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

CRIMINAL APPEAL NO. AAU 0088 of 2019
[In the High Court at Lautoka Case No. HAA 03 of 2019]
[MC Nadi Case No.880 of 2012]

BETWEEN	:	**PAMELA AKINGI ANGIRA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Ruling	:	**14 June 2023**

RULING

[1] The appellant had been charged in the Magistrates' court at Nadi with one count of importing 2411.3 grams of amphetamine (it is in fact Methamphetamine), an illicit drug on 24 August 2012 at Nadi International Airport at Nadi in the Western Division contrary to section 4 of the Illicit Drugs Control Act 2004 and another count of possession of 2411.3 grams of amphetamine, an illicit drug on 30 August 2012 at Nadi International Airport at Nadi in the Western Division contrary to section 5 (a) and section 9 of the Illicit Drugs Control Act 2004.

[2] Following the trial where the prosecution had led the evidence of 26 witnesses and the appellant had testified on her behalf, the learned second Magistrate had convicted the appellant of both charges and sentenced her on 24 December to 10 years imprisonment with a non-parole period of 09 years. The appellant had appealed

against both conviction and sentence to the High Court on the following grounds of appeal:

1. *That the second Learned Magistrate erred in law and in fact by failing to exercise judicial discretion to consider declaring the trial de novo and start the trial afresh due to the First Learned Magistrate hearing in part the Prosecution witnesses PW1 to PW18 in order for the Second Learned Magistrate to be able to correctly decide on the demeanor and credibility of the above witnesses in the interest of justice and in fairness to the appellant.*

2. *That the Second Learned Magistrate erred in law and in fact when he proceeded to hear the Prosecution witnesses PW19-PW28 giving evidence and in doing so was not able to correctly decide on the demeanor and credibility of the prior witnesses in the interest of justice and in fairness to the appellant.*

3. *That the Second Learned Magistrate erred in law and in fact when he failed to inform the appellant her right to re-summon or rehear previous Prosecution witnesses before the First Learned Magistrate pursuant to Section 139 of the Criminal Procedure Decree 2009.*

4. *That there was a substantial miscarriage of justice when the appellant was not accorded the ultimate objective, the right to a fair trial.*

[3] The appellant's appeal to the High Court had been dismissed on 06 June 2019 whereupon she had filed this second tier appeal in the Court of Appeal against the High Court judgment. Her appeal filed in June 2019 first came up before this court in July 2020 and since then it was mentioned about 12 times in order to facilitate legal assistance to the appellant and failing which to allow time for her to file amended grounds of appeal and submissions in person which the appellant failed to do. In the end this court considered her initial grounds of appeal and written submissions of the respondent along with the judgment of the second Magistrate, sentencing order and the High Court judgment in preparing this ruling. The reasons for the ensuing delay are beyond this court.

<u>Scope under section 22 of the Court of Appeal Act</u>

[4] The appellant's appeal to this court is against the High Court judgment delivered on 06 June 2019 in terms of section 22 of the Court of Appeal Act a second tier appeal.

In a second tier appeal, a conviction could be canvassed on a ground of appeal involving a question of law only [also see **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)]. 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].

[5] Though, leave to appeal is not required under section 22, a single judge could still exercise jurisdiction under section 35(2) in order to determine whether the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal [vide **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012) and **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)]. In doing so, a single judge is 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 [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014)]. It is therefore a counsel's or an appellant's duty to properly identify a discrete question (or questions) of law in prosecuting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005).

[6] What is important is not the label but the substance of the appeal point. This exercise is 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 **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020) and **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014)].

[7] The phrase 'a question of law alone' is one of pure law to the satisfaction of the court, as opposed to one of law unaccompanied by any other ground of appeal [vide **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)].

[8] In a second tier appeal under section 22 of the Court of Appeal an appellant cannot seek to re-open and re-argue facts or mixed fact and law of the case or re-agitate findings of pure facts or mixed fact and law. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the court 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 this court must give effect to that legislative intention.

[9] The grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows:

Conviction

1. *That the judge erred in law and in fact when the failed to consider that there was substantial miscarriage of justice when the appellant was not accorded the intimate objective, the right to a fair trial.*

2. *That the Judge erred in law and in fact when he failed to consider that the second learned magistrate failed to inform the appellant her right to re-summon or re-hear previous Prosecution witnesses before the first learned magistrate pursuant to section 139 of the Criminal Procedure Decree 2009.*

Sentence

3. *That the judge did not consider that the sentence delivered by the learned magistrate was:*

   [a] Acted upon a wrong principle.
   [b] Allowed extraneous or irrelevant matter to guide or affect him.
   [c] Mistook the facts.
   [d] Did not take into account some relevant consideration.

01st and 02nd grounds of appeal

[10] The first ground of appeal is the same as the 04th ground of appeal raised in the High Court and the 02nd ground of appeal is similar to the 03rd ground of appeal urged in the High Court. They are inextricably interwoven.

[11] The gist of the compliant is that the learned Magistrate before whom the trial was concluded (LM2) had failed to exercise his discretion to start the trial *de novo* as the

evidence of PW1-PW18 had been led before the earlier Magistrate (LM1). The appellant also alleges that by continuing with the trial without informing the appellant that she had a right to summon the previous prosecution witnesses in terms of section 139 of the Criminal Procedure Act, 2009, from where LM1 had stopped and taking the evidence of PW19-PW26 till the conclusion, LM2 had denied her a right to a fair trial causing a substantial miscarriage of justice.

[12] Section 139 of the Criminal Procedure Act, 2009 is as follows:

> *139. — (1) Subject to sub-sections (1) and (2), whenever any magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction in the case and is succeeded (whether by virtue of an order of transfer under the provisions of this Decree or otherwise), by another magistrate, the second magistrate **may** act on the evidence recorded by his or her predecessor, or partly recorded by the predecessor and partly by second magistrate, or the second magistrate **may** re-summon the witnesses and recommence the proceeding or trial.*
>
> *(2) In any such trial the accused person **may**, when the second magistrate commences the proceedings, demand that the witnesses or any of them be re-summoned and reheard and **shall** be informed of such right by the second magistrate when he or she commences the proceedings.*
>
> *(3) The High Court may, on appeal, set aside any conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was had, if it is of opinion that the accused has been materially prejudiced, and may order a new trial.*

[13] Thus, it is clear that an accused has an unequivocal and absolute right to be informed of his or her right to demand re-summoning of witnesses. Does the accused also have such an absolute right to have the witnesses re-summoned? There can be two answers to this question. The first is that when the accused makes such a demand, the second magistrate has a discretion to accede to that demand or reject it, fully or partially. If the second magistrate accedes to the accused's demand, he must re-summon the witnesses but if he rejects the demand he can act on the evidence already recorded. Second answer is that when the accused demands that witnesses be re-summoned, the second magistrate is always obliged or has no option but to re-summon the witnesses.

There does not appear to be an authoritative pronouncement by an appellate court on this matter. If so, this aspect needs clarity by way of a full court decision by this court or the Supreme Court.

[14] On the other hand, upon being informed of his right, if the accused does not demand that witnesses be re-summoned, then the second magistrate using his discretion can either re-summon the witnesses on his own or act on the evidence recorded by his or her predecessor/s.

[15] Second Magistrate's judgment in this case only states that counsel for the prosecution and defense agreed to adopt the evidence led before the previous magistrate as if it was done before the second Magistrate. There is no mention whether the second Magistrate informed the appellant of her right to demand re-summoning of witnesses.

[16] It is one thing for the counsel for both parties to agree to adopt the proceedings (which is not is dispute) but it is quite a different thing for the appellant to be informed of her statutory right to demand re-summoning of witnesses. The High Court judge had stated that *'it is apparent that the provisions of section 139 of the Criminal Procedure Act have ben complied of before, even though the journal entries do not expressly record so'.* The learned judge had then concluded that *'The accused had neither objected to the continuation of trial nor demanded a trial de novo. Accordingly, it is clear that the accused being given the due opportunity did not demand a trial de novo.'.* These reasons are at best based on arguments and at worst speculative. However, there is no unequivocal evidence on record that the appellant had been informed of her right to demand that the witnesses or any of them be re-summoned and reheard.

[17] Therefore, what interpretation out of the two possible constructions highlighted at paragraph 13 above should be placed on section 139 of the Criminal Procedure Act is a pure question of law and whether the second Magistrates had in fact complied with section 139 of the Criminal Procedure Act is, of course, a mixed question of law and fact but it concerns the appellant's right to a fair trial absence of which may tantamount to a remediable irregularity or a miscarriage of justice. The full court may

consider both these aspects at the hearing. Whether the proviso to section 23(1) of the Court of Appeal could come into play is another matter for the full court to determine. Re-trial is another option for the Full Court.

03rd ground of appeal

[18] The aggregate sentence of 10 years for both counts is neither unlawful or nor passed in consequence of an error of law to be justiciable under section 22(1) (A) of the Court of Appeal Act.

[19] However, in my view the Magistrate could have even imposed consecutive sentences in terms of section 7(2) of the Criminal Procedure Act on the two charges and the total length of the incarceration could have gone up to 14 years.

Orders of the Court:

1. Appeal against conviction may proceed to the full court on the question of law identified.
2. Appeal against sentence 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

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent