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

CRIMINAL APPEAL NO. AAU 140 of 2019
[In the High Court of Lautoka Case No. HAA 16 of 2019]
[In the Magistrates Court at Sigatoka case No.504/2018]

BETWEEN : **AIYAZ ALI *alias* AIYAZ ALI DEAN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Ratu for the Appellant**
: **Dr. A. Jack for the Respondent**

Date of Hearing : **07 January 2021**

Date of Ruling : **08 January 2021**

RULING

[1] The appellant had been arraigned in the Magistrates' Court at Sigatoka on one count of obtaining property by deception contrary to section 318 of the Crimes Act, 2009 and one count of breach of a suspended sentence.

[2] The learned High Court judge had set out the material facts as follows.

> *'[2] On 17 October 2018, the appellant was charged with one count of obtaining property by deception and one count of breach of a suspended sentence. He was produced in the Magistrates' Court at Sigatoka and remanded in custody. On 8 March 2019, the appellant pleaded guilty to the charge of obtaining property by deception. He deferred his plea for breach of a suspended sentence.*
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> *[3] On 15 March 2019, the appellant was sentenced to 1 year 11 months' imprisonment with a non-parole period of 1 year 5 months for obtaining property by deception, to be served concurrently with any pre-existing sentence.*

[4] The facts of the case were that the appellant approached the victim, who was an elderly farmer in the pretext of being a genuine customer to buy dried Tobacco leaves (locally known as Suki) from him. The appellant obtained 27 kg of Tobacco valued at $2400.00 by giving the victim a dud cheque for the same amount. When the victim presented the cheque to the bank, he was informed that the account had no funds.

[3] Of the appellant's grounds of appeal urged before him, the learned High Court judge had stated as follows and dismissed his appeal against sentence on 02 August 2019.

'[5] The grounds of appeal filed by the appellant are vague, repetitive and unintelligible. It appears that the appellant is critical of the methodology used by the learned magistrate to give reasons for the sentence he imposed on the appellant and his failure to suspend the sentence.

[6] The learned magistrate used instinctive synthesis methodology to give reasons for the sentence he imposed on the appellant. He considered the relevant factors and after weighing and balancing those factors imposed a term of 1 year 11 months imprisonment. ***He took into account that the appellant had pleaded guilty early,*** *was remorseful and there had been partial recovery of the property. He properly identified a tariff for the offence of obtaining property by deception articulated in the case of State v Miller unreported Cr App No 29 of 2013; (31 January 2014) and imposed a term on the lower end of the tariff. He further reduced the sentence to reflect the period that the appellant had spent in custody on remand. The learned magistrate considered that suspension of sentence was inappropriate because the appellant had previous convictions for similar offences. Further the sentence was made concurrent, meaning the appellant did not receive any additional prison term for the offence of obtaining property by deception.*

[7] After considering all the submissions made by both parties, this Court is satisfied that there is no error in the exercise of the sentencing discretion.

[4] The appellant had filed a timely appeal against the decision of the High Court on 30 August 2019. Subsequently, the Legal Aid Commission had tendered an amended notice of appeal and written submissions on 21 September 2020 containing the following sole ground of appeal.

'1. The Learned Judge erred in law and in fact when he failed to consider the Appellant's early guilty plea and that there was no separate discount accorded for it.'

[5] The state had replied by way of written submissions filed on 04 November 2020.

[6] Thus, the appellant's current appeal to this court is against the High Court judgment delivered on 02 August 2019 in terms of section 22 of the Court of Appeal Act as a second tier appeal.

[7] Section 21 of the Court of Appeal Act permits an appeal against conviction, sentence, and acquittal on a trial held before the High Court and against grant or refusal of bail pending trial by the High Court. The right of appeal against a decision made by the High Court in its appellate jurisdiction is given in section 22 of the Court of Appeal Act.

[8] In a second tier appeal under section 22 of the Court of Appeal Act, a conviction could be canvassed on a ground of appeal involving a question of law only [also see paragraph [11] of **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)] and 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].

[9] Calanchini P had discussed the scope of section 22 of the Court of Appeal Act *vis-à-vis* section 35 (1) and (2) in **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012) and held that 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).

> *'The significant point to note from these provisions is that there is an automatic right to appeal to the Court of Appeal from a decision of the High Court exercising its appellate jurisdiction from a magistrates' court on a question of law only. Leave is not required under such circumstances. The appeal lies in respect of a question of law only. Since leave is not required there is no jurisdiction given to a single judge of the Court under section 35 (1) of the Court of Appeal Act to consider the appeal.*
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> *The position is that a single judge may nevertheless exercise the jurisdiction given under section 35 (2) of the Act:*

"If on the filing of a notice of appeal or of an application for leave to appeal a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal."

In the context of the present appeal, it remains open to me to discuss whether the Appellant's notice of appeal which is an appeal under section 22 of the Act (a) is bound to fail because there is no right of appeal or (b) is vexatious or frivolous.'

[10] Calanchini P once again remarked in **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016) that leave to appeal is not required under section 22 but a single judge of the Court of Appeal could act under section 35(2).

'[3] Section 22 is a stand-alone provision that sets out the appeal procedure for appeals from the High Court in the exercise of its appellate jurisdiction. Pursuant to section 22 (8) certain provisions of the Act apply to such appeals. However leave to appeal is not required under section 22. An appeal under section 22 is subject to the provisions of section 35 of the Act. Section 35 (2) provides:

"(2) If on the filing of a notice of appeal _ _ _ a 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."

[11] I had the occasion to remark in **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020) on section 22 of the Court of Appeal Act as follows [see **Munendra v State** [2020] FJCA 234; AAU0023.2018 (27 November 2020) also].

'[14] However, in my view, upon filing an appeal under section 22 of the Court of Appeal Act a single judge is still required to consider whether there is in fact a question of law that should go before the full court, for designation of a point of appeal as a question of law by the appellant or his pleader would not necessarily make it a question of law. What is important is not the label but the substance of the appeal point. This exercise should be undertaken by the single judge not for the purpose of considering leave under section 35(1) but as a filtering mechanism to make sure that only true and real questions of law would reach the full court. If an appeal point taken up by the appellant in pith and substance or in essence is not a question of law then the single judge could act under section 35(2) and dismiss the appeal altogether.'

[12] The following general observations of the Supreme Court in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013) are helpful to identify a question of law in a given situation.

> *'[14] A summary of these cases show that questions that have been accepted as a point of law alone include causational issue in homicide cases, jurisdiction to try an offence, existence of a particular defence, mens rea for a particular offence, construction of a statute and defective charge. The list, however, is not exhaustive. In **Hinds** (1962) 46 Cr App R 327 the English Court of Appeal did not define the phrase 'a question of law alone', but suggested that the determination of whether a ground of appeal involves a question of law alone be made on a case by case basis.*

[13] For example 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.

> *'[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.*

Sole ground of appeal

[14] The gist of the appellant's argument is that the Magistrate should have accorded a separate discount for early guilty plea. He cites **Mataunitoga v State** [2015] FJCA 70; AAU125.2013 (28 May 2015) where it was held

> *'[18] In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and quantification to the guilty plea (as a matter of practice and not principle), and assess the effect of the plea on the sentence by taking in account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.*
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> *[19] In the present case, it is clear that the learned High Court judge did not have regard to the appellant's guilty plea in sentencing him as required by section 4 (2) (f) of the Sentencing and Penalties Decree 2009. The failure is an error in the sentencing discretion. That discretion now has to be exercised by this Court to correct the error.*

[15] In **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012) Gounder J said *inter alia* as follows.

> *'[10] ..... . But, I am aware that as a matter of principle, the courts in Fiji generally give reduction in sentences for offenders who plead guilty. In Naikelekelevesi State [2008] FJCA 11; AAU0061.2007 (27 June 2008), the Court of Appeal stressed that guilty plea should be discounted separately from other mitigating factors present in the case.*
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> *[11] The weight that is given to a guilty plea depends on a number of factors.....*
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> *'Encouragement will be given to early pleas of guilty only if they lead (and are seen to lead) to a substantial reduction in the sentence imposed. That does not mean that the sentencing judge should show a precisely quantified or quantifiable period or percentage as having been allowed. Indeed, it is better that it not be shown;*
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> *'[12] The appellant's guilty plea was clearly taken into account as a mitigating factor.'*

[16] Having examined several past decisions, I remarked in **Naucusou v State** [2020] FJCA 74; AAU101.2019 (9 June 2020) as follows.

> *'[19] The current judicial thinking that has developed progressively over the years is that it is a not a sine qua none for a sentencing judge to give a separate discount for an early guilty plea though it should be accorded some discount depending on the circumstances of each case with even no discount for an inevitable and totally belated plea. As a matter of good practice the sentencing judges may do so but not showing a separate discount for the early guilty plea ipso facto does not constitute an error of law as long as it had been taken into account as a mitigating factor.*

[17] The learned High Court had remarked in the impugned judgment that the Magistrate had used instinctive synthesis methodology to give reasons for the sentence he imposed on the appellant and he had considered the relevant factors and after weighing and balancing those factors imposed a term of 01 year 11 months imprisonment. The High Court judge had remarked that the Magistrate had taken into account that the appellant had pleaded guilty early and after considering all the submissions made by both parties, the learned High Court judge had been satisfied that there was no error in the exercise of the sentencing discretion.

[18] The Supreme Court in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015) approved instinctive synthesis methodology also in the matter of sentencing in the following words:

> *'[50] It is significant to note that the Sentencing and Penalties Decree does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors.*

[19] Having examined all the material, I have no reason to disagree with the finding of the learned High Court judge.

[20] Therefore, I hold that the sentence imposed on the appellant by the Magistrate had not been unlawful or passed in consequence of an error of law. Nor is there a question of law involved in the ground of appeal urged by the appellant.

Order

1. Appeal bearing No. AAU 140 of 2019 is dismissed in terms of section 35(2) of the Court of Appeal Act.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL