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

CRIMINAL APPEAL NO. AAU 140 of 2017
[High Court No. HAA 72 of 2016L]

BETWEEN : **JOSUA NATAKURU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
: **Prematilaka, JA**
: **Bandara, JA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **23 February 2022**

Date of Judgment : **27 May 2022**

JUDGMENT

Gamalath, JA

[1] I agree with the conclusions of Bandara, JA.

Prematilaka, JA

[2] I am in agreement with the outcome suggested by my brother Bandara, JA in the draft judgment that the appeal should be dismissed. However, I wish to place my own observations on a matter of law discussed in the draft judgment in relation to the 02nd ground of appeal.

[3] My brother Bandara, JA had dealt with the issue of burden and standard of proof in a situation where any fact is within the knowledge of an accused and stated that the burden of proof of that fact falls on him and that burden should be discharged on a balance of probability as opposed to proof beyond reasonable doubt (vide paragraph 41 of the draft judgment).

[4] At the same paragraph it is stated that such a situation only puts the evidential burden and not the legal burden on the accused. At paragraph 43 Bandara, JA has proceeded to state that when an accused claims to be having a particular defense available to him, it could in certain situations become a fact especially within the knowledge of the accused and in that situation at least a slight explanation is warranted from him.

[5] Thus, the issue, for an accused, is whether the burden is legal to be discharged on a balance of probability ('beyond reasonable doubt' is not in contemplation for obvious reasons) or it is simply an evidential burden in the sense of adducing or pointing to evidence suggesting a reasonable possibility that the matter exists or does not exist, when the matter in his favour is especially within his knowledge.

[6] It appears to me that the situation discussed by brother Bandara, JA is not covered under PART 9 of the Crimes Act, 2009. According to Part 9 the prosecution bears the legal burden *i.e.* the burden of proving the existence of the matter, of proving every element of an offence

and must be discharged beyond reasonable doubt by the prosecution unless a different standard is specified by law (vide section 57 and 58).

[7] A burden of proof imposed on an accused by law becomes a legal burden if and only if the three situations set out under section 60 exist and if so, the burden of proof must be discharged on a balance of probability (vide section 61). In a situation not coming under section 60, a burden of proof imposed by law on an accused is only an evidential burden [vide section 59(1)] *i.e.* the burden of adducing or pointing to evidence suggesting a reasonable possibility that the matter exists or does not exist [vide section 59(7)].

[8] Section 59(2) and (3) sets out two situations where the evidential burden lies on an accused; when he denies criminal responsibility relying on a provision of the Crimes Act or when he relies on any exception, exemption, excuse, qualification or justification provided by law creating the offence. However, an accused no longer bears the evidential burden in relation to a matter if sufficient evidence to discharge that burden is adduced by the prosecution or by court. According to my reading, none of the provisions under section 59 deals directly with a situation 'where any fact is within the knowledge of an accused' and specifies in that scenario where the burden lies and what the standard of proof is.

[9] Therefore, in my view the principles of common law within the framework of PART 9 of the Crimes Act, 2009 will have to fill this lacuna. As far as I can see, it is reasonable and safe to assume that where any fact is especially within the knowledge of the accused (and not when such fact is equally available to the prosecution or could be ascertained with due diligence by the prosecution) the burden of adducing or pointing to evidence suggesting a reasonable possibility that the fact exists or does not exist, *i.e.* evidential burden is on the accused. In other words, in a situation when it is extremely difficult, if not near impossible for the prosecution to prove such facts as they are especially within the knowledge of the accused but can be proved by him without difficulty or inconvenience, the evidential burden of proof in relation to those facts shifts to the accused.

[10] I am fortified to take this position in view of section 60 and 61 of the Crimes Act, 2009 pointing to the fact that the defense carry the legal burden to be proved on a balance of probability only on limited circumstances specified under section 60 and in other situations the standard of proof should logically be lower than that. It goes without saying that when the legal burden is on the prosecution it must, unless otherwise provided, always be proved beyond reasonable doubt. Further, section 59, subject to section 60, clearly suggest that the burden of proof on an accused is an evidential burden Therefore, I am not persuaded to take the view that in a situation where a fact is especially within the knowledge of the accused as a total or partial defense or negating an element of the offence, he should prove that fact on a balance of probability. In that situation all what he has to do to demonstrate a reasonable doubt in the prosecution case is to adduce or point to the existence of that fact by evidence *i.e.* by discharging the evidential burden in his favour suggesting a reasonable possibility that the fact exists or does not exist.

[11] As pointed out by brother Bandara, JA the appellant had failed to adduce any evidence on his so called defenses available to him. Neither has he even explained why he failed to do so. Thus, he had not discharged the evidential burden cast on him.

Bandara, JA

[12] The Appellant had been tried before the Magistrate's Court of Lautoka for a single count of robbery contrary to section 310 (1) (a) (i) of the Crimes Act, 2009.

[13] The information read as follows:

*"**Statement of Offence (a)***

ROBBERY: Contrary to Section 310 (1) (a) (i) of the Crimes Decree No. 44 of 2009.

Particulars of Offence (b)

JOSUA NATAKURU, on the 15th day of May, 2016 at Lautoka in the Western Division robbed **SHYAMAL NAIDU** of 1 x LG mobile phone valued at $129.00 and immediately before such robbery used force on the said **SHYAMAL NAIDU**.*"*

[14] Upon his arraignment on the 23rd May 2016 the Appellant pleaded not guilty and opted for a trial before the Lautoka Magistrate Court.

[15] The prosecution called three witnesses to testify and at the conclusion of its case, the Learned Magistrate found a case for the Appellant to answer.

[16] The Appellant opted to remain silent and not to call any evidence.

[17] On the 14th October 2016 the Magistrate delivered the judgment and convicted the Appellant on the charge against him.

[18] On the 15th November 2016 the Appellant was sentenced to a period of 03 years and 09 months' imprisonment with a non-parole term of 03 years.

[19] The Appellant filed a timely appeal against his conviction in the High Court, and on the 31st May 2013 his appeal was dismissed.

[20] Thereupon, the Appellant filed a timely appeal in the Court of Appeal against the decision of the High Court. Subsequently, he had amended his grounds of appeal and filed amended grounds on the 12th February 2018 and filed further additional grounds on the 10th May 2018.

[21] The single judge of appeal by his ruling dated 15th October 2019 refused to grant leave on all the grounds of appeal against conviction.

[22] The Appellant appearing before the full court in person, advanced the following five grounds of appeal, all of which had been advanced before the single judge of the appeal at the leave application. However, none of these grounds were advanced before the High Court.

[23] The grounds of appeal advanced by the Appellant before the High Court are as follows:

"Grounds of Appeal:

7. The Appellant submits the following grounds of appeal against conviction only: -

I. That the Learned Magistrate erred in law by failing to explain the Appellant's right to remain silent after the Prosecution had closed its case; and

II. That the Learned Magistrate erred in law and fact by failing to consider that element of force being used immediately before the offence was not proved by the Prosecution."

[24] The five grounds of appeal advanced before the full court are as follows:

"1. The learned Magistrate erred in law when he failed to ask the unrepresented accused whether he had other evidence to adduce in his defence, therefore causing a substantial miscarriage of justice in the circumstances of this and to the Appellant.

5. The learned Magistrate erred in law in failing to consider the existence of a particular defence for the accused by the means by which the accused came to be in possession of the mobile phone.

6. The Learned Magistrate erred in law when he found that the accused had the necessary mental element of dishonest appropriation of property belonging to the complainant.

7. That the Learned Magistrate erred in law in the manner he had accepted the uncorroborated evidence of the complainant on the element of the use of force to affect robbery.

8. That the flagrant incompetence of the Legal Aid Counsel by misrepresentation of facts in her appeal submissions has denied the Appellant a reasonable opportunity of acquittal on the element of the proof of the use of force to affect robbery."

Brief summary of the facts of the case

[25] Complainant Shyamal Shaneel Naidu testified before the Magistrate, that on the 15th May 2016 at about 7.45 pm, he was returning home after work. Having got off the bus he had crossed the road just before Natokowaqa Police Post.

[26] At that point of time the Appellant had come from behind and started talking to the complainant in a manner of a previously known person, patting him on the shoulder. Complainant soon realized that the Appellant was not a known person and tried to prevent the latter from holding his hand.

[27] The Appellant had then grabbed the complainant forcefully from behind and taken his phone from the pocket. Thereupon, the complainant had run to the police post and complained the incident to a female officer, on duty at the time.

[28] When the Appellant was called inside the police post he had told the police officer that the complainant owed him $30. He had further tried to punch the complainant in front of the police officer. Thereafter, the Appellant had gone away getting into a mini bus.

[29] At the trial the complainant had clearly identified the mobile phone (exhibit 1) as the one that belonged to him, and also identified the Appellant as the person who robbed it.

[30] In the course of the cross-examination the complainant had denied having known the Appellant prior to the incident, or travelling together with him, on the day of the incident.

[31] As to the manner the complainant gave evidence, the Magistrate observes in his judgment that:

> *"9. Although the complainant was cross-examined extensively by the Accused, his credibility could not be challenged. The complainant replied to the questions put by the Accused very clearly and confidently. He did not contradict his statements at any time. His evidence was very consistent and I am very much convinced about the credibility of the complainant."*

[32] A summary of the police investigations is found in paragraphs 10 and 11 of the judgment of the Magistrate.

> *"10. The prosecution witness, Detective Inspector Saimoni Qasi gave evidence that on the 15th May 2016 at about 8pm he received a call from a female constable at Natokowaqa Police Post seeking assistance regarding a robbery. He said that he was told that the suspect had boarded a mini bus*

to go towards the city. The witness said that "it was fortunate that we were around the city and was driving towards intersection which is just a round about the same time this mini bus was right on the way down. The female officer was exact with the number which was LM 415 registration that is where we intercepted the mini bus, stopped the driver, asking driver if anyone had boarded the mini bus and the driver said yes in front of Police Post in Natokowaqa. Waded to the accused sitting at the other end. That is where he came out of the mini bus your worship."

11. The witness further said that the Accused was well known to him and when confronted the Accused handed over the phone to the witness. The witness identified the Exhibit 1 as the phone which was handed over to him by the Accused. Further the witness identified the Accused as Josua Natakuru.'

[33] As stated earlier the prosecution had adduced three witnesses and closed its case.

[34] The Appellant who was self-represented remained silent when his defense was called.

01st ground of appeal

"1. THAT the learned Magistrate erred in law when he failed to ask the unrepresented accused whether he had other evidence to adduce in his defence, therefore causing a substantial miscarriage of justice in the circumstances of this and to the Appellant."

[35] Section 179 of the Criminal Procedure Act *inter alia* provides that:

"At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused person sufficiently to require the making of a defence, the Court shall –

(a) Again explain the substance of the charge to the accused; and
(b) Inform the accused of the right to –

(i) Give evidence on oath from the witness box, and that, if evidence is given, the accused will be liable to cross-examination; or

(c) Ask the accused whether he or she has any witnesses to examine or other evidence to adduce in his or her defence; and

(d) The Court shall then hear the accused and his witnesses and other evidence (if any).”

[36] The following portion of the proceedings, of the court record clearly indicates that complying with section 179, the court had explained the Appellant’s right upon the defence being called (the following questions and answers had transpired between the judge and the accused):

“Court: Tell him that the court is satisfied that the Prosecution has made out a case against him. So read out the charge again to him.
Clerk Sonam: Reads out the charge in English.
A. I understood your worship.
Court: Ask him whether he wants to give evidence, call witnesses or remain silent?
A. I have no witness, your worship. I wish to remain silent. I also have an application to make sir. In this case I now make an application for.
Court: I have already decided that there is a case made out by the Prosecution?
A. Very well.
Court: That is why I asked whether you want to give evidence or no.
A. Yes, Sir.
Court: You don’t want to give evidence? I will fix it for judgment 14th October for judgment and 29th August for remand extension.
A: Your worship, with leave of the court I would like to file written submission, closing submission.”
Court: Tell him that he can file it at the registry?”

[37] It is clear from the foregoing that the Magistrate had, in unequivocal terms explained the Appellant the rights that he was entitled to, when a defense was called, including his right to adduce evidence. The Magistrate had also advised the appellant of his common law right to remain silent though such a requirement is not specifically stated in section 179 [vide **Vaqewa v State** [2015] FJSC 21; CAV 05 of 2015 (20 August 2015)]. As for the consequences of remaining silent, the Magistrate in keeping with section 14(2)(j) of the Constitution, had not drawn any adverse inference against the Appellant, from his silence and failure to call witnesses.

[38] The Learned Magistrate had clearly asked the Appellant whether he wanted to give evidence, call witnesses or remain silent. In response the Appellant had stated that he did not intend to call witnesses and wished to remain silent. Prior to that, the Magistrate had proceeded to explain the charge to the Appellant. Thus, no violation of the Appellant's rights under section 179 had occurred. [see **Lutu v State** (2001) 1 FLR 40 (02 February 2001) [2001] FJHC 267 and **Vaqewa v State** [2015] FJCA 152; AAU0119.2011, AAU0038.2013 (3 December 2015)].

[39] This ground of appeal, though raising a question of law, is unmeritorious. There is no error of law committed by the Magistrate as far as this ground of appeal is concerned for this court to intervene.

2nd Ground of Appeal

> "*5. The learned Magistrate erred in law in failing to consider the existence of a particular defence for the accused by the means by which the accused came to be in possession of the mobile phone."(sic)*

[40] Advancing the above ground of appeal the Appellant contends that the Magistrate failed to consider the existence of a particular defense which would justify his possession of the phone in question.

[41] The complainant had categorically denied that he ever knew the Appellant prior to the incident. The Appellant in the course of the cross-examination had not made any suggestion to the complainant, of the availability of such a defence in the former's favour.

[42] Moreover, no questions were posed in the course of the cross-examination pursuing such a line of defence. However, whether such a defecnce existed or not becomes "*a fact within the knowledge of the appellant*," in which event the burden of placing such a fact before the court invariably shifts to him.

[43] As pointed out by Best in 'Law of Evidence', (12th Edn. page 291), the "*presumption of innocence is, no doubt, presumptio juris; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property", though the latter is only a presumption of fact. Thus, the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice*.

[44] Lord Mansfield in **Blatch** v. **Archer** (1774) 1 Cowp. 63 at p.65 observed that, *"according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden*".

[45] The rule of evidence that is applicable here is, "*when any fact is especially within the knowledge of any person the burden of proving that fact is upon him*." This rule takes effect only in a situation where the prosecution has proved its case beyond reasonable doubt. In some jurisdictions the said principle is statutory.

[46] For instance section 106 in the Indian Evidence Act, 1872 provides that, — *"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him"*.

The illustration (b) thereto states:

> (b) *A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.*

[47] In **Shambu Nath Mehra** vs **The State Of Ajmer** (1956 AIR 404, 1956 SCR 199), Indian Supreme Court held that, "*section 106 of the Evidence Act does not abrogate the well-established rule of criminal law that except in very exceptional classes of cases the*

burden that lies on the prosecution to prove its case never shifts and section 106 is not intended to relieve the prosecution of that burden.' On the contrary, it seeks to meet certain exceptional cases where it is impossible, or disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience. But when knowledge of such facts is equally available to the prosecution if it chooses to exercise due diligence, they cannot be said to be especially within the knowledge of the accused and the section cannot apply".

[48] In **Jayasena** v. **The Queen** ([1970]AC 618), the Privy Council held that, "the *principle involved in this section derives from the English law of evidence, where it has however been sparingly used. ……The prosecution is usually able to establish that an accused person has special knowledge of the circumstances of the crime with which he is charged. ……Under some systems of law this is considered to be sufficient for the accused to be-called upon at the outset of a trial to say what he knows".*

[49] **In Motilal Chakrawarty vs The King (1950 CriLJ 115)** Harries, CJ held that, "Section 106 of, *Evidence Act can never be used to shift the onus of establishing an essential fact from the prosecution on to the shoulders of an accused person. This I think is abundantly clear from a comparatively recent decision of their Lordships of the Privy Council in the case of Stephen Senerviratne v the King 41 C. W. N. 65: A.I.R. (23) 1936 P.C. 289 37 Cr.L.J. 963. In that case it was expressly held that Section 106 of Ceylon Ordinance no. 14 of 1895, which is the same as Section 106, Evidence Act, does not cast any burden on an accused person to prove that no crime, was committed by proving facts lying specially within his knowledge".*

