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

CRIMINAL APPEAL NO. AAU 166 of 2016
[In the High Court of Suva Case No. HAA 008 of 2016]
[In the Magistrates Court at Suva case No.1712/2010]

BETWEEN : **BABITA DEVI KUMAR VERMA**
SANJAY SINGH VERMA

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. F. Vosarogo for the Appellant**
: **Ms. J. Prasad for the Respondent**

Date of Hearing : **13 January 2021**

Date of Ruling : **14 January 2021**

RULING

[1] The 01st appellant had been arraigned in the Magistrates' Court at Suva on one count of forgery contrary to section 341(1) of the Penal Code and both appellants had been charged with another count of uttering forged documents contrary to section 343(1) of the Penal Code.

[2] Both appellants had been convicted after trial by the Magistrate on 30 November 2015. Before the sentence was passed they had appealed to the High Court against the conviction but the appeal had been dismissed on 02 November 2016.

[3] The appellants' solicitors had filed a timely appeal against the decision of the High Court on 02 December 2016. Subsequently, the same solicitors had tendered written

submissions on 09 December 2016. The state had replied by way of its written submissions filed on 30 October 2020.

[4] However, the notice of appeal had sought to invoke the jurisdiction of the Court of Appeal under section 21 of the Court of Appeal Act. Written submissions of the appellants have reiterated the same. 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.

[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. Therefore, there is no proper appeal before this court in as much as the appellate powers of the Court of Appeal against an appeal decision of the High Court cannot be invoked under section 21 of the Court of Appeal Act. Thus, the appellants' current appeal to this court against the High Court judgment delivered on 02 November 2016 cannot be regarded as a second-tier appeal in terms of section 22 of the Court of Appeal Act.

[6] Therefore, this court has no jurisdiction even to entertain this appeal as its appellate powers under section 22 of the Court of Appeal Act have not been invoked. Accordingly, this appeal should stand dismissed on this ground alone. I raised this matter with the counsel for the appellant at the hearing on 12 January 2021. However, without prejudice to that position, I shall proceed to consider the appeal as if it is an appeal under section 22 of the Court of Appeal Act as both parties made submissions on the merits of the matter at the hearing.

[7] 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].

[8] 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:*
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>> *"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."*
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> *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.'*

[9] 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 Act 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:*
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>> *"(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."*

[10] 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) and **Dean v State** AAU 140 of 2019 (08 January 2021) 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.'*

[11] However, most counsel drafting grounds of appeal in second-tier appeals under section 22 of the Court of Appeal Act do not seem to have a clear understanding of the narrow scope of the section and consequently, the limited jurisdiction of this court in such appeals. More often than not, they simply reiterate the same grounds of appeal urged before the High Court calling themselves questions of law. This is not the approach that should be adopted by counsel filing appeals in this court in terms of section 22 of the Court of Appeal Act. As a result, the appellate court roll is getting clogged with unmeritorious appeals and the appellants are simply made to pursue appeals having no or little prospect of success under section 22 of the Court of Appeal Act.

[12] This aspect had received the attention of the Court of Appeal previously in **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005) where it was held

> *'[2]. Section 22(1) of the Court of Appeal Act (Cap. 12), which is the source of this Court's jurisdiction in the present case, is clear and unambiguous in restricting a second right of appeal to questions of law. It is therefore counsel's duty properly to identify a discrete question (or questions) of law in promoting a s.22(1) appeal. In the present case there has been a failure to do that, and the appeal was presented effectively as a second general appeal incorporating the wide variety of complaints made to the High Court. That is not acceptable. In the course of hearing Mr Sharma responsibly recognized the situation, and after*

some discussion identified three issues which were pursued in argument. The remaining issues were abandoned and require no further consideration.

[13] Further in **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014) this court in relation to section 21 (1)(a) of the Court of Appeal Act remarked on the notice of appeal casually labelling grounds of appeal as involving questions of law in the following terms.

> *'[12] All the grounds of appeal, except for the first ground, are described in the amended Notice of appeal as raising an error of law. However, it needs to be clearly stated that the mere fact that the ground of appeal is stated in the notice to raise an error of law does not necessarily mean that the ground involves a question of law alone. In **Hinds –v- R** (1962) 46 Cr. App. R 327 Winn J at page 331 when commenting on section 3(a) of the Criminal Appeal Act 1907 (UK) (the terms of which were similar to the present section 21(1) (a) of the Court of Appeal Act) noted:*
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> > *"The court is very clearly of the opinion that the proper construction of those words (against conviction "on any ground of appeal which involves a question of law alone)" is that there must be, in order that the right given by that subsection can be claimed a ground of appeal raised which is a question of law, and that the section cannot be effectively invoked merely by raising a ground which the grounds of appeal or the submissions of counsel at any later stage describe as a ground of law."*

[14] 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.*

Grounds of appeal

[15] Only two grounds of appeal were urged on behalf of the appellants at the hearing after the 02nd and 04th grounds of appeal were abandoned. They are as follows.

'Ground 1 - That the Learned Appellate Judge erred in law in rejecting that the trial court ought to have recused himself after hearing and determining a civil appeal based on the same facts and parties, the failure of which would have given rise to reasonable apprehension of bias in the decision making of the trial court.

Ground 2 - That the Learned Appellate Judge erred in law in failing to consider delay of the trial process and the entirety of the case presented inordinate delay carrying with it a real risk of injustice to the Appellant, the failure of which compromises the evidence given, assessment of such evidence and the judicial determination of such evidence resulting in an unfair trial of the Appellants.'

01st ground of appeal

[16] The appellants had raised and urged this ground of appeal as the 01st ground of appeal in the High Court. The complaint of the appellants is 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.

[17] The High Court judge thoroughly examined this complaint from paragraphs 06-21 of the judgment. It is common ground that there was no application on behalf of the appellants requesting the Magistrate to recuse himself. It appears that the earlier matter referred to by the appellants was an appeal from the Small Claim Tribunal (SCT) where the Magistrate sitting in appeal had affirmed the decision of the SCT that had been given in the appellant's favour. It appears that the Magistrate's jurisdiction in the civil appeal had been limited only to see whether the proceedings had been conducted before the SCT in an unfair manner to the appellant prejudicially affecting the result or whether the SCT had exceeded its jurisdiction. Thus, the Magistrate was obviously not required to go into the credibility and reliability of the witnesses in the said civil appeal. The High Court judge had remarked that the proceedings at the SMT or the Magistrate court sitting in appeal were not available to the High Court. In the absence of such material it was not possible for the High Court judge to have morefully examined both proceedings and compared them with the criminal proceedings before the Magistrate to find out merits of the appellants' grievance. Thus, it could only be surmised as to what had transpired in the proceedings before the SCT and the Magistrates court in appeal as opposed to criminal proceedings before the Magistrates court. Needless to say, that there can be as many differences as there can be similarities between these civil and

criminal proceedings. All in all, the appellants' complaint appears to be an afterthought after waiting without expressing any reservation for a favourable outcome in the criminal case at the hands of the Magistrate failing which the allegation of bias has been made against the Magistrate.

[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 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."*
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> *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.*

[23] Thus, having examined the appeal record (*i.e.* all proceedings in the Magistrate court) carefully at paragraphs 13-21 the High Court judge had concluded that the Magistrate had conducted the trial against the appellants impeccably and there was nothing to infer that there was a real danger of bias or he had regarded with favour or disfavour the appellant's case.

[24] Therefore, on a fair reading of the judgment it appears that the High Court judge had applied the proper tests accepted in Fiji to the facts before him to ascertain whether there was merit in the appellants' ground of appeal and answered it in the negative. The appellants had not demonstrated otherwise.

[25] Thus, the ground of appeal urged by the appellants is not one which involves a question of law only as the High Court judge had examined the entire appeal record before it in determining the appellants' allegation. It involves a question of mixed law and fact.

