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

CRIMINAL APPEAL NO.AAU 46 of 2021
[In the High Court at Suva Case No. HAC 063 of 2017]

BETWEEN	:	**TIMAIMA SAGALE BUADROMO**
		Appellant
AND	:	**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION (FICAC)**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. R. Singh for the Appellant**
	:	**Mr. S. Savumiramira for the Appellant**
Date of Hearing	:	**26 January 2023**
Date of Ruling	:	**31 January 2023**

RULING

[1] The appellant had been charged at the Magistrates court with three counts of Abuse of Office contrary to section 111 of the Penal Code (one charge) and 139 of the Crimes Act, 2009 (two charges) and one alternate count of extortion contrary to Section 117 of the Penal Code and one alternate count of obtaining financial advantage contrary to section 326 (1) of the Crimes Decree No. 44 of 2009 covering the period from 2007 to 2014. The charges read as follows.

'COUNT 1

Statement of offence

ABUSE OF OFFICE*: Contrary to Section 111 of the Penal Code*

Particulars of offence

TIMAIMA SAGALE BUADROMO *between the 14th December 2007 to 25th January 2010, at Suva in the Central Division whilst being employed in the Public Service as the Director of the Fiji Museum, in abuse of the authority of her office did arbitrary acts for gain namely approving and accepting allowances in the sum of $560 for the performance of her duties as the Director of the Fiji Museum which were acts prejudicial to the right of the Fiji Museum and the Government of Fiji.*

ALTERNATIVE CHARGE TO COUNT 1

Statement of offence

EXTORTION*: Contrary to Section 117 of the Penal Code*

Particulars of offence (b)

TIMAIMA SAGALE BUADROMO *between the period of 14th December 2007 to 25th January 2010, at Suva in the Central Division whilst being employed in the Public Service as the Director of the Fiji Museum, accepted rewards in the sum of $560.00 from the Fiji Museum for the performance of her duties as the Director of the Fiji Museum, beyond her proper pay and emoluments.*

COUNT 2

Statement of offence (a)

ABUSE OF OFFICE*: Contrary to Section 39 of the Crimes Decree No, 44 of 2009*

Particulars of offence (b)

TIMAIMA SAGALE BUADROMO *between the 22nd November 2010 to 21st June 2014, at Suva in the Central Division whilst being employed in the Public Service as the Director of the Fiji Museum, in abuse of the authority of her office did arbitrary acts for gain namely approving and accepting allowances in the sum of $1120 for the performance of her duties as the Director of the Fiji Museum which were acts prejudicial to the right of the Fiji Museum and the Government of Fiji.*

ALTERNATIVE CHARGE TO COUNT 2

Statement of offence (A)

OBTAINING FINANCIAL ADVANTAGE*: Contrary to Section 326 (1) of the Crimes Decree No. 44 of 2009*

Particulars of offence (B)

TIMAIMA SAGALE BUADROMO *between the 22nd November 2010 to 21st June 2014, at Suva in the Central Division engaged in a conduct namely claiming and approving allowances for herself and as a result of that conduct obtained a financial advantage in the sum of $1120 knowing that she is not eligible to receive the said financial advantage.*

COUNT 3

Statement of offence (a)

ABUSE OF OFFICE*: Contrary to Section 139 OF THE Crimes Decree No. 44 of 2009.*

Particulars of offence (b)

TIMAIMA SAGALE BUADROMO *between the 4th November 2011 to 19th May 2014, at Suva in the Central Division whilst being employed in the Public Service as the Director of the Fiji Museum, in abuse of the authority of her office did arbitrary acts namely servicing and repairing the Fiji Museum vehicle registration DV 828 in the sum of $15, 045.96 at the Carpenters Motors in Nadi and Lautoka without calling for the quotation and in breach of the Fiji Museum Board of Trustees Financial Instructions which were acts prejudicial to the right of the Fiji Museum.'*

[2] The charges had been filed on 11 February 2015 and the trial had commenced on 12 September 2016 and after 10 trial dates it had been concluded on 16 August 2018. At the end of the trial the Magistrate acquitted the appellant of all charges.

[3] The respondent preferred a timely appeal on 07 June 2019 against the acquittal to the High Court. Upon hearing the appeal, the learned High Court judge had determined that all proceedings before the Magistrate were a nullity and ordered a new trial.

[4] The appellant then had filed an appeal to this court under section 22 of the Court of Appeal Act against the decision of the High Court judge on the following grounds of appeal.

*'**Ground 1 – Appeal Records***

(i) THAT the Learned Judge erred in law by failing to consider the evidence provided on page 12 of the Appeal Records that the election

was put to the appellant by the Learned Magistrate on 11 February 2015.

(ii) *THAT the Learned Judge erred in law by failing to consider that the evidence provided in the Appeal Records is sufficient proof that the appellant had knowledge that such a right existed.*

(iii) *THAT the Learned Judge erred in law in failing to consider that the procedural defect was not fatal to warrant a nullity of the entire proceedings in the Magistrates' Court.*

(iv) *THAT the Learned Judge erred in law by failing to consider that in light of the evidence, the nature of the defect itself was not of such a kind that the court would have no alternative but to nullify the proceedings in the Magistrates' Court.*

Ground 2 – Acquiescence

(v) *THAT alternatively, the Learned Judge erred in law by failing to consider that the appellant being fully aware of her right to elect acquiesced to stand trial in the Magistrates' Court.*

(vi) *THAT the Learned Judge erred in law by failing to consider that the trial in the Magistrates' Court took 3 years from 2015 – 2018 during which no objection was raised by either party nor the Court about the election not being put to the appellant.*

Ground 3 – Court's duty

(vii) *THAT alternatively, that the Learned Judge erred in law by failing to consider that it is the Magistrates' Court that has failed to ensure that election was expressly exercised.*

(viii) *THAT the Learned Judge erred in law in that in light of the appellant's acquittal she should not have had to suffer the consequences of the court's failure to require express election.*

(ix) *THAT the Learned Judge erred in law by failing to consider that any procedural defects ought to be in favour of the accused person.*

Ground 4 – No prejudice

(x) *THAT the Learned Judge erred in law by failing to consider that the appellant suffered no prejudice by not expressly exercising her right to election.*

(xi) *THAT the Learned Judge erred in law by failing to consider that the appellant was acquitted in the Magistrates' Court and that no miscarriage of justice was suffered.*

(xii) *THAT the Learned Judge erred in law by failing to consider that given the fact that the Respondent brought these proceedings upon the*

appellant that they ought to have raised the lack of expressed election issue at the commencement of the trial in the Magistrates' Court.

Ground 5 - Jurisdiction

(xiii) THAT the Learned Judge erred in law that the procedural defect was not fatal as the appellant acquiesced to stand trial in the Magistrate's Court and that the Magistrates' Court had jurisdiction to hear indictable offences tried summarily.

Ground 6 – Prejudice due to lengthy proceedings

(xiv) THAT the Learned Judge erred in law by failing to consider that the appellant had been subjected to lengthy proceedings in the Magistrate's Court and the High Court for over 6 years from 29 October 2014 – 23 March 2021, 15 months alone were spent trying to regularise the Appeal Records and therefore a fresh trial was unfair and/ or unjust.'

[5] In a second-tier appeal under section 22 of the Court of Appeal Act, a decision of the High Court 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)].

[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].

[7] However, designation of a ground 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 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).

[8] 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)]. Some examples of such questions of law could be found in **Naisua v State** (supra), **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).

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

[9] 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)].

[10] Therefore, if at least one of an appeal points 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) followed for example in **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), **Wang v State** [2021] FJCA 146; AAU47.2021 (17 September 2021), **Sukanaivalu v Fiji Independent Commission Against Corruption (FICAC)** [2021] FJCA 171; AAU0092.2020 (22 October 2021)] and **Eileen Anderson v The State** AAU 031 of 2020 (29 December 2022).

[11] Under section 22 of the Court of Appeal the appellants cannot seek to re-open and re-argue the facts of the case in a second tire 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.

[12] Though neither party, particularly the respondent, had raised any issue before the High Court with regard to the jurisdiction of the Magistrate to hear and determine the case against the appellant, the learned High Court judge on his own had raised the issue of 'election' and stated in the judgment as follows:

> *'3. ……The learned Magistrate had recorded that "Accused to advise the court on next mention date of her election with regards to count no 2 and 3 abuse of office section 139 Criminal Procedure Decree 2009"and adjourned the matter to 16 March 2015. On that date the Prosecution filed amended charges. But there is no mention in the record whether the election was given thereafter.*
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> *7……..At the hearing this Court enquired from the parties whether the election was given at the Magistrate's Court, as the 2nd and 3rd counts are indictable offences triable summarily. Since both parties could not confirm the same, the hearing was vacated. The case was adjourned to prepare transcripts of the audio recordings of the proceedings in the Magistrate's Court to verify whether the Respondent had exercised election, though it may not have been recorded in the case record. On 28 January 2021 it was informed by the registry that there are no audio records available pertaining to that period. Based on the copy records of the Magistrate's Court the parties confirmed that there is no mention of election.*
>
> *8. This Court subsequently requested both parties to file supplementary submissions on the issue of election.*
>
> *17. In this present case the parties do not dispute that the court record does not signify that the Respondent elected the Magistrate's Court, apart from the record by the learned Magistrate; "Accused to advice court on next mention date of her election with regards to count No 2 & 3 abuse of office section 139 Criminal Procedure Decree." Further it appears that after the filing of the amended charge there has not been any mention about election in respect of the second and third counts.'*

[13] Thus, the learned High Court judge had proceeded to decide the appeal not on merits as to whether the acquittal of the appellant was justified on the evidence before the Magistrate as the respondent had urged the High Court to do in the first place but on the basis that Abuse of Office being an offence which was indictable but summarily

triable, the appellant had not been given the right of election to be tried in the Magistrates court and therefore it lacked jurisdiction hear and determine the matter resulting in the entirety of proceedings becoming a nullity leading to ordering a new trial.

[14] Both counsel seem to agree that all grounds of appeal could be abridged to two main issues for consideration at this stage. They are:

1. *Whether the learned judge failed to consider that the appellant being fully aware of her right to elect, acquiesced to stand trial in the Magistrates court?*

2. *Whether the learned judge failed to consider the correct legal principles including prejudice to the appellant when ordering a fresh trial?*

[15] It is common ground again between both counsel that the appellant had been given the right to elect. What is not recorded is whether she made an election and if so what her election was.

[16] Section 4 of the Criminal Procedure Act, 2009 *inter alia* states as follows:

'4.—(1) Subject to the other provisions of this Decree—

(a) any indictable offence under the Crimes Decree 2009 shall be tried by the High Court;

(b) any indictable offence triable summarily under the Crimes Decree 2009 shall be tried by the High Court or a Magistrates Court, at the election of the accused person; and

(c) any summary offence shall be tried by a Magistrates Court.'

[17] Thus, in the case of any indictable offence triable summarily under the Crimes Act, 2009, both the High Court and the Magistrates court have concurrent and patent jurisdiction to try an accused. This includes the offence of abuse of office under section 139 of the Crimes Act, 2009 which specifically states that it is an indictable offence which is triable summarily. In terms of section 4(1)(b) of the Criminal Procedure Act a person accused of any indictable offence triable summarily (such as

abuse of office) gets the right to decide on the forum *i.e.* whether he or she wishes to be tried in the High Court or the Magistrates court. If and when the accused makes an election to be tried in one of the courts, the other court no longer has forum jurisdiction to try the accused. What happens if an accused does not make any election when given the right to elect? What happens if he changes the election subsequently? The latter, of course does not arise in this appeal but seems to have been dealt with in a decision cited by the High Court judge at paragraph 19 of the judgment.

[18] It is trite law that when faced with any indictable offence triable summarily under the Crimes Act, 2009, an accused must be given the right to elect the forum in which he wishes to be tried (vide **Batikalou v State** [2015] FJCA 2; AAU31.2011 (2 January 2015). The proceedings before Magistrate Courts have been declared a nullity due to the failure of the Magistrate to provide the option available under section 4 (1) (b) of the Criminal Procedure Decree 2009 [see for example **Aca Koroi v The State** [2013] FJHC 306; HAM 186 of 2012S (21 June 2013) and **The State v Ilaitia Ravuwai** (2014 FJHC 487; HAC 118 of 2014S; 3 July 2014)]. There are other similar examples cited by the High Court judge at paragraph 18, 37, 41, 42, 43 and 50 of the judgment.

[19] In **Batikalou v State** (supra) the appellant had pleaded guilty to robbery, an indictable offence (which is triable summarily) and sentenced in the High Court but an inquiry had not been made with regard to the wish of the appellant whether he would prefer to be tried in the Magistrate Court or the High Court. The appellant's counsel had submitted that the appellant would have pleaded guilty in the Magistrate Court too and would have commenced his term much earlier. If the appellant pleaded before the learned Magistrate he may have received a lesser sentence. The counsel had submitted that the appellant was greatly prejudiced due to being deprived of the option in the Magistrate Court and that the failure of the statutory obligation would make the entire proceedings a nullity. The counsel for the state had argued that the court should take a wider assessment of the interests of justice to determine whether there is any prejudice to the appellant due to the non-compliance of the statutory provision, instead of automatically declaring the proceedings a nullity, clearly illustrating the

relegated position that procedural law takes, procedural errors being bypassed or even overlooked if no prejudice is caused to either party.

[20] The Court of Appeal in ***Batikalou*** adopted the strict view that in the realm of criminal law, procedural law holds as important a place as substantive law as it infringes upon the life and liberty of the person and cited Lord Bingham in the House of Lords in **R v Clarke** [2008] EWCA Civ 303; [2008] 2 All ER 665 that technicality is always distasteful when it appears to contradict the merits of a case, but the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen to trial for serious crime a certain degree of formality is not out of place and declared the entire proceedings null and void. Accordingly, the Court allowed the appeal, quashed the conviction and set aside the sentence and refused to order re-trial as well because:

> *'……..The appellant was arrested on 12 June 2010. He has been in confinement ever since that is more than 4 years and 3 months. Considering the facts of this case, the accused could be found guilty of committing simple robbery. Although taking into account that the appellant has been declared a habitual offender, I am of the view that there is no justification in ordering a re-trial.'*

[21] However, one crucial distinguishing feature in ***Batikalou*** as opposed to the appellant's case is that unlike in ***Batikalou*** the appellant had been given the right to elect. What is not recorded is whether she made any election and if so, what the election was.

[22] However, we cannot and do not have to find an answer to these questions from the record in this appeal, for section 35(2)(ii) of the Criminal Procedure Act, 2009 seems to provide a way out of the problem. Section 35 is as follows:

> *'35. — (1) The High Court may inquire into and try any offence subject to its jurisdiction at any place where it holds sittings.*
>
> *(2) All criminal cases to be heard by the High Court shall be —*
>
> *(a) instituted before a Magistrates Court in accordance with this Decree; and*

(b) transferred to the High Court in accordance with this Decree if the offence is –

(i) an indictable offence; or

(ii) an indictable offence triable summarily, and the accused has indicated to the Magistrates Court that he or she wishes to be tried in the High Court.'

[23] Thus, any criminal case must be instituted in the Magistrates court and an indictable offence triable summarily must be transferred to the High Court ***only if*** the accused indicates to the Magistrates Court when given the election that he or she wishes to be tried in the High Court. Therefore, when section 35 Criminal Procedure Act, 2009 is read with section 4(1)(b) of the Criminal Procedure Act, 2009 the only logical conclusion one can draw is that if an accused does not make an election when given the right to do so in the Magistrates court in respect of an indictable offence triable summarily, he or she must be tried in the Magistrates court, for in that event the case cannot be transferred to the High Court and the High Court would not have the forum jurisdiction to hear the case. Otherwise, an accused can completely frustrate the criminal proceedings against him when charged with an indictable offence triable summarily by simply remaining silent when asked to elect the forum.

[24] Though, there is no specific provision in the Criminal Procedure Act, 2009 it is clear that if an accused, when given the right of election in respect of an indictable offence triable summarily, does not or refuse to make an election, the Magistrates court is vested with forum jurisdiction to hear the case. The case should be transferred to the High Court ***only if*** the accused indicates to the Magistrates Court when given the right to elect that he or she wishes to be tried in the High Court and not otherwise.

[25] In fact the Court of Appeal has stated in ***Batikalou*** as much in the following terms:

*'[13] Indictable offences are tried in the High Court. However, indictable offences triable summarily, shall be tried by the High Court or Magistrate Court at the election of the accused person (section 4 (1) (b)). Such cases should be transferred to the High Court **only if** the accused has indicated to the Magistrate Court that he or she wishes to be tried in the High Court*

(section 35 (2) (b) (II) of the Criminal Procedure Decree 2009). (emphasis mine)

[26] On the other hand, the conduct of all parties namely the appellant, his counsel, and counsel for the respondent and the Magistrate unmistakably suggest that this has been the case in the trial against the appellant. The fact that the respondent had not even taken up lack of jurisdiction in the Magistrates court in appeal cannot imply anything other than the fact that all parties have proceeded on the basis that the appellant had not elected to be tried in the High Court and therefore the Magistrate proceeded to hear the case.

[27] Therefore, in my view the High Court judge had erred in holding that the Magistrates court was not possessed of jurisdiction to hear and determine the appellant's case *'as a result of the failure to put election to the appellant to choose the court she wished to be tried'*. There was and is no dispute between the parties that the Magistrate had indeed given the right of election to the appellant. What is not clear is whether she made any election and if so what election she made. The High Court judge had not considered section section 35 Criminal Procedure Act, 2009 read with section 4(1)(b) of the Criminal Procedure Act, 2009 to deal with this situation. The judge had based his decision on judicial precedents dealing with situations where election itself had not been given when it should have been given. The counsel too had not brought these provision to the notice of the High Court judge. Therefore, the High Court should have considered the merits of the appeal by the respondent and made a determination in the appeal without quashing the acquittal on the alleged lack of jurisdiction not urged by either party.

[28] It is equally puzzling as to why the High Court judge decided to order a new trial before a Resident Magistrate having held that there had been a failure to put election to the appellant to choose the court she wished to be tried. If at all, the order should have been to direct the Magistrate to give the election to the appellant and record her choice of forum and act accordingly to hear the case or transfer the case to the High Court as the case may be.

[29] It is clear, that the decision of the High Court judge to send the case back to the Magistrates court for a new trial was based on the judge's decision that the appellant had not been given the right to elect the forum and therefore the proceedings in the Magistrates court was a nullity. Although, the High Court judge had considered several authorities with regard to the new trial, he had not been mindful of the fact that he had not ruled on the merits of the appeal when the appellant had secured an acquittal after a fully-fledged trial. The respondent too had been prejudiced to the extent that it had not been able to argue on the merits of the matter as to why the acquittal was not justified and should be overturned. Thus, for both parties whether ordering a new trial is in the interest of justice is doubtful.

[30] On the other hand the Supreme Court recently made some pertinent observations on ordering a retrial in **Abourizk v State** [2022] FJSC 29; CAV0012.2019 (25 August 2022) and **Abourizk v State** [2022] FJSC 46; CAV 0013 of 2019 (9 November 2022). In my view, in the above circumstances the full court may consider directing the High Court to consider the respondent's appeal on merits and deliver a judgment in which event the debate on the correctness of the order for a new trial made by the High Court may assume less significance or become even totally unnecessary, for what order the High Court would make on the appeal is a matter for the High Court judge to decide.

Order of the Court:

1. Notice of appeal may proceed to the Full Court on the two question identified at paragraph 14 of this ruling.

COURT OF APPEAL FIJI

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