[50] In a situation, when any fact is especially within the knowledge of an accused, the burden of proof of it falls on him, which burden should be discharged by proving the fact on a balance of probability. The standard of proof of a fact which is especially within the knowledge of an accused is on a balance of probability and not beyond reasonable doubt. However, the said rule does not cast any burden on the Appellant to prove that he had not committed the offence by providing facts lying especially within his knowledge. Such a

situation only puts the evidential burden on an accused, and it is not the legal burden which always lies with the prosecution.

[51] The said common law rule in no manner does absolve the prosecution of its responsibility of proving a criminal case beyond reasonable doubt and should be considered within the provisions of and in the context of Part 09 ('PROOF OF CRIMINAL RESPONSIBILITY') of the Crimes Act, 2009. In the present case the prosecution has discharged its duty by proving beyond reasonable doubt that the Appellant had robbed the phone that belonged to the complainant.

[52] Once the legal burden is discharged by the prosecution, if an accused claims that, "*a particular defence is available for him*", in certain situations it could become a fact especially within the knowledge of the accused, of which, in the least a slight explanation is warranted from him (*i.e.,* as in the present case, the manner how the Appellant can substantiate his undisputed possession of the complainant's mobile phone). The Appellant had failed to place such an explanation before the Magistrate.

[53] Paragraph 12 of the judgment referring to the evidence of the police officer states:

> *"12. The Accused asked only three questions from the witness in the following manner during the cross-examination;*
>
> *Q: Witness you said that I gave you the phone on my own free will, yes or no?*
> *A: That is correct. Actually he admitted to me taking the phone.*
> *Q: And I explained that this phone was given to me by the Indian boy for money that he owed for me to sell that phone to recover the $30 which he owed me. Yes or no?*
> *A: That is incorrect.*
> *Q: Witness are you saying it is not correct?*
> *A: It was not correct your worship."*

[54] As to how the complainant happened to owe $30 to the Appellant becomes a fact especially within the knowledge of the latter, when the former had denied it (along with the denial of knowing the Appellant prior to the incident). In the circumstances the logic and common

sense necessitate at least an explanation from the Appellant for his failure to place his so called defense before the Magistrate. This is essentially a trial issue that should have been canvassed during the trial or at least at the High Court appeal hearing, which the appellant has failed to do. There was NO factual basis for the Magistrate to consider such a 'defense'. What the appellant urges here is a mixed question of fact and law.

[55] Therefore, I conclude that this ground of appeal has no merit and there is no question of law involved here.

3rd ground of appeal

> *"6. The Learned Magistrate erred in law when he found that the accused had the necessary mental element of dishonest appropriation of property belonging to the complainant."*

[56] There is no error on the part of the Magistrate when he had adequately dealt with the issue raised in paragraphs 20, 21 and 22, which are as follows:

> *"20. The next element is whether the Accused dishonestly appropriated property belonging to the complainant. Section 290 of the Crimes Decree defines the word dishonesty in relation to theft as follows;*
>
> *290. for the purposes of this part, dishonest means –*
>
> *(a) dishonest according to the standards of ordinary people; and*
> *(b) known by the defendant to be dishonest according to the standards of ordinary people.*
>
> *21. Further Section 293 explains appropriation of property as follows:*
> *"293. (1) For the purposes of this Division, any assumption of the rights of an owner to ownership, possession or control of property, without the consent of the person to whom it belongs, amounts to an appropriation of the property.*
> *(2) Sub-section (1) applies to a case where a person obtains possession of property (innocently or not) without committing theft, and there is a later assumption of rights without consent by keeping or dealing with it as owner.*

(3) For the purposes of this Division, if property, or a right or interest in property, is, or purports to be, transferred or given to a person acting in good faith, a later assumption by the person of rights which the person had believed himself or herself to be acquiring does not, because of any defect in the transferor's title, amount to an appropriation of the property.

22. The Complainant gave evidence that the mobile phone marked as Exhibit 1, belongs to him. It was not disputed at any point that the complainant is the owner of the mobile phone. It is very clear that the Accused has taken the mobile phone dishonestly form the complainant without his consent. This point was further buttressed with the evidence that the Accused had handed over the phone to the Police Office who arrested him. Therefore I am satisfied that the prosecution has proved that the Accused has dishonestly appropriated property belonging to the complainant."

[57] This ground of appeal is concerned with a mixed question of fact and law and lacks merit and therefore, there is no 'question of law only' for this court to intervene.

4th ground of appeal

"7. THAT the Learned Magistrate erred in law in the manner he had accepted the uncorroborated evidence of the complainant on the element of the use of force to affect robbery."

[58] There is no requirement for the court to look for corroborative evidence, in relation to the elements of the offence in question. On the element of the use of force, the complainant's evidence is credible.

[59] In **R v Murray** (1987) 11 NSWLR 12 Lee J observed that: "*In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable*".

[60] When it comes to the reliability and credibility of the complainant the following remarks made by the Magistrate in his judgment are noteworthy and they show that what the

Appellant complains about is a mixed question of fact and law and there is no question of law only for this court to intervene.

> *"9. Although the complainant was cross-examined extensively by the Accused, his credibility could not be challenged. The complainant replied to the questions put by the Accused very clearly and confidently. He did not contradict his statements at any time. His evidence was very consistent and I am very much convinced about the credibility of the complainant."*
>
> *"17. I have observed the demeanour of the witnesses. I am satisfied that the prosecution witnesses gave evidence in a very convincing and consistent manner. Further the witnesses corroborated each other's evidence. Their credibility remained intact throughout the case. I have no reason to disbelieve the prosecution witnesses as they gave very consistent, corroborative and clear evidence."*

[61] In **Director of Public Prosecutions v Hester** [1973] AC 296 at 324.) Lord Diplock stated that, *"in common law systems, unlike some other systems, an accused can be convicted on the testimony of a single witness"*.

[62] This ground of appeal in any event lacks any merit.

5th ground of appeal

> *"8. That the flagrant incompetence of the Legal Aid Counsel by misrepresentation of facts in her appeal submissions has denied the Appellant a reasonable opportunity of acquittal on the element of the proof of the use of force to affect robbery."*

[63] There is no precise standard for judging the competency of a counsel and there are no rules that provide definitive standards for the duties owed by defense counsel whilst performing his/her duties. The Appellant was self-represented at the trial and he conducted his own defense. In any event, there is absolutely no material before this court, showing that the Legal Aid counsel involved in the Appellant's appeal in the High Court, had been grossly incompetent, since she had raised at least one ground of appeal which could be considered

as a pure question of law and another, of course, arguably on a mixed question of fact and law.

[64] This ground of appeal does not involve a pure question of law and lacks merit.

[65] The jurisdiction of this court is limited by section 22 (1) of the Court of Appeal Act to consider only questions of law and it provides that:

> *"22. -(1) Any party to an appeal from a [Magistrates Court] to the [High Court] may appeal, under this Part, against the decision of the [High Court] in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only …"*

[66] All in all, it is to be noted that none of the 02nd to 05th grounds of appeal, advanced before us by the Appellant does not involve questions of law.

[67] As for the Appellant's application to lead fresh evidence; firstly, that application should have been made in the first appellate court, namely the High Court that heard his appeal. The appellant had not done so. He has given no explanation for the failure either. Secondly, *ex facie* the appellant's application to lead fresh evidence, which I have examined carefully, does not satisfy the criteria set out in **Tuilagi v State** AAU 0090 of 2013; [2017] FJCA 116 (14 September 2017) and **Ladd v Marshall** [1954] 3 All ER 745. Thirdly, in any event it is very doubtful whether this court acting under section 22 of the Court of Appeal Act hearing a second-tier appeal possesses jurisdiction and power to consider an application for fresh evidence unless exceptional circumstances exist and the application comes within the meaning of a *'question of law only'.*

[68] Therefore, the application to lead fresh evidence is refused.

Order

1. Appeal dismissed.

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice W. Bandara
JUSTICE OF APPEAL