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

CRIMINAL APPEAL NO. AAU 39 of 2021
[In the High Court at Lautoka Case No. HAA 52 of 2020]
[In the Magistrates Court at Ba case No.2051/16]

BETWEEN : **ASHISH ASMEET NARAYAN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. M. N. Khan for the Appellant**
: **Ms. L. Latu for the Respondent**

Date of Hearing : **02 September 2021**

Date of Ruling : **10 September 2021**

RULING

[1] The appellant had been arraigned in the Magistrates' Court at Ba on one count of dangerous driving occasioning death contrary to section 97(1) and (2) (c) and 5(a) and (8) and (114) of the Land Transport Act No.35 of 1998.

[2] The appellant had been convicted after trial by the learned Magistrate who sentenced him on 17 August 2020 to 2 ½ years of imprisonment with a non-parole period of 01 year and 09 months and ordered him to pay a fine of $1000 with a consecutive default sentence of 10 days/03 months & 10 days. He was also disqualified from driving for a period of 01 year.

[3] The appellant through his counsel had appealed to the High Court at Lautoka against the conviction (12/14 grounds of appeal) and sentence (04 grounds of appeal). The respondent had conceded to the first and second grounds of appeal against conviction

but opposed the appeal on the remaining grounds. Both parties had filed written submissions and a hearing into the appeal had been conducted. The learned High Court judge had pronounced the judgment on 03 March 2021 setting aside the conviction and sentence and ordering a speedy new trial on the amended charge.

[4] The appellants' lawyers had filed a timely appeal (29 March 2021) against the decision of the High Court in terms of section 22 of the Court of Appeal Act. Subsequently, the same lawyers had tendered written submissions on 10 August 2021. The state's written submissions had been filed on 01 September 2021. The reply submissions of the appellant had been lodged with notice to the respondent. The hearing by the single Judge into the matter in the Court of Appeal was concluded *via* Skype with the participation of counsel for both parties.

[5] 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. 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 [see also 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].

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

[6] There is no jurisdiction given to a single judge of the Court of Appeal under section 35 (1) of the Court of Appeal Act to consider such an appeal made under section 22 for leave to appeal, as leave is not required under section 22 but a single judge could still exercise jurisdiction under section 35(2) [*vide* **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012] and if the single judge of this Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal the judge may dismiss the appeal under section 35(2) of the Court of Appeal Act (vide **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)].

[7] Therefore, upon filing an appeal under section 22 of the Court of Appeal Act a single judge of the Court of Appeal is still required to consider whether there is in fact a question of law that should go before the full court. Designation of a point of appeal as a question of law by the appellant or his pleader would not necessarily make it a question of law [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014). 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 [vide **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014), **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) and **Verma v State** [2021] FJCA 17; AAU166.2016 (14 January 2021)].

[8] It is therefore counsel's duty properly to identify a discrete question (or questions) of law in promoting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005). 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.'*

[9] 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**.'*

Grounds of appeal

[10] Four grounds of appeal were urged on behalf of the appellant at the hearing. They are as follows:

Ground 1

THAT the Learned Appellant Judge erred in law when he ordered in paragraph 10 of his judgment in that:

> *"10….Therefore, as I see, the proper order should be to have a trial afresh on the amended charge."*

Ground 2

THAT the Learned Appellant Judge erred in law when he ruled in paragraph 11 (ii) of his judgment in that:

> *"…11(ii) a speedy retrial is ordered on the amended charge."*

Ground 3

THAT the Learned Appellant Judge had erred in law when he ordered a re-trial in the matter"; and

Ground 4

THAT the Learned Appellant Judge had erred in law when he ordered a speedy re-trial in the matter without considering the Appellants right to appeal his Lordships Judgment to the Fiji Court of Appeal.

[11] It appears from the impugned judgment of the High Court that at the commencement of the trial in the Magistrates court the charge had been amended but it had not been read over/explained to the appellant and his plea had not been taken on the amended charge. However, at the end of the trial the appellant had been convicted of the amended charge. The appellant had appealed to the High Court on 12/14 grounds

against conviction and 04 grounds of appeal against sentence but the trial judge had decided that the consideration of the first ground of appeal against conviction (conceded by the respondent) was sufficient to dispose of the appeal. The first ground is as follows:

> *'The learned Magistrate erred in law and in fact in proceedings to hear the case in the matter without taking the plea of the Accused on the Amended Charge.'*

[12] The High Court judge had decided that failure to read over/explain the amended charge to the appellant had made the trial a mistrial and therefore the conviction could not stand. The judge had then considered whether a retrial should be ordered or the appellant should be acquitted or discharged. According to the impugned judgment the learned High Court judge had considered the lengthy submissions and applicable law (without specifying any particular authority or authorities) and decided that the appellant could be acquitted only after valid trial and since the trial was a mistrial there had been no proper trial in the Magistrates court. Therefore, the High Court judge had decided to order a retrial on the amended charge. Accordingly, the judge had set aside the conviction and sentence and ordered a speedy retrial on the amended charge.

[13] The appellant's counsel submits that the after the case had returned to Ba Magistrates court it had been called on 11 March 2021 in court and the retrial has now been fixed before the Resident Magistrate who had convicted the appellant earlier for 25 October 2021. It appears from the affidavit of the appellant that his counsel had requested the Resident Magistrate to transfer the case to court No.02 to be taken up before a different Magistrate on the basis that the Resident Magistrate had already made up his mind regarding the culpability of the appellant after the previous trial and also requested the Resident Magistrate to stay the proceedings pending the Court of Appeal decision on the appellant's pending appeal. However, according to the appellant the Resident Magistrate had not made any order but wanted a formal application to be made to him to consider recusal and/or stay of proceedings pending the appeal proceedings in the Court of Appeal.

01st to 04th grounds of appeal

[14] I think all grounds of appeal are interlocked as far as the pith and substance is concerned and could be dealt with together. The gist and the central plank of the appellant's argument is that as a result of the amended charge not being read over/explained to the appellant and his plea not being taken on the amended charge what subsequently occurred in the Magistrates court was a nullity as opposed to a mistrial. Therefore, the learned High Court judge could not have ordered a new trial against the appellant suggesting that he should have been discharged or acquitted.

[15] Therefore, the first question is whether the proceedings following the failure to read over/explain the amended charge and to take the appellants' plea amounted to a nullity or whether it resulted only in a mistrial. The answer to that question seems to determine the answer to the second question which is whether the appellant should have been discharged or acquitted following setting aside the conviction and sentence or whether ordering a new trial was the correct order.

[16] The counsel for the appellant has submitted *inter alia* the decisions in **Pratap v Reginam** [1968] FJLawRp 16; [1968] 14 FLR 93 (22 May 1968), **Hassan v Reginam** [1973] FJLawRp 3; [1973] 19 FLR 11 (11 May 1973), **Narayan v Reginam** [1983] FJLawRp 16; [1983] 29 FLR 139 (28 November 1983) and **Cerevakawalu v State** [2001] FJCA 25; AAU0024U.2001S (22 November 2001) in support of his contention. Clearly, these decisions had been delivered under statutory regimes different to the current Criminal Procedure Act, 2009.

[17] The Court of Appeal held that as no plea was taken at the time of the amendment to the original counts the appellant was not properly before the court and the proceedings were null and void: the defect being fundamental the proviso to section 300 (1) of the Criminal Procedure Code could not be applied. The appeal was allowed and the convictions and sentences of the appellant on the three remaining counts were quashed [**Pratap v Reginam** (supra)]. However, as per the footnote in PacLII the judgment of the Court of Appeal in this case had been reversed by the Privy Council in Privy Council Appeal No. 10 of 1969 (unreported)].

[18] The single judge of the Supreme Court held that the failure of the Magistrate's Court to put the appellants to their election after the amendment of the original charge and to call for a plea from each of the appellants as required by law rendered the whole proceedings null and void. In the circumstances the appeal was allowed and the conviction and sentence entered against each of the appellants were quashed [**Hassan v Reginam** (supra)].

[19] The Court of Appeal held that when a court wishes to prefer an amended charge it is mandatory that the accused be called upon to plead to the amended charge. Failure to comply with this requirement renders any subsequent conviction on the amended charge a nullity. The Magistrate having had no jurisdiction to convict the appellant on a charge which he had never faced there was no power to order a retrial on that charge [**Narayan v Reginam** (supra)].

[20] The appellant had pleaded guilty to a defective charge and the Court of Appeal held that the proper course was to declare the entire proceedings a nullity and quash both the convictions and sentences but it said that would not necessarily prevent the State from laying fresh charges and as the entire proceeding was a nullity, pleas of autrefois convict, would not be available in respect of any such fresh charges. It was further held that remitting for a re-hearing in the Magistrates Court or exercising a power originally vested in the Magistrate was to ignore the incurable invalidity of what had happened [vide **Cerevakawalu v State** (supra)].

[21] On the other hand the respondent argues that what had happened in the Magistrates court was a mere irregularity amounting to a mistrial. It has cited **Samy v State** [2012] FJCA 3; AAU0019.2007 (30 January 2012) (ambiguous /involuntary plea), **Anthony v State** [2015] FJCA 34; AAU0027.2012 (6 March 2015) (irregularity during the trial) and **Kabakoro v State** [2021] FJCA 46; AAU152.2017 (15 February 2021) (non-disclosure of material document during the trial) as examples of such irregularities in support of its position.

[22] High Court of Australia in **Crofts v R** (1996) 70 AJLR 917 at p 927 explained the principles governing a mistrial upon an irregularity during the trial as follows:

"……. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the state at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial discretion designed to overcome its apprehended impact. As the court below acknowledge, much leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript."

[23] However, none of the above decisions cited by the respondent directly deals with a situation where an accused had been convicted upon a charge which was never read over/explained and without taking his plea.

[24] Similarly, whether the decisions cited by the appellant are still applicable given the different scenarios involved therein and in the light of possible developments in the law and legal principles in this area since then and particularly in the context of the current statutory regime namely Criminal Procedure Act, 2009 are matters worthy of consideration by the full court to decide whether the High Court had committed an error of law or not. A fresh look at the issue involved by the full court under the current statutory framework would clear the air and provide guidance to lower courts.

[25] In **Azamatula v The State** [2008] FJCA 84; AAU0060.2006S (14 November 2008), the Court Appeal has already made the following observations on the power to order a retrial by the High Court.

*'[12] The power of a High Court judge to order a retrial is found in the provisions of section 319 of the Criminal Procedure Code. The power is discretionary and as such the power must always be exercised judicially (**Shekar v State** [2005] FJCA 18). As was said by the Privy Council in **Au Pui-kuen v Attorney-General of Hong Kong** ([1980] AC 351) 'no judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it' (see also **Ting James Henry v HKSAR** [2007] HKCFA 71). **The overriding consideration in the exercise of the power is the interests of justice** (**Aminiasi Katonivualiku v. The State** (CAV 0001/1999S; 17 April 2003).'*

[26] In **Au Pui-kuen v Attorney-General of Hong Kong** [1980] AC 351, the Privy Council said that the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence.

[27] It is not clear what the amended charge against the appellant in the Magistrates court was; whether the appellant had effectively met the substance of the amended charge during the trial though it had not been formally read over to him and his plea not taken is also not clear. These might be some relevant factors to be considered by the full court.

[28] Since it cannot be ascertained from the impugned judgment of the High Court as to what considerations, legal and otherwise, had persuaded the High Court judge to order a retrial, it is not possible to determine at this stage whether the judge had applied the correct legal principles in arriving at his decision. This would amount to a question of law which can proceed to the full court. Other legal issues identified earlier could be considered in the same context.

Application for an order staying the proceedings

[29] The next question is whether a single Judge of this Court has power to stay proceedings in the Magistrates court under section 35(1) of the Court of Appeal Act.

[30] It is trite law that powers of a single judge of this Court in criminal appeals are set out in section 35 of the Court of Appeal Act and it is very specific and it does not give the single judge power to grant a stay a criminal trial or proceedings pending appeal. Unless the jurisdiction is given by the statute, the jurisdiction does not exist [vide **Seru v State** [1999] FJCA 37; Aau0041d.99 (3 August 1999), **Leqeleqe v State** [2005] FJCA 2; AAU0005.2005 (21 January 2005), **Chaudhry v State** [2014] FJCA

106; AAU10.2014 (15 July 2014) and **Buadromo v Fiji Independent Commission Against Corruption** (FICAC) [2021] FJCA 14; AAU01.2021 (19 January 2021)]. As remarked by Sir Moti Tikaram, President, Court of Appeal in **Seru v State** (supra):

> *'The Court of Appeal Act has been amended twice in 1998 first by Act No. 13 of 1998 and then by Act No. 39 of 1998. It is significant to note that Section 35 itself was revised and enlarged by Act No. 13 of 1998 but no power was given to a single judge to grant a stay.'*

[31] The counsel belatedly submitted that this Court should act under section 28 and 20 of the Court of Appeal Act to issue an order staying the proceedings. More or less a similar argument was made in **Buadromo v Fiji Independent Commission Against Corruption** (supra) and the Court dealt with it as follows and did not uphold it:

> *'[20] The counsel for the appellant submitted that section 28 of the Court of Appeal Act read with section 20 (1) (e) and (k) of the Court of Appeal Act empowers a single judge to issue a stay of proceedings as requested by the appellant. He relied on the words 'any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters" that appear after five specific supplemental powers from section 28 (a) to (e) to be read with powers of a single judge of appeal in civil appeals under section 20 (1) (e) and (k) to buttress his argument.*
>
> *[21] This argument would fail for two reasons. Firstly, the supplemental powers given under section 28 (a) to (e) are to be exercised by the full court of the Court of Appeal and not by a single judge whose powers are restricted to what are specified under section 35(1). Secondly, as held in **Chaudhry v State** (supra) even the full court would not have the power to stay conviction and sentence pending appeal under section 28 read with section 13 of the Court of Appeal Act. Chalanchini P had elaborated this issue as follows:*
>
> > *'[45] A further question that necessarily follows is whether the Court of Appeal has the jurisdiction under Part IV of the Act to order a stay of conviction and sentence pending appeal. It was conceded by Counsel for the Appellant that there is no express power to that effect given to the Court of Appeal under Part IV.'*
> >
> > *[53] Section 28 sets out five specific supplemental powers to be exercised by the Court of Appeal when it is considered necessary or expedient in the interest of justice. They are (1) the power to order the production of documents,*

exhibits or other things, (2) the power to order the attendance and examination of compellable witnesses, (3) the power to receive the evidence if tendered, of any competent but not compellable witness, (4) the power to appoint a special commissioner and (5) the power to appoint any person with special expert knowledge to act as assessor. It is only after these five specific supplemental powers have been listed that the general power expressed by the words "any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters" appear. In my judgment the intention of the section was to give to the Court of Appeal a criminal matters the same powers that are exercised by the Court of Appeal in civil matters with respect to the admission of evidence and would include the power to apply, for example, the provisions of the Civil Evidence Act 2002.

'[54] If the words in section 28 that are under consideration are to be given a wider meaning then that meaning must be determined by reference to the powers given to the Court of Appeal in civil matters in Part III of the Court of Appeal Act. Those powers are set out in section 13 of the Act which is headed "Powers of Court of Appeal in civil appeals" and states:

> *"13. For all the purposes of and incidental to the hearing and determination of any appeal under this Part _ _ _ the Court of Appeal shall have all the power, authority and jurisdiction of the High Court and such power and authority as may be prescribed by rules of Court."*

[55] In my judgment the purpose of this section is to give to the Court of Appeal during the course of its hearing and determination of any civil appeal the same power, authority and jurisdiction as the High Court possesses under the High Court Act Cap 13 and the High Court Rules for the hearing and determination of civil proceedings. Its purpose is not to give to the Court of Appeal jurisdiction which it possesses in civil appeals a jurisdiction which it does not possess in criminal matters. In my opinion the Appellant cannot rely on section 13 for the claim that section 28 gives either a single judge or the Court the jurisdiction to entertain an application for a stay of conviction and sentence in a criminal appeal.

[56] Finally, on this point, it is quite clear that Part III is in effect a stand-alone Part for the purpose of civil appeals

and Part IV is a stand-alone Part for criminal appeals. The provisions of the Act that apply in common to both civil and criminal appeals are set out in Part II of the Act. If the drafter had intended that the Court of Appeal should enjoy the same jurisdiction, powers and authority in respect of both criminal and civil appeals, there would have been no need for a separate Part III and Part IV.

[57] For all of the above reasons I find that there is no jurisdiction to hear the application for a stay and as a result the application is dismissed.

[22] The same reasoning adduced by Calanchini P is mutatis mutandis applicable to the appellant's application to stay appeal proceedings in Criminal Appeal No.HAA015 of 2019 regarding the submission based on section 28 read with section 20 (1) (e) and (k) of the Court of Appeal Act.

[23] Gates J (as His Lordship then was) considered the phrase 'that is incidental to an appeal or intended appeal' in section 20 (1) (k) in ***Silimaibau v Minister for Sugar Industry*** *[2004] FJHC 530; HBC155.2001L (5 March 2004) and stated:*

'[15] In section 20(1)(k) the phrase "that is incidental to an appeal or intended appeal" should be interpreted narrowly so that the court could only deal with matters ancillary to an appeal which was afoot. The applicant does not come into this category, nor does the section deal with stay which is separately provided for by section 20(1)(e). Section 20(1) (k) does not apply in this application.'

[24] It is plainly clear that section 20(1)(e) of the Court of Appeal Act has little relevance to criminal matters. Forceful authority can be found on this aspect in ***Seru v State*** *(supra) where it was held:*

*'**Whether application can be treated as a civil matter***

On the basis of decided cases I am unable to agree with Counsel for the Applicants that I have the power to invoke Section 20(1)(e) of the Act (as amended) to grant a stay. The trial that the Applicants want me to stay albeit temporarily is a criminal trial. The application for a permanent stay was made in that criminal trial. The ruling that the Applicants wish to challenge is a ruling made in that criminal trial which is currently proceeding……..

Criminal law and the criminal justice system abound with civil rights provisions to ensure a fair trial. Any allegation of infringement of those rights cannot change the character of the proceedings.

> *I therefore hold Part III of the Court of Appeal Act in particular Section 20(1)(e) thereof cannot be invoked to grant a stay order. The words "not being a criminal proceeding" in Section 12(1) are significant.'*

[32] Thus, I would conclude that the appellant's application to stay proceedings in the Magistrates court at Ba cannot be granted by this Court. There is sufficient authority in Fiji that the appellant could apply to the High Court under its inherent and supervisory jurisdiction for a stay of proceedings in the Magistrates' Court, if he so wishes [for example as in **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014)].

[33] Needless to state that an order seeking vacation of the hearing date already fixed for 25 October 2021 and an order that the case should not be dealt with by the Resident Magistrate are equally beyond the jurisdiction of this court in the current proceedings and cannot be granted.

[34] The appellant has not made any allegation of actual bias against the Resident Magistrate but the appellants' counsel has urged the Resident Magistrate to transfer the case before another Magistrate on the basis that the views which he has expressed in his judgment following the previous trial may result in an appearance of pre-judgment. The learned Resident Magistrate has apparently not refused that application but requested the counsel to make a formal application for recusal for consideration which the appellant has not yet done. It is for the Resident Magistrate to decide whether he would recuse himself from hearing the case against the appellant afresh upon the amended charge guided by the relevant legal principles.

[35] It may be pertinent for the Resident Magistrate *ex mero motu* (of his own motion) or on an application by the appellant to carefully consider the observations and apply the principles expressed by the High Court of Australia in **LIVESEY v. NEW SOUTH WALES BAR ASSOCIATION** (1983) 151 CLR 288 20 May 1983 in this regard.

> *'7. It was common ground between the parties to the present appeal that the principle to be applied in a case such as the present is that laid down in the majority judgment in Reg. v. Watson; Ex parte*

Armstrong (1976) 136 CLR 248, at pp 258-263 . That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. That principle has subsequently been applied in this Court (see, e.g., Re Judge Leckie; Ex parte Felman (1977) 52 ALJR 155, at p 158 ; Reg. v. Shaw; Ex parte Shaw (1980) 55 ALJR 12, at pp 14, 16) and in the Supreme Court of New South Wales (see, e.g., Barton v. Walker (1979) 2 NSWLR 740, at pp 748-749 . Although statements of the principle commonly speak of "suspicion of bias", we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meaning. (at p294)

8. *In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters "of degree and particular circumstances may strike different minds in different ways" (per Aickin J. in Shaw (1980) 55 ALJR, at p 16). If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court. Once it is accepted that a judge should not automatically stand aside whenever he is requested so to do, it is inevitable that appellate courts, removed from the pressure of a possible need for immediate decision and enjoying the advantages both of hindsight and, conceivably, further material and information, will on occasion conclude that a decision of a judge at first instance that he should sit was mistaken and has resulted in a situation where one of the parties or a fair-minded observer might entertain a reasonable apprehension of bias or prejudgment. Such a conclusion does not involve any personal criticism of the judge at first instance or any assessment of his qualities or of his ability to have dealt with the case before him fairly and without pre-judgment or bias. It is simply an instance of the ordinary working of the appellate process in which the views of the judges who constitute the appellate court*

prevail over the views of the judge or judges who constituted the court from which the appeal is brought. (at p295).'

[36] In **Verma v State** [2021] FJCA 17; AAU166.2016 (14 January 2021) the complaint of the appellants was that the Magistrate also presided over the civil proceedings that involved similar facts and evidence and therefore should have recused him of the criminal trial against the appellants. The Court of Appel referred to the following decisions in the Ruling which too may be relevant to the Resident Magistrate in dealing with the appellants' situation.

*'[18] Therefore, following **Tokoniyaroi v State** [2014] FJSC 9; CAV4.2013 (9 May 2014) and **Koya v State** [1998] FJSC 2; CAV0002.1997 (26 March 1998) and **Patel v Fiji Independent Commission Against Corruption** [2013] FJSC 7; CAV 0007 of 2011 (26 August 2013) the High Court judge had approached the appellants' ground of appeal on the 'non-recusal' of the Magistrate taken-up for the first time in appeal.*

*[19] In **Tokoniyaroi** the Supreme Court stated:*

'[44] The two cases are indistinguishable on the basis that the issue of bias has been raised on appeal after the trial. It is on this basis that the decision of the Supreme Court in Koya was binding on the Court of Appeal in the present case. The Supreme Court decided that when a trial in the High Court has taken place and an appellate court is determining an appeal where bias is raised, the appellate court looks at the record of the trial showing how it was conducted by the trial Judge. If the record demonstrates that the trial judge conducted the trial impeccably, it would be difficult to establish that there was a miscarriage of justice arising from non-recusal.'

*[20] In **Koya** (supra) where bias on the part of the trial judge was raised for the first time in appeal the Supreme Court laid down the approach of the appellate court should take as follows:*

> *'Here we are concerned with a trial which has actually taken place and with the question whether there has been a miscarriage of justice on the ground that there was a real danger of bias or a reasonable apprehension or suspicion of bias. In the determination of that ground, the record of the trial, showing how it was conducted by the trial judge, is of fundamental importance. Generally speaking, if the record were to demonstrate that a judge sitting with a jury conducted a trial impeccably, it would be difficult to establish that there*

was a real danger that the trial was vitiated by apparent bias or that a fair-minded observer, knowing the facts, would reasonably apprehend or suspect that such was the case.

*[21] In **Patel** the Supreme Court stated:*

'[33] The real danger of bias test was explained by Lord Goff in R –v- Gough (supra) at 670 in this way:

"I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or having unfairly regarded) with favour or disfavour, the case of a party to the issue under consideration by him _ _ _."

*[34] The test was subsequently slightly adjusted by the House of Lords in **Porter –v- Magill** [2002] 2 WLR 37 at pages 83 – 84. As a result the approach to be taken is that 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, that the tribunal was biased.*

'[35] In my judgment this approach is to be preferred to either a purely subjective test or the reasonable apprehension of bias test. A purely subjective test considers the concerns of a particular litigant and would as a result allow any litigant to successfully challenge any judge assigned to a case whenever that litigant perceived that the judge might be prejudiced.'

*[22] The Supreme Court in **Chief Registrar v Khan** [2016] FJSC 14; CBV0011.2014 (22 April 2016) which the appellants have cited stated:*

*'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] 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.'*

Orders

1. Appeal (bearing No. AAU 39 of 2021) is allowed to proceed to the full court on the question of law identified in the Ruling.

2. An order to stay criminal proceedings in Ba Magistrates court case No. 2051 of 2016 is refused.

3. An order to vacate the hearing date already fixed for 25 October 2021 in Ba Magistrates court case No. 2051 of 2016 is refused.

4. An order that Ba Magistrates court case No. 2051 of 2016 should not be dealt with by the Resident Magistrate is refused.

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