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

CRIMINAL APPEAL NO.AAU 032 of 2021
[In the High Court at Suva Case No. HAA 22 of 2020]
[In the Magistrates court at Suva Criminal Case CF – 2098/2016]

BETWEEN : **ROHIT RAM LATCHAN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. V. Singh and Mr. E. Kumar for the Appellant**
: **Ms. M. Konrote for the Respondent**

Date of Hearing : **16 January 2023**

Date of Ruling : **18 January 2023**

RULING

[1] The appellant had been charged in the Magistrates Court at Suva on three counts of **UNDISCHARGED BANKRUPT ACTING AS A DIRECTOR** contrary to section 189 (1) of the Companies Act Cap 247. The details of the offence and particulars are as follows:

FIRST COUNT
Statement of Offence (a)

UNDISCHARGED BANKRUPT ACTING AS A DIRECTOR*: Contrary to Section 189 (1) of the Companies Act Cap 247.*

Particulars of Offence (b)

ROHIT RAM LATCHAN, *on the 28th day of October 2014, at Suva, in the Central Division, being declared a bankrupt by the Magistrate's Court in Suva and not having received his discharge, acted as a Director of, or directly or indirectly took part in the management of* ***LATCHAN HOLDINGS LIMITED,*** *without the leave of the Court by signing as the Director of* ***LATCHAN HOLDINGS LIMITED*** *on application for Caveat No. 804805.*

SECOND COUNT
Statement of Offence (a)

UNDISCHARGED BANKRUPT ACTING AS A DIRECTOR*: Contrary to Section 189 (1) of the Companies Act Cap 247.*

Particulars of Offence (b)

ROHIT RAM LATCHAN, *on the 28th day of October 2014, at Suva, in the Central Division, being declared a bankrupt by the Magistrate's Court in Suva and not having received his discharge, acted as a Director of, or directly or indirectly took part in the management of* ***LATCHAN HOLDINGS LIMITED,*** *without the leave of the Court by signing as the Director of* ***LATCHAN HOLDINGS LIMITED*** *on application for Caveat No. 804806.*

THIRD COUNT
Statement of Offence (a)

UNDISCHARGED BANKRUPT ACTING AS A DIRECTOR*: Contrary to Section 189 (1) of the Companies Act Cap 247.*

Particulars of Offence (b)

ROHIT RAM LATCHAN, *between the 4th January 2014 to 30th December 2015, at Suva, in the Central Division, being declared a bankrupt by the Magistrate's Court in Suva and not having received his discharge, acted as a Director of, or directly or indirectly took part in the management of* ***ESTOL HOLDINGS LIMITED*** *without the leave of the Court, by acting as the Director of* ***ESTOL HOLDINGS LIMITED****.*

[2] At the end of the trial, the learned Magistrate had acquitted the appellant of the third count but convicted him of the first and second counts and sentenced the appellant on 03 March 2020 by imposing an aggregate fine of $500 with a default term of 50 days imprisonment.

[3] The appellant had appealed against conviction and sentence to the High Court and the learned High Court judge had dismissed the appeal on 12 February 2021. The appellant had then appealed to the Court of Appeal in a timely manner.

[4] This is a second-tier appeal against conviction and sentence in terms of the Court of Appeal Act. 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 (1) 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).

[5] 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

[6] 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)].

[7] 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)].

[8] 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.

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

> ***Ground 1***
>
> *THAT the Learned Judge erred in law by failing to correctly consider and apply section 14(2)(n) of the Constitution of Fiji and section 626, 627 and 628 of the Companies Act 2015.*
>
> ***Ground 2***
>
> *THAT the Learned Judge erred in law in finding that the Learned Trial Magistrate had correctly considered the mens rea element of the intention in the part of the Appellant in relation to the offences.*
>
> ***Ground 3***
>
> *THAT the Learned Judge erred in law by failing to consider and correctly apply Chief Registrar v Kapadia [2016] FJILSC 8 and Fiji Independent Commission Against Corruption v Rabuka Criminal Appeal No: HAA 57 of 2018.*
>
> ***Ground 4***
>
> *THAT the Learned Judge erred in law by failing to correctly consider and apply section 15(1)(f) and section 16 of the Sentencing and Penalties Act and the principles laid down in the State v Bairatu [2012] FJHC 864 (date of judgment 13 February 2012).*
>
> ***Ground 5***
>
> *THAT the Learned Judge erred in law by failing to find that the Magistrate Court should have dismissed the charges against the Appellant pursuant to section 187*

of the Criminal Procedure Act, since he charges against the Appellant were dated 10th January 2019 but related to matters that arose in October 2014 after finding in paragraphs 51-53 of his ruling as follows:

> *[51] Section 133 (3) of the Companies Act of 2015 must be read together with section 132, which provides that any person who is disqualified from acting as an officer of a Company under the said Part commits an offence if that person does any of the acts as stated in the section.*
>
> *[52] I concede that neither section 132 nor section 133 (3) have a penalty provision which is in-built in the sections. However, the relevant penalty provision can be found in section 626 of the Companies Act 2015, which outlines the General Penalty provisions in terms of the Act. Section 626 reads as follows:*
>
> > ***626**. A person who –*
> >
> > *(a) does an act or thing that the person is forbidden to do by or under a provision of this Act;*
> > *(b) does not do an act or thing that the person is required or directed to do by or under a provision of this Act; or*
> > *(c) otherwise contravenes a provision of this Act, is guilty of an offence and –*
> >
> > *(i) is liable to pay a penalty not exceeding the maximum penalty prescribed for a contravention of that provision in accordance with this Act, unless a provision of this Act provides that the person is or is not guilty of an offence; or*
> > *(ii) if no maximum penalty is prescribed for a contravention of the provision in accordance with this Act, is liable to pay a penalty not exceeding $500, unless a provision of this Act provides that the person is not guilty of an offence.*
>
> *[53] Therefore, this Court cannot agree with this contention that there is no sentence provided for the acts stipulated under section 133 (3) of the Companies Act of 2015. The relevant sentencing provisions have been clearly enumerated in Section 626 of the Act.*

01st ground of appeal

[10] The appellant argues that the offence under section 189 of the Companies Act (Cap 247) with which he was charged did not exist at the time of sentencing and therefore no conviction should have been entered in view of section 14(2)(n) of the Constitution. He submits that section 189 had been repealed by the Companies Act 2015.

[11] In terms of section 14(2)(n) of the Constitution every person charged with an offence has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.

[12] Section 189 (1) is as follows:

> *'**189**.-(1) If any person who has been declared bankrupt or insolvent by a competent court in Fiji or elsewhere and has not received his discharge acts as director of, or directly or indirectly takes part in or is concerned in the management of, any company, except with the leave of the court, he shall be liable to imprisonment for a term not exceeding 2 years or to a fine not exceeding $1,000, or to both.'*

[13] Counsel for the appellant submits that the Companies Act 2015, which *inter alia* repealed Companies Act (Cap. 247) has promulgated a somewhat similar provision under section 133. Section 133 (3) states that *'A person is disqualified from acting as an Officer of a Company if the person is an undischarged bankrupt under the laws of Fiji or another country for so long as the person is an undischarged bankrupt under the laws of Fiji or another country.'*

[14] However, it is clear that apart from the general tenor of both sections, the elements of the prohibited acts under section 189 (1) and 133 (3) are different. An offence has to be identified by its elements. Therefore, they do not constitute one and the same offence. The most striking difference is that prior leave of court can exempt a person from criminal liability under section 189 (1) whereas under 133 (3) the liability is not exempted on such prior permission of court. Another significant difference is that

section 189(1) applies to a director or a person who directly or indirectly takes part in or is concerned in the management of any company whereas section 133(3) is applicable to any officer of a company as defined in the Act itself.

[15] Section 14(2)(n) of the Constitution is applicable only if the offence remains the same but the prescribed punishment for that offence (and not a similar or corresponding offence) has been changed between the time that offence was committed and the time of sentencing. In other words, section 14(2)(n) of the Constitution comes into operation when the Parliament changes the sentence to an existing offence with no change to the offence itself. Therefore, the Magistrate was right in concluding that section 14(2)(n) of the Constitution has no application to the appellant's case as the legislature did not change the sentence to section 189 (1) but repealed it altogether. Accordingly, those found guilty of the offence in section 189 (1) had to be necessarily punished according to the prescribed punishment under section 189(1) itself.

[16] Whether section 133(3) by itself constitutes an offence or whether it only describes instances where a person becomes disqualified from acting as an Officer of a Company, for it is section 132 that makes such a disqualified person doing any of the acts set out liable for an offence, is arguable but that debate is not necessary or relevant in this instance as the appellant was charged under section 189 (1) of the Companies Act (Cap.247).

[17] In my view, under the Companies Act 2015, a person should be charged under section 132 read with section 133 as the case may be. If anyone is looking for an offence with similarities to section 189 (1) of the Companies Act (Cap.247), he has to read section 132 along with section 133. On a plain reading of section 132, it becomes clear that it is not the same offence as section 189 (1) of the Companies Act (Cap.247) though they have similarities and dissimilarities.

[18] This is not a case where the legislature has simply changed the punishment prescribed under section 189 (1) of the Companies Act (Cap.247) between the time the offence was committed and the time of sentencing. It is a case of repeal of section 189 (1) of

the Companies Act (Cap.247) and indeed the whole of the old Companies Act and bringing in the new Companies Act.

[19] Therefore, the argument that since section 189(1) did not exist anymore on the statute at the time of sentencing, the appellant could not have been convicted is plainly wrong, for the repeal of Companies Act (Cap.247) by section 752(a) of the Companies Act 2015 with effect from 26 May 2015 has no retrospective effect. What is material is whether the impugned act was an offence at the time it was committed under the Companies Act (Cap.247).

[20] The High Court judge had felt that section 133(3) of the Companies Act 2015 corresponds to section 189 (1) of the Companies Act (Cap.247) and decided that in terms of section 14(2)(n) of the Constitution the appellant was entitled to the least severe punishment set down in section 626(c) (ii) of the Companies Act 2015 which is a penalty not exceeding $500. The Magistrate had imposed a fine of $500 on the appellant as permitted under section 189 (1) of the Companies Act (Cap.247). Though, the decision of the High Court judge was flawed with regard to the applicability of 14(2)(n) of the Constitution, the ultimate sentence imposed by the Magistrate was well within the prescribed punishment under section 189(1) of the Companies Act (Cap.247). Had the appellant been sentenced with full vigour of section 189(1) of the Companies Act (Cap.247) he would have been liable to a term of imprisonment not exceeding 2 years or a fine not exceeding $1,000, or both. Therefore the ultimate sentence was not unlawful; nor was it entered in consequence of an error of law.

02nd ground of appeal

[21] The High Court judge while conceding that the learned Magistrate has made no reference to the fault element under section 189(1) of the Companies Act (Cap.247), had stated that when analysing the entire body of evidence led on behalf of the prosecution it could be established that the appellant's conduct clearly depicted intention on his part. The appellant concedes that intention was the fault element for

an offence under 189(1) of the Companies Act (Cap.247) in terms of section 23(1) of the Crimes Act.

[22] Therefore, the High Court judge made no error in deciding that intention was the fault element and determining that intention had been made out as a finding of fact based on facts of the case. The Magistrate had also decided that the appellant's acts of signing the two caveats were deliberate meaning that they were not unintentional.

[23] The High Court judge was entitled to draw this conclusion based on facts and evidence before him under section 256 of the Criminal Procedure Act. This is not a question of law alone.

03rd ground of appeal

[24] The appellant's conviction was based on him having signed on the two caveats as a director of Latchan Holdings Limited. The appellant submits that he was not a director at the relevant time and it was a mistaken description. He argues that in view of **Chief Registrar v Kapadia** [2016] FJILSC 8 (21 September 2016) and **Fiji Independent Commission Against Corruption v Rabuka** [2018] FJHC 1071; HAA57.2018 (12 November 2018) the appellant's own description as director was insufficient to prove the charge levelled against him in the absence of any other evidence.

[25] The issue in ***Kapadia*** was as to whether there is an onus upon members of the profession into 'making full and proper enquiries into the status' of a declarant prior to the execution of a caveat document and whether such a failure fulfils the basis of a charge of 'unsatisfactory professional conduct'? The counsel for Mr. Kapadia had conceded and not disputed that because Mr Latchan was a bankrupt he could not act as a company director but argued that section 3 of the Statutory Declarations Act does not require the occupation of the declarant to be mentioned and though the statement on the caveat that Rohit Latchan was a 'company director' was incorrect, that error was therefore irrelevant. It is in the above context that the Commissioner had remarked in his judgment that there is no law that says a bankrupt cannot make a

statutory declaration. This decision has no relevance to the facts of the appellant's case where the charge was under 189(1) of the Companies Act (Cap.247).

[26] **Fiji Independent Commission Against Corruption v Rabuka** [2018] FJHC 1071; HAA57.2018 (12 November 2018) was a case where Mr. Rabuka (respondent) was acquitted of a single count of Providing False Declaration of assets, income and liabilities, contrary to sections 24(1A) and 24(5) of the Political Parties (Registration, Conduct, Funding, and Disclosures) Act [No. 4 of 2013] and the appellant (FICAC) appealed against the acquittal. The High Court held in appeal *inter alia* that apart from Mr. Rabuka's own description that he was the party leader there was no other evidence to prove that fact.

> *'[64] But where was the evidence **to prove** that Mr. **Rabuka** had been elected or appointed by the members as "party leader." He had so described himself in the declaration form when lodging his financial details. This was a preliminary fact to be formally proved. If the prosecution could not prove the matter, he would have no reason to comply with the requirements of section 24(1A). His own description does not prove the matter for the prosecution. They must produce confirmatory evidence to attain proof beyond reasonable doubt. As will be seen further on, this evidence would not have been difficult to obtain – if it existed.'*

[27] In the appellant's case, his counsel had cited ***Rabuka*** (which was considered by the Magistrate) not to support the argument that he was not a director but to show that the documentary evidence did not prove that he was an undischarged bankrupt. His position at the trial had been that he signed the two caveats not as a director but on authority from the directors to sign them. However, the Magistrate had dealt with the issue whether the appellant was a director at paragraphs 19, 29, 33, 34, 35 and 36 and concluded that he had signed those caveats as a director of Latchan Holdings Limited.

[28] The High Court judge too had concluded that:

> ***'[23]*** *The Learned Magistrate has accepted that the Appellant had signed and lodged the two Caveats bearing numbers 804805 and 804806, which were tendered to Court as Prosecution Exhibits PE1 and PE2, as a Director of Latchan Holdings Limited (page 41 of the Magistrate's Court Record). I*

find that there is no error of fact or law in the Learned Magistrate coming to such a finding.'

[29] At the sentencing hearing the appellant's counsel had submitted that the appellant's signing the caveats as a director of the company was not deliberate as he was of the view that he was no longer bankrupt. On the other hand the evidence reveals that even if (for the sake of argument) the appellant was not a director, he was directly or indirectly taking part in the management of the company as alleged in the charges. In any event, this ground of appeal essentially deals with an issue of mixed fact and law and not law alone.

04th ground of appeal

[30] The appellant complains that learned High Court Judge erred in law by failing to correctly consider and apply section 15(1)(f) and section 16 of the Sentencing and Penalties Act and the principles laid down in the **State v Bairatu** [2012] FJHC 864 (13 February 2012).

[31] I have examined the sentencing order delivered by the Magistrate on 03 March 2020. He had devoted most of it to discuss the above provisions along with a relevant judicial precedent in **Fiji Independent Commission Against Corruption v Mau** [2011] FJHC 222; HAC089.2010 (14 April 2011) and considered not only ***Bairatu*** but **State v Nayacalagilagi** [2009] FJHC 73; HAC165.2007 (17 March 2009) and **State v Waqa** [2017] FJHC 89; HAA116.2016 (10 February 2017) in the factual context of this case and decided not to exercise his discretion to record a non-conviction.

[32] The learned High Court had discussed this aspect at paragraphs 58-64 with regard to the said provisions and ***Bairatu*** and held as follows:

'[62] *In this regard, the Learned Trial Magistrate has duly taken into account all the relevant considerations and has come to a finding that entering a non-conviction against the Appellant was not warranted (At pages 56-60 of the Magistrate's Court Record). He has considered the case of* ***State v***

Batiratu *(Supra), and other relevant case authorities, in arriving at his finding.*

[63] *There is no justifiable basis for this Court to interfere with the Learned Trial Magistrate's conclusions.*

[64] *Considering the aforesaid, I am of the opinion that the Ground of Appeal against sentence is without merit.'*

[33] I agree with both the Magistrate and the High Court judge. The discretion exercised by the Magistrate had not resulted in any miscarriage. In any event, this ground of appeal involves not only the law but also the facts of the case. This is not a question of law alone. Following the conviction recorded, the sentence imposed itself is neither unlawful nor entered in consequence of an error of law.

05th ground of appeal

[34] The appellant argues that the Magistrates Court should have dismissed the charges against the Appellant pursuant to section 187 of the Criminal Procedure Act, since the charges against the appellant were dated 10 January 2019 but related to matters that arose in October 2014.

[35] This ground of appeal or argument does not appear to have been taken up in the High Court; nor in the Magistrates court according to the High Court and Magistrates court judgments.

[36] There is no error in the High Court judge's finding that he would not agree that there is no sentence provided for the acts stipulated under Section 133 (3) of the Companies Act of 2015 because the relevant sentencing provisions have been clearly enumerated in section 626 of the said Act.

[37] However, the appellant was not charged under section 133 (3) of the Companies Act 2015 but under 189(1) of the Companies Act (Cap.247). The repealing of Companies Act (Cap.247) does not alter that position. The sentence under 189(1) of the Companies Act (Cap.247) is a term of imprisonment not exceeding 2 years or a fine

not exceeding $1,000, or both. Section 187 of the Criminal Procedure Act applies to offences the maximum punishment for which does not exceed imprisonment for 12 months or a fine of $1000. In such instances proceedings should be brought within 12 months of the alleged offence. Therefore, the prescriptive period in section 187 does not apply to an offence under 189(1) of the Companies Act (Cap.247).

[38] Thus, there is no question of law arising from this ground of appeal.

[39] Therefore, in this second-tier appeal the appellant can canvass neither the conviction nor the sentence under section 22 of the Court of Appeal Act.

Order of Court:

1. Appeal is dismissed in terms of section 35(2) of the Court of Appeal Act.

COURT OF APPEAL FIJI

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