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

CRIMINAL APPEAL NO. AAU 161 of 2020
[In the High Court at Suva Case No. HAA 26 of 2019]
[In the Magistrates Court at Taveuni case No.047/2016]

BETWEEN : **VERESA DRAUNIMASI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. G. O'Driscoll for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **01 August 2022**

Date of Ruling : **02 August 2022**

RULING

[1] The appellant was charged in the Magistrates court at Taveuni with one count of ASSAULT CAUSING ACTUAL BODILY HARM contrary to section 275 of the Crimes Act, 2009 by assaulting RONALD SHIVNESH REDDY on 05 February 2016 at Taveuni, in the Northern Division.

[2] At the conclusion of the trial the appellant was found guilty and convicted of the said charge. On 31 August 2020, he was sentenced to a term of 04 months' imprisonment. Aggrieved by the said decisions the appellant filed a petition of appeal in respect of both his conviction and sentence in the High Court.

[3] In a judgment delivered on 21 October 2020, the learned High Court judge had dismissed the appellant's appeal.

[4] The appellant is now pursuing a second tier appeal on conviction under section 22 of the Court of Appeal Act against the High Court judgment. The grounds of appeal urged are as follows:

Conviction

1. *The learned Appellate Judge erred in law in holding that there was a dock identification which was sufficient for the Learned Trial Magistrate to hold that I had committed an offence when there was no such identification done so during the trial.*

2. *The learned Appellate Judge had erred in law in failing to direct his mind that in absence of identification and there being an allegation that there were two police officers who had assaulted the complainant, it was not prudent to convict thereby giving the appellant the benefit of doubt.'*

[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 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). It is therefore counsel's or an appellant's duty to properly 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).

[6] 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

[7] 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)].

[8] Therefore, 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 [see **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), **Verma v State** [2021] FJCA 17; AAU166.2016 (14 January 2021) and **Narayan v State** [2021] FJCA 143; AAU39.2021 (10 September 2021) and **Wang v State** [2021] FJCA 146; AAU47.2021 (17 September 2021)].

[9] The appellant cannot seek a rehearing of the appeal heard before the High Court in the Court of Appeal. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the Court of Appeal to rectify any error of law or clarify any ambiguity in the law and not to deal with any errors of fact or of mixed fact and law which is the function of the High Court. That is the intention of the legislature and the court must give effect to that legislative intention.

[10] Some examples of actual questions of law could be found in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013), **Morgan v Lal** [2018] FJCA 181; ABU132.2017 (23 October 2018), **Ledua v State** [2018] FJCA 96; AAU0071.2015 (25 June 2018) and **Turaga v State** [2016] FJCA 87; AAU002.2014 (15 July 2016).

Is there a question of law only under the first ground of appeal?

[11] The matter raised by the appellant is a question of fact or mixed fact and law. In any event, this is not a matter the appellant had raised in the HC. His appeal ground

relevant to his identification in the HC was that the Magistrate erred in holding that the complainant had properly identified him without taking into consideration the fact that the witness had previously not known him and the dock identification was not conclusive or accurate.

[12] The High Court judge had addressed both concerns fully at paragraphs 11- 19 of the judgment. It is clear from evidence that the complainant had ample time and opportunity to identify the appellant on the day in question and once again identified him in court as the defendant or Versa, the police officer who had slapped and punched him and used the dog leash to hit him. The fact that there is no specific reference to the dock identification is immaterial. He was undoubtedly in the dock when identified by the witness. The challenge in the High Court was not that there was no dock identification but the dock identification was not conclusive and accurate. The defence was not one of mistaken identity but a denial of the assault. There was no serious challenge to the fact that the appellant was one of the police officers who arrested the appellant.

[13] Thus, there is no question of law alone under this ground of appeal.

Is there a question of law only under the second ground of appeal?

[14] This too relates to another aspect of the first ground of appeal on identification. The fact that there were two police officers who assaulted the appellant did not in any way affect the complainant's identification of the appellant as one of them. He had clearly come out with what each one had done.

[15] In any event this is a trial issue and at least should have been canvassed in the first appeal before the High Court. Jurisdiction under Section 22 of the Court of Appeal cannot be invoked to agitate a matter of fact or fact and law either not taken-up/argued or re-agitate points taken-up/argued without success in the Magistrates court and in the High Court unless it is a pure question of law.

[16] Thus, there no question of law alone that has been urged by the appellant. Therefore, the appeal should be dismissed in terms of section 35(2) of the Court of Appeal Act.

Order

1. Appeal (bearing No. AAU 161 of 2020) is dismissed in terms of section 35(2) of the Court of Appeal Act.

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