *The learned judge erred in law and in fact in holding that your Petitioner's appeal was interlocutory when in fact the decision of the High Court was in essence a final order.*

[51] This ground goes to the nature of the decision of the High Court from which the appeal grounds are based, whether, it is an interlocutory or interim order, or whether it is a final order of that Court. It is alleged that the High Court order was in essence a final order of

that Court. It appears that the appeal is against the High Court decisions on the appellant's application seeking a stay of all proceedings in the Magistrates Court pending the determination of the appeal and leave to appeal against the High Court ruling. A close reading of the judge's ruling made on 19 September 2022 indicate that it was in relation to an application made by the appellant for a stay of proceedings in the Magistrate's Court, following ruling made by the Magistrate declining an application by the appellant for the Magistrate to state and sign a special case for the opinion of the High Court on the question:

> *"Does the Magistrate's Court have jurisdiction to try and/or convict for an offence that is not operative at law during the alleged date of commission of the said alleged offence as contained in the particulars of the charge."*

[52] The application to the High Court is made in accordance with section 270 of the Criminal Procedure Act 2009. By its nature, a case stated for a stay of proceedings, means that, if the application is successful, the proceedings or trial being held in the Magistrates Court to determine the guilt or otherwise of the accused's, would have to await the determination of the issues raised in the case state by the High Court, before it continues, or it is discontinued, as the case may be. A decision on a stay application is not a final decision, as to the guilt or otherwise of the accused persons are still to be determined. A case stated by Magistrates Court may be made under section 266(1) of the Criminal Procedure Act after the hearing and determination by the Magistrate of any summons, charge or complaint, if either party to the proceedings is dissatisfied with the proceedings as being: (a) erroneous in point of law; or (b) in excess of jurisdiction. The section is operational only "after the hearing and determination" of the case, not before as in this case. The ground is dismissed. There is no miscarriage of justice.

[53] **Ground 5:** *The learned judge erred in law and in fact in treating the appellant's case as an appeal in the High Court when in fact it was a case stated issue and as a consequence applied the wrong procedural rules which has caused a substantive miscarriage of justice.*

[54] It is clear from the appellant's written submissions that the appellant's case is an appeal from the Magistrates Court to the High Court. The appeal to the Court of Appeal under

section 22 of the Court of appeal Act, is an appeal from a decision of the High Court in its appellate jurisdiction. In his written submissions (paragraph 3.3.1) the appellant states:

> *"Your Petitioner being aggrieved at the High Court decision, appealed to the Fiji Court of Appeal under section 22 of the Court of Appeal Act 1949.Thus this appeal being an appeal from the High Court on an appeal from the Magistrate's Court required no leave of a single judge of appeal. …."*

[55] However, the appellant continues with the following:

> *" ……. a single judge f appeal, whilst dealing with an ancillary application for stay of proceedings in the lower court dismissed the entire appeal……. the substantive appeal should have been put before the full court."*

[56] Two points need to be made here, firstly, section 22(2) of the Court of Appeal Act, in my view, applies to this appeal, to the effect that, the decision of the High Court, on a case stated, under the provisions of the Criminal Procedure Act 2009, shall be deemed to be a decision of the High Court in its appellate jurisdiction. Secondly, the petitioner has not explained what constitutes or is meant by 'entire appeal', and 'substantive appeal 'in his submissions.

[57] All appeals under section 22 of the Court of Appeal Act are governed by section 22 of the Act. It is the procedure for dealing with appeals under the Act that has to be followed. The learned single judge had adequately explained his position in his ruling on the matter. A single judge could still exercise power under section 35(2) of the Act which operates in situations where a notice of appeal is filed or an application for leave to appeal is filed, and a judge of the Court of Appeal, in consideration of such a notice, determines that the appeal is vexatious, or frivolous or is bound to fail because there is no right to appeal or no right to seek leave to appeal, the judge may dismiss the appeal. Section 35(2) of the Court of Appeal Act, is concerned with the nature of the appeal document filed (whether it is a notice of appeal or an application for leave to appeal) in the Court's Registry. This ground is dismissed. There is no miscarriage of justice.

[58] **Ground 6:** *The learned judge of appeal erred in law and in fact in rejecting you Petitioner's appeal by not granting a stay on a constitutional issue which needed to be addressed immediately.*

[59] There is no legal basis to this ground. The fact is, the application for stay has been rejected as it was premature, and did not comply with section 266 of the Criminal Procedure Act 2009.The ground has no merit. It does not come within section 7(2) of the Supreme Court Act. There is no miscarriage of justice.

[60] **Ground 7:** *The learned judge erred in law and in fact in failing to isolate the one and only issue in the proceedings and that is "How are the Courts to deal with a section 14(1) (a) of the Constitution of the Republic of Fiji 2013", once it is raised, and thus making no findings on the same.*

[61] There is nothing wrong with the question of law raised by the petitioner. The only issue is: Was it properly raised at the right time in accordance with the relevant statutory procedure? The application for stay was correctly dismissed. The ground is dismissed. It does not come within section 7(2) of the Supreme Court Act. There is no miscarriage of justice.

[62] **Ground 8:** *The learned judge erred in law and in fact by failing to appreciate that section 14(1) (a) of the Constitution of the Republic of Fiji 2013 commands the Courts to abort all prosecution if it becomes apparent that a person is being tried for an offence that was not an offence at law at the material time.*

[63] This ground has no factual, legal or constitutional basis. The fact is that the petitioner has failed to comply with the statutory provisions regulating applications for stay and its grant. It has no merit and is dismissed not coming within section 7(2) of the Supreme Court Act. There is no miscarriage of justice.

[64] **Ground 9:** *The learned judge erred in law and in fact by being completely oblivious to the rule of law that the Constitution is the Supreme Law of the land and the same will override any other legal prescription if the need to resolve the issue at hand so warrant.*

[65] This ground has no basis in law or under the constitution. The petitioner did not comply with Section 266 of the Criminal Procedure Act 2009. It has no merit and is dismissed, not coming within section 7(2) of the Supreme Court Act. There is no miscarriage of justice.

Conclusion

[66] While the Constitution is the supreme law of Fiji, and any law that is inconsistent with it is invalid to the extent of the inconsistency, the constitution itself provides for the enforcement of the rights protected under Chapter 2 (Bill of Rights), in section 44. Section 45(5) of the Constitution confers a right on any person to lodge a complaint with the Human Rights And Anti-Discrimination Commission alleging that a right or freedom in the Bill of Rights has been denied, violated or infringed or threatened. On the other hand, one has to be mindful also of the important role of Criminal Procedure, and the need to comply with the Criminal Procedure Act 2009, in a criminal justice system such as ours in Fiji, for the orderly conduct of criminal trials and proceedings and the swift resolution of criminal cases. A consideration of sections 9 (1)(g) and 21(7)(a) of the Constitution given the facts and circumstances of this case, and the legal effect of the Gazette Notice, are also relevant in assessing and evaluating the case for the petitioner.

[67] In consideration of the maters raised in the above discussion, the application for special leave to appeal to this Court is dismissed. The grounds and submissions in support of the grounds do not satisfy the threshold established under case law and the requirements/standard required for section 7(2) of the Supreme Court Act. The merits of the appeal has also been considered .The petition/appeal is dismissed.

Orders of the Court:

1. *Application for Special Leave to appeal is dismissed.*
2. *The Petition/ Appeal is dismissed.*

The Hon Mr. Justice William Calanchini
JUDGE OF THE SUPREME COURT

The Hon Mr. Justice William Young
JUDGE OF THE SUPREME COURT

Hon Mr. Justice Alipate Qetaki
JUDGE OF THE SUPREME COURT