[26] 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] ………….*<u>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</u>.*

[27] The appellants do not allege that the High Court judge had applied the wrong tests in considering their allegation of bias on the part of the Magistrate. If the appellants' complaint relate to the outcome of the application of the proper tests to the facts by the High Court judge, as it appears to be the case, then it becomes a question of mixed law and fact and in that event it is no longer justiciable in terms of section 22 of the Court of Appeal Act.

02nd ground of appeal

[28] The appellants raise this ground of appeal based on the length of time which they claim to be 12 years from the time taken to bring the charges to court and for the whole criminal proceedings to be brought to an end with the conviction in the Magistrates Court. The appellants state that the offences had allegedly taken place in 2006 and 2008, the criminal proceedings had commenced in 2010 and the trial had taken place from 2013 to 2015. This according to the appellants constitute a violation of section 15(3) of the Constitution of Fiji.

[29] This appeal ground had not been urged before the High Court in its current form. What had been urged under the 15th ground of appeal in the High Court is a complaint that the Magistrate had considered the evidence, demeanour of witnesses and their reaction under cross-examination in the judgment when the prosecution witnesses had given evidence over 02 years ago. The appellants had stated that it would have been difficult for the Magistrate to have recollected such evidence after 02 years and therefore, there was a substantial miscarriage of justice by the consideration of such evidence in the matter of conviction.

[30] The High Court judge had, as he had throughout the judgment, considered this complaint diligently from paragraph 57 to 63 citing *inter alia* meticulous information as to the commencement and the conclusion of the trial (see paragraph 58). The High Court judge had remarked that of almost 25 months long gap between the prosecution

and defence cases, the appellants were responsible for the delay of 18 months having obtained adjournments at will.

[31] The High Court judge had concluded that the demeanour of witnesses had only a marginal effect on the determination of guilt of the appellants by the Magistrate as the case against them was based on circumstantial evidence. In any event, the High Court had decided that there had been no substantial miscarriage of justice even if the ground of appeal was to be answered in favour of the appellants.

[32] No complaint or material had been placed before the High Court to substantiate the entire length of delay of 12 years taken for the whole process as alleged by the appellants. Having complained of lack of merits of the conviction on the basis of delay of 02 years taken to conclude the trial in the Magistrates court as possibly affecting the Magistrate's memory and failed in that endeavour, the appellants have now orchestrated it to include the so called total period of 12 years taken to bring the proceedings to an end in the Magistrates court and changed the character of the complaint to that of a violation of their rights under section 15(3) of the Constitution.

[33] In my view, without establishing the foundation with supporting material in the first court of appeal the appellants cannot raise a new ground of appeal for the first time with no fresh material to substantiate before this court under section 22 of the Court of Appeal Act. It is clear that even to consider the second ground of appeal this court has to peruse a great deal of facts and circumstances contributing to the delay. The appellants have not placed before the High Court any additional material other than what transpired in the Magistrates court to explain the sequence of events and what had happened or not happened during the period of 12 years.

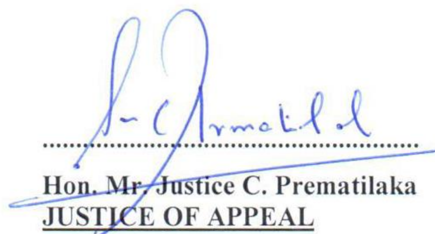
[34] Had there been a credible factual basis for the appellants' allegation of violation of their constitutional right under section 15(3) of the Constitution, they should have sought constitutional redress or judicial review at the earliest opportunity. They cannot now do so collaterally in the pretext of an appeal ground under section 22 of the Court of Appeal Act arising from the High Court decision.

[35] Therefore, the second ground of appeal does not involve a question of law only. It involves a question of mixed law and fact.

[36] Therefore, I hold that both grounds of appeal urged on behalf of the appellants before this court do not involve questions of law only and consequently their second-tier appeal cannot reach the full court under section 22 of the Court of Appeal Act.

Order

1. Appeal (bearing No. AAU 166 of 2016) is dismissed in terms of section 35(2) of the Court of Appeal Act.



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL