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

CRIMINAL APPEAL NO. AAU 139 of 2017
[In the Magistrates at Nausori Case No. CF 267 of 2012]
[High Court at Suva HAC233 of 2012]

BETWEEN	:	**THE STATE**
		Appellant
AND	:	**SHAHADATT KHAN**
		Respondent

Coram	:	**Prematilaka, RJA** **Bandara, JA** **Rajasinghe, JA**
Counsel	:	**Mrs. A.V. Vavadakua and Mr. R. Kumar for the Appellant** **Mr. S. Kumar for the Respondent**
Date of Hearing	:	**07 and 15 February 2023**
Date of Judgment	:	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of my brother Bandara, JA and agree that this court lacks jurisdiction to hear this appeal. I would now add my own reasons for the said conclusion.

[2] Following a trial in the Magistrates Court at Nausori exercising extended jurisdiction the respondent was convicted on two counts of Assault Causing Actual Bodily Harm and one count of an Act Intended to Cause Grievous Harm. On 18 September 2017 the respondent

was sentenced to 10 months' imprisonment on count 01, 13 months' imprisonment on count 02 and 24 months' imprisonment on count 03. The sentences were ordered to be served concurrently and were immediately suspended for a period of 36 months on condition that the respondent shall not re-offend.

[3] The appellant's application for leave to appeal sentence is timely. Though somewhat vaguely framed, the issue raised under the first ground of appeal is that the sentences should not have been suspended and the second ground of appeal concerns the absence of reasons or insufficient reasons for suspending the sentence.

[4] The offence of assault occasioning actual bodily harm carries a maximum sentence of 5 years imprisonment under section 275 of the Crimes Act 2009 and classified as a summary offence. On the other hand the offence of act intended to cause grievous harm carries a maximum sentence of life imprisonment under section 255 of the Crimes Act, 2009 and classified as an indictable offence.

[5] The respondent has taken up a preliminary objection to the jurisdiction of this court to hear this appeal on the premise that the appellant should have appealed to the High Court.

[6] It is clear that with regard to the two charges of Assault Causing Actual Bodily Harm (summary offence) the Magistrate was exercising the original or ordinary jurisdiction of the Magistrates Court and it was only with regard to the charge of Act Intended to Cause Grievous Harm (indictable offence) that the Magistrate was acting under extended jurisdiction [vide section 4(c) and 4(2) of the Criminal Procedure Act, 2009]. It is also not in doubt that the correct forum to hear and determine the appeal against sentence in respect of the two charges of Assault Causing Actual Bodily Harm is the High Court [vide section 246 of the Criminal Procedure Act, 2009].

[7] The preliminary issue for determination is whether an appeal lies to the Court of Appeal against the sentence imposed on the charge of Act Intended to Cause Grievous Harm where the Magistrate was exercising extended jurisdiction. If so, it cannot be seriously argued that the High Court should hear the appeal against sentence in respect of the two charges of Assault Causing Actual Bodily Harm and the Court of Appeal should hear the sentence appeal regarding the charge of Act Intended to Cause Grievous Harm, for at least to avoid multiplicity of litigation if not for any other reason, the Court of Appeal should hear the appeal against sentence in respect of all charges. If not, the High Court is the proper appellate forum to hear and determine the entire sentence appeal.

[8] This is an important issue as far as the Court of Appeal is concerned in as much as a substantial number of appeals are filed in the Court of Appeal every year against convictions and sentences entered in the Magistrates court exercising extended jurisdiction and those appeals consume a considerable time and resources of the full court as well as the single judge of the Court of Appeal. Such appeals, most of which are against sentence, could be dealt with by a judge of the High Court more expeditiously and need not exhaust the precious time of the full court of the Court of Appeal and that time, space and resources could otherwise be devoted to more substantive and long-awaited appeals from the High Court on serious offences involving murder, rape, aggravated robbery, money laundering, importation and cultivation of illicit drugs etc. For example, this appeal concerns the only question whether the custodial sentences of 10 months, 13 months and 24 months respectively should not have been suspended and the appeal has taken nearly 05 years and 05 months to reach the hearing stage. If the appeal had been filed in the High Court, in all probability it would have been concluded much earlier.

[9] This vitally important matter of jurisdiction of the Court of Appeal was raised in **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022) where the Supreme Court commented on what the correct forum may be to hear an appeal when the Magistrate court exercises extended jurisdiction. Keith, J said

> *'[33] There was one topic, unrelated to the issues raised on the appeal, which we drew the parties' attention to. Tawake was tried in the magistrates' court acting under its extended jurisdiction. At first blush, any appeal against his conviction or sentence should have been made to the High Court, not the Court of Appeal. We have not addressed the question of the venue for Tawake's appeal any further as understandably neither party were in a position to address us on the topic. But we flag the issue up now in case it arises again. If such appeals are regularly being made to the Court of Appeal, the Court of Appeal needs to address the question as to whether that is appropriate.'(emphasis mine)*

[10] One view is that when the Magistrates court exercises jurisdiction invested in it by the High Court by virtue of section 4(2) of the Criminal Procedure Act, 2009 ('extended jurisdiction' as opposed to its original jurisdiction) to try an offence, which, in the absence of such extension of jurisdiction, would be beyond the Magistrate's jurisdiction, the Magistrates court is deemed to exercise original jurisdiction of the High Court (subject, of course to the limitation of powers of sentencing) and therefore, the right of appeal as provided in section 21 of the Court of Appeal Act to appeal to the Court of Appeal is available against a conviction, sentence or acquittal by the Magistrates court. Therefore, if the proceedings before a Magistrate against an accused under extended jurisdiction is deemed to be that of the original jurisdiction of the High Court pursuant to section 4(2) of the Criminal Procedure Act, 2009, the proper forum to invoke the appellate jurisdiction is the Court of Appeal. This view is, of course, based on a legal fiction that extended jurisdiction exercised in the Magistrates Court is indeed the jurisdiction of the High Court.

[11] If it is not the case, only a second-tier appeal to the Court of Appeal on a question of law only against conviction or an unlawful or erroneous sentence is available against a decision of the High Court made in its appellate jurisdiction. Thus, the existence of a decision of the High Court given in the exercise of its appellate jurisdiction is a condition precedent or a *sine qua non* to invoke and cloth the Court of Appeal with jurisdiction under section 22(1) of the Court of Appeal Act. It is only against the decision of the High Court made in the exercise of its appellate jurisdiction that the next appeal *i.e.* the second tier appeal is

available to the Court of Appeal subject, of course, to the limitations imposed by section 22 of the Court of Appeal Act.

[12] The argument to the contrary, with considerable merits, which, of course, appeals to me is that in terms of section 99(3), (4) and (5) of the Constitution of the Republic of Fiji, the Court of Appeal has jurisdiction to hear and determine appeals only from the High Court as prescribed by the Constitution and other written law such as section 21 of the Court of Appeal Act which allows the Court of Appeal to hear appeals from convictions, acquittals, sentences or orders refusing bail pending trail by the High Court and not from the Magistrates court. Further, section 100(5), (6) and (7) of the Constitution specifying appellate jurisdiction of the High Court, lend support to the above contention. Therefore, the argument goes that there cannot be a direct appeal to the Court of Appeal against the judgment, sentence or order of a Magistrates court whether given in its original jurisdiction or extended jurisdiction.

[13] If this argument is adopted, all appeals from the Magistrates Court against judgments and orders made in its original and extended jurisdiction will have to be heard in the High Court as the court of first appeal and only a second tier appeal could be lodged in the Court of Appeal in terms of section 22 of the Court of Appeal Act upon a decision of the High Court made in its appellate, revisional or 'stated case' jurisdiction.

[14] I expressed my provisional view on this argument as follows in **Tuisamoa v State** [2020] FJCA 155; AAU0076.2017 (28 August 2020):

> *'[25] ……. However, for this proposition to apply it has to be based on the premise that when the Magistrates Court exercises extended jurisdiction it does not exercise the original jurisdiction of the High Court but its own jurisdiction, for the High Court cannot entertain appeals from its own judgments, sentences or orders or exercise supervisory jurisdiction over such judgments, sentences or orders.'*

[15] Now that the respondent has raised the issue of jurisdiction as a preliminary issue, as requested by the Supreme Court in ***Tawake*** I shall delve further into this. Section 4 of the Criminal Procedure Act, 2009 provides:

> *"(1) Subject to the other provisions of the Act –*
>
> *(a) Any indictable offence under the Crimes Act 2009 shall be tried by the High Court;*
>
> *(b) Any indictable offence triable summarily under the Crimes Act 2009 shall be tried by the High Court or a Magistrate Court, at the election of the accused; and*
>
> *(c) Any summary offence shall be tried by the magistrates Court.*
>
> *(2) Notwithstanding the provisions of sub-section (1), a judge of the High Court may, by order under his or her hand and seal of the High Court, in any particular case or class of cases, invest a magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the magistrates' jurisdiction.*
>
> *(3) A magistrate hearing a case in accordance with an Order made under sub-section (2) may not impose a sentence in excess of the sentencing powers of the magistrate as provided for under this Act."*

[16] *'Invest someone with something'* means to give authority or power to someone *(vide* **Cambridge Dictionary**) or to officially give someone power to do something (*vide* **Longman Dictionary**) or establish a right or power in someone (*vide* **Oxford Dictionary**).

[17] Once a judge of the High Court invests a magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the magistrates' jurisdiction, the High Court judge has no power under the Criminal Procedure Act to reclaim that jurisdiction or recall the case even if the judge wishes to do so. This means once by an order under his or her hand and seal of the High Court, a judge of the High Court invests a magistrate with jurisdiction in any particular case or class of cases under section 4(2) of the Criminal Procedure Act, the High Court judge ceases to possess jurisdiction and no longer has jurisdiction over that case or class of cases. The jurisdiction is then exclusively vested in the

magistrate who becomes the sole repository of jurisdiction to try that case. There is no concurrent or even residual jurisdiction left in the High Court in respect of that case or class of cases. Therefore, once vested with jurisdiction under section 4(2) of the Criminal Procedure Act, the magistrate exercises jurisdiction of the Magistrates Court and not that of the High Court. The fact that the legislature has expressly stated in section 4(3) of the Criminal Procedure Act, 2009 that a magistrate hearing a case under extended jurisdiction may not impose a sentence in excess of the sentencing powers of the magistrate as provided for under the Criminal Procedure Act supports this proposition.

[18] Right to appeal against any judgment, sentence or order of a Magistrates Court is given in section 246(1) of the Criminal Procedure Act and an appeal therefrom lies only to the High Court. Section 246(1) states that:

> *"Subject to any provisions of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrate's Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court or both a judgment and sentence."*

[19] Section 246(1) does not distinguish between original/ordinary jurisdiction of the Magistrates Court and extended jurisdiction in so far as the appeals are concerned. Irrespective of which jurisdiction the Magistrates court exercises, any judgment, sentence or order therefrom is appealable to the High Court and not to the Court of Appeal. However, the Magistrate can still transfer the case for sentencing to the High Court in terms of section 190 (1) of the Criminal Procedure Act in which event the accused could be dealt with as if he had been convicted by the High Court [vide section 190(3)] and the accused has a right of appeal to the Court of Appeal as if he had been convicted and sentenced by the High Court [vide section 190(4)], for it would be highly illogical for the High Court to hear the conviction appeal and for the Court of Appeal to deal with the sentence appeal.

[20] Section 100(5) of the Constitution of 2013 further reinforces that all judgments of the Magistrates Court are appealable to the High Court and not to the Court of Appeal.

[21] The Court of Appeal has no inherent jurisdiction and the right to appeal itself is a creature of statute [vide **Chaudhry v State** at [40] [2014] FJCA 106; AAU10.2014 (15 July 2014)].

[22] The Supreme Court held in **Tiritiri v State** [2014] FJSC 15; CAV9.2014 (14 November 2014) that:

> *'[21] The Court of Appeal is strictly a creation of statute. There must be a statutory foundation upon which the Court may exercise jurisdiction in a particular matter……..'*

[23] In **Takiveikata v State [**2004] FJCA 39; AAU0030.2004S (16 July 2004) the Court of Appeal held:

> *'The Court of Appeal is a creature of statute and its jurisdiction is to be found in the Court of Appeal Act and in the Constitution. Section 3(3) of the Court of Appeal Act, as amended, provides as follows:-*
>
> > *"(3.) Appeals lie to the court as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court."*
>
> *Section 21 which specifically relates to criminal appeals has no application to this case because there has not been a conviction.'*

[24] In **Cavubati v State** [2003] FJCA 59; AAU0022.2003S (14 November 2003) the Court of Appeal held:

> *'It is fundamental that a right of appeal is a creature of statute and that that right only exists to the extent created by statute. See **Police v. S.** [1977] 1 NZLR 1 (CA) **Nuplex Industries Ltd v. Auckland Regional Council** [1999] 1 NZLR 181,185. It is not a mere matter of practice or procedure, and neither a superior nor an inferior court, nor both combined can create or take away such a right. See **37 Halsbury Laws of England** (4th ed) para 677. The requirements of the Criminal Procedure Code creating the right of appeal must be strictly complied with. See **R v. Suggett** 81 Cr. App. R.243 **Archbold Criminal Pleadings and Practice** 1995 volume 1 para. 7-166.'*

[25] Thus it is trite law that the right to appeal is not a natural or inherent right, it is a creature of statute and there cannot be any right of appeal unless it is expressly provided in any statute. The Supreme Court of India held in **P.S. Sathappan (Dead) By Lrs vs Andhra Bank Ltd. & Ors** Appeal (civil) 689 of 1998 **(**decided 07 October 2004**)** that a right of appeal is a creature of statute and the said right, thus, can only be enjoyed if law confers the same. It was reiterated that right of appeal is a creature of the statute and the question whether there is a right of appeal or not will have to be considered on an interpretation of the provision of the statute and not on the ground of propriety or any other consideration [vide **D.N.Taneja vs Bhajan Lal** (4 May 1988) 1988 SCR (3) 888, 1988 SCC (3) 26].

[26] The right to appeal to the Court of Appeal is purely statutory. The Court of Appeal has no inherent jurisdiction, Widgery, L.J. delivering the judgment of the court in **R. v. Jefferies (2)** stated of the Court of Appeal, Criminal Division [1968] 3 All E.R. at 240):

> "*Whatever may be the powers of courts exercising a jurisdiction that does not derive from statute, the powers of this court are derived from, and confined to, those given by the Criminal Appeal Act, 1907."*

[27] In **Gonzalez v R** 1984–85 CILR 291 (06 December 1985) the Court of Appeal (Zacca, P., Kerr and Georges, JJ.A) considered whether, in view of the fact that the appellant was not a "convicted person," it had jurisdiction, under the Court of Appeal Law, s.5, to hear the appeal and held that:

> '*The Court of Appeal had no jurisdiction to entertain an appeal from an order of the Grand Court refusing to grant bail to a person in custody awaiting trial. The court's appellate criminal jurisdiction was conferred by the Court of Appeal Law, s.5 which clearly provided that only a "convicted person" had the right to appeal to the Court of Appeal and since the appellant was not a "convicted person" he had no such right.'*

[28] **R v Chardon** [2020] QCA 277 it was held by the Supreme Court of Queensland that the Court's jurisdiction to hear appeals and its powers in such appeals are entirely statutory.

[29] Section 3(3) of the Court of Appeal Act provides that appeals lie to the Court of Appeal as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court. Section 21 of the Court of Appeal Act allows the Court of Appeal to hear appeals from convictions, acquittals, sentences or orders refusing bail pending trail by the High Court and not by Magistrates court. In terms of section 99(3), (4) and (5) of the Constitution of the Republic of Fiji 2013, the Court of Appeal has jurisdiction to hear and determine appeals only from the High Court as prescribed by the Constitution and other written law. Court of Appeal means the Court of Appeal referred to in section 99 of the Constitution (vide section 2 of the Interpretation Act). Section 99(3) of the Constitution provides:

> *"The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as prescribed by written law, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by written law."*

[30] Further, section 100(5), (6) and (7) of the Constitution specifies appellate jurisdiction of the High Court, supporting the above contention. High Court means the High Court referred to in section 100 of the Constitution (vide section 2 of the Interpretation Act). Section 100(5) of the Constitution provides:

> *"The High Court has jurisdiction, subject to conferral by written law of rights of appeal and to such requirements as may be prescribed by written law, to hear and determine appeals from all judgments of the Magistrates Court and other subordinate courts."*

[31] Therefore, a direct right of appeal to the Court of Appeal from the Magistrates Court is unsanctioned by any provision of the Constitution or any other written law. There cannot be such inherent jurisdiction either in the Court of Appeal. My provisional view in **Tuisamoa v State** [2020] FJCA 155; AAU0076.2017 (28 August 2020) which I can now confirm is as follows:

> *'[25] This thinking appeals to me as it could do away with the artificially created direct appeal to the Court of Appeal from any judgment, sentence or order*

> *given in the Magistrates Court. Such a direct right of appeal to the Court of Appeal is unsanctioned by any provision of the Constitution or any other written law. It also sits in harmony with purposive interpretation of section 21 and 22 of the Court of Appeal Act and section 246 of the Criminal Procedure Act, 2009.'*

[32] The trial court is determined by how the offence which an accused is charged with is categorized under section 4 of the Criminal Procedure Act, 2009. However, the appellate forum is decided according to the court which tries the accused and not by the category the offence belongs to.

[33] This discussion is not complete without considering the decision in **State v Prasad** [2019] FJCA 18; AAU123.2014 (7 March 2019) which was brought to my attention by my brother Rajasinghe, JA. Neither party drew our attention to this case. Here, the respondent was charged with the offence of act with intent to cause grievous harm contrary to section 255(a) of the Crimes Act. He was produced in the Magistrates Court and the case was transferred to the High Court, the offence of act with intent to cause grievous harm being an indictable offence. The High Court extended the jurisdiction of the Magistrates Court to try this case pursuant to section 4(2) of the Criminal Procedure Act. After the case was remitted to the Magistrates Court for trial, on 22 November 2013, the prosecution amended the charge to a summary offence of assault causing actual bodily harm contrary to section 275 of the Crimes Act. The respondent pleaded guilty to the summary offence and he was fined $150.00 and bound over in the sum of $300.00 to keep peace and be of good behavior for 12 months. The Director of Public Prosecutions filed an untimely appeal against the respondent's sentence in the High Court. However, the petition of appeal was administratively transferred to the Court of Appeal on the basis that the appeal was against a decision of the Magistrates' Court exercising an extended jurisdiction. The single Judge of the Court of Appeal ruled that the appeal involved a question of jurisdiction which was a question of law and stated that the question can be answered by the Full Court.

[34] The full court of the Court of Appeal held that once the charge was amended to a summary offence, the jurisdiction of the Magistrates Court changed. It ceased to have extended jurisdiction. A decision made by the Magistrates Court exercising its own jurisdiction is appealable to the High Court in terms of section 246 of the Criminal Procedure Act. Therefore, it was held that the Court of Appeal lacked jurisdiction to entertain the appeal of the appellant.

[35] However, in the course of the judgment the court remarked that the right of appeal against a decision of the Magistrates' Court made under an extended jurisdiction pursuant to section 4 (2) of the Criminal Procedure Act lies with the Court of Appeal pursuant to section 21 of the Court of Appeal Act.

[36] The issue before the full court to be determined was, when the Magistrates court ceased to have extended jurisdiction with the amendment of the charge from an indictable offence to a summary offence whether the Court of Appeal had the jurisdiction to entertain an appeal against the sentence imposed by the Magistrate. The court correctly answered that question in the negative. The whole discussion in the judgment was focused on that issue. The court did not have to consider or make an authoritative pronouncement on the question whether the Court of Appeal has jurisdiction to entertain an appeal against a sentence imposed by the Magistrates court exercising extended jurisdiction. The Court appears to have assumed or taken it for granted that it does have jurisdiction without critically analyzing the relevant law as discussed above though it had cited almost all those provisions in reference to the real issue before court. The court could have disposed of the legal issue before it without any decision or even remarks on where the appeal lies against a sentence imposed in the exercise of extended jurisdiction. To that extent, the pronouncement that any appeal against the decision of the Magistrate's Court exercising extended jurisdiction would have to be before the Court of Appeal in terms of section 21(2) of the Court of Appeal Act is *obiter dicta* and not part of *ratio decidendi*.

[37] Even otherwise, the full court in ***Prasad*** has not considered the fundamental tenant of jurisprudence that a right of appeal must be created by an express provision of the law and cannot be inherently vested or assumed. It has not pointed out any provision of the Constitution or any other law that confers appellate jurisdiction on the Court of Appeal against all judgments, sentences or orders of the Magistrates Court delivered in the exercise of extended jurisdiction. As discussed above all the Constitutional and other statutory and legal provisions demonstrate otherwise. Moreover, the full court in ***Prasad*** has not considered or has not had the benefit of considering the pronouncements in ***Chaudhry, Tiritiri, Takiveikata*** and ***Cavubati*****.** The reason is obvious. The full court did not and did not have to consider that question of law in ***Prasad***.

[38] Similarly, in **Kirikiti v State** [2014] FJCA 223; AAU00055.2011 (7 April 2014) there is only a bare statement that when an accused is convicted in the Magistrates Court exercising extended jurisdiction, the right of appeal lies under section 21(1) of the Court of Appeal and it suffers from similar deficiencies highlighted above.

[39] Therefore, I am afraid, I am unable to follow **State v Prasad** (supra) or **Kirikiti v State** (supra) or treat them as having laid down an authoritative pronouncement that the right of appeal against a decision of the Magistrates Court made under an extended jurisdiction pursuant to section 4 (2) of the Criminal Procedure Act lies with the Court of Appeal.

[40] Therefore, I uphold the respondent's objection to jurisdiction of this court to entertain this appeal and hold that the Court of Appeal lacks jurisdiction to hear this appeal. However, I recognize that as a matter of practice the Court of Appeal under section 21 of the Court of Appeal Act has in the past entertained without objection by the respondents, direct appeals from the Magistrates Court against judgments and sentences delivered under extended jurisdiction pursuant to section 4 (2) of the Criminal Procedure Act. Therefore, I would not propose to dismiss or strike out this appeal for lack of jurisdiction but refer it to the High Court to be dealt with according to law.

[41] At the same time, in view of the importance of the question of law involved and because another division of this court in **State v Prasad** (supra) had taken a different view, I encourage both parties to seek an authoritative ruling from the Supreme Court.

Bandara, JA

[42] The respondent was charged with two counts of Assault Causing Actual Bodily Harm and one count of Act Intended to Cause Grievous Harm contrary to section 275 and 255 of the Crimes Act 2009 respectively.

[43] The charges read as follows:

*"**COUNT 1***

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: *Contrary to Section 275 of the Crimes Act 2009.*

Particulars of Offence

***SHAHADATT KHAN**, on the 28th day of April 2012, at Waidra, Nausori in the Eastern Division, assaulted **FAIYUM ALI** thereby occasioning him actual bodily harm.*

COUNT 2

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: *Contrary to Section 275 of the Crimes Act 2009.*

Particulars of Offence

***SHAHADATT KHAN**, on the 28th day of April 2012, at Waidra, Nausori in the Eastern Division, assaulted **ROZINA BEGUM** thereby occasioning her actual bodily harm.*

COUNT 3

Statement of Offence

ACT INTENDED TO CAUSE GRIEVOUS HARM: *Contrary to Section 255 (a) of the Crimes Act 2009.*

Particulars of Offence

SHAHADATT KHAN*, on the 28th day of April 2012, at Waidra, Nausori in the Eastern Division, unlawfully wounded* ***ASRAF KHAN*** *with a cane knife."*

[44] On the 8th June 2016 the respondent entered a plea of not guilty to the information filed by the Director of Public Prosecutions.

[45] The matter was first called in the Suva High Court and thereafter was remitted to Nausori Magistrate Court with extended jurisdiction.

[46] Accordingly the Respondent was tried before the Magistrate Court at Nausori, pursuant to the said extension of jurisdiction conferred upon it by the High Court of Suva in accordance with section 4 (2) of the Criminal Procedure Act 2009.

[47] The following brief summary of facts is reflected in the Sentencing Ruling of the Learned Magistrate:

> *"**Brief Facts:***
>
> 3. *There is a dispute concerning shares in an Estate of which the land where the victims and Shahadatt resides on.*
> *Incident of 28 April 2011 concerned this dispute.*
> *The victim's were transporting items from the old house (on top of a hill) to the new house at the bottom.*
> *To do this they were crossing a fence (over Shahadatt's land) to easily access the new house.*
> *There was dispute about certain posts been uplifted. For this matter was reported to the police. PW5 came and spoke to parties and in particular told Shahadatt to wait.*

Despite this Shahadatt went to the fence.
Faiyum Ali was helping Asraf Khan and Rozina to shift the items. Shahadatt Khan his uncle approached them asking who told them to enter the land. Shahadatt had with him a stick and a knife.
He attacked Faiyum 03 times with the stick on his head, neck and elbow.
Rozina was hit near her eye and had a cut on her eyebrow. According to her, she heard Shahadatt say he will finish them.
Asraf came to their rescue when Shahadatt hit him with the cane knife. He asked Shahadatt not to hit him putting his hand up. The first and third strike hit his head whilst the second strike, the tip of the knife hit his hand.
Seeing blood on Asraf's shirt, Shahadatt ran away.
Shahadatt is Faiyum and Asraf's paternal uncle.
As per medical report of Faiyum Ali [exhibit 1], the patient was noted to be distressed and shocked but his condition was stable.
Injuries noted were:

- *Tenderness and swelling of right forearm*
- *Tenderness of nape*

The victim had received muscular injuries and was prescribed pain reliever.
Medical report of Asraf Khan [exhibit 2] indicated the patient was calm and his condition was well. Injuries noted were:

- *10cm long and 1cm deep laceration on temporal aspect of right skull. Wound edge are straight;*
- *5cm laceration on base of right thumb and 5mm deep;*
- *10cm long and 1mm deep incision of posterior right arm.*

Blood stains were noted on the shirt jeans.
Diagnosis showed that injuries were consistent with a sharp instrument. The patient had fainted once during the suturing.
Treatment prescribed were: sutures and dressing.
Exhibit 3 – the medical report for Rozina Begum states that the patient was in distress, shocked and fearful.
There was laceration on the left eyebrow with bloodstains on left forearm."

[48] Following the trial in the Magistrate Court at Nausori the Respondent was convicted on two counts of Assault Causing Actual Bodily Harm, and one count of an Act Intended to Cause Grievous Harm.

[49] Consequently on the 18th September 2017, the Respondent was sentenced to 10 months imprisonment on count 1, 13 months imprisonment on count 2, and 24 months imprisonment on count 3.

[50] The sentences were ordered to be served concurrently and were immediately suspended for a period of 36 months on condition that Respondent did not re-offend.

[51] State being dissatisfied with the suspended sentence imposed by the Magistrate filed a timely appeal seeking leave to appeal against the sentence, on the basis that a custodial sentence warrants on the Respondent, given the nature of the attack perpetrated by him.

[52] The two grounds of appeal advanced before this Court by the Appellant are as follows:

> *"1. The learned Sentencing Magistrate erred in law and fact when she failed to impose a custodial sentence given the aggravating factors of the case and the seriousness of the injuries sustained by Rozina Begum and Asraf Khan.*
>
> *2. The learned trial Sentencing Magistrate erred in law when she failed to expressly articulate the exceptional circumstances that warranted a suspension of the sentence."*

[53] Both grounds of appeal appear to be ambiguous.

[54] The 1st ground of appeal states about a failure on the part of the Magistrate to impose a custodial sentence, whereas in fact, all intents and purposes the latter had imposed a custodial term, in regard to which he had taken a further conditional step by imposing a suspension. The suspension is not absolute but conditional.

[55] The 2nd ground of appeal states about the Magistrate's failure to expressly articulate exceptional circumstances that led him to impose a suspended sentence. The wording gives the impression that there is an obligation on the part of a Magistrate to expressly articulate exceptional circumstances that substantiate the imposition of a suspended

sentence; in other words a prison term cannot be suspended by a Magistrate when exceptional circumstances are lacking.

[56] There is no statutory or common law obligation imposed on a Judge to expressly articulate exceptional circumstances to substantiate his decision to suspend a custodial sentence.

[57] Section 26 (1) of the Sentencing and Penalties Act 2009 (the Sentencing Act) confers power on a Criminal Court to suspend a custodial sentence stating:

> *"On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances."*

[58] In terms of the above provision a wide discretion has been granted to a judge in imposing a suspended sentence without an obligation to seek exceptional circumstances.

[59] However, section 26 (2) of the said Act imposes a ceiling on the jurisdiction, that the original criminal courts exercise, in relation to imposing of suspended sentences.

> *"A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceedings for more than one offence:-*
>
> *(a) Does not exceed 3 years in the case of the High Court; or*
> *(b) Does not exceed 2 years in the case of the Magistrates Court."*

[60] The foregoing provision makes it clear, that the option of suspending a sentence of imprisonment is available for less serious offences, where the head sentence does not exceed 3 years in the High Court or 2 years in the Magistrate's Court.

[61] The process that should be followed in suspending a sentence is considered in **R v. Petersen** [1994] 2 NZLR 533 by the New Zealand Court of Appeal in the following terms:

> *"The principal purpose of [the relevant section] was to encourage rehabilitation and to provide the Courts with an effective means of achieving that end by holding a prison sentence over an offender's head. It was available in cases of moderately serious offending but where it was thought there was a sufficient opportunity for reform, and the need to deter others was not paramount. The legislature had given it teeth by providing that the length of the sentence of imprisonment was fixed at the time the suspended sentence was imposed, that it was to correspond in length to the term that would have been imposed in the absence of power to suspend and that the Court before whom the offender appeared on further conviction was to order the suspended sentence to take effect, unless of the opinion it would be unjust to do so. So, there was a presumption that upon further offending punishable by imprisonment the term previously fixed would have to be served (see p. 537 line 4).*
> *The Court's first duty was to consider what would be the appropriate immediate custodial sentence, pass that and then consider whether there were grounds for suspending it. The Court must not pass a longer custodial sentence than it would otherwise do because it was suspended. Equally, it would be wrong for the Court to decide on the shorter sentence than appropriate in order to take advantage of the suspended sentence regime (see p.538 line 47, p.539 line 5). R V. Mah-Wing (1983) 5 Cr App R (S) 347 followed.*
>
> *The final question to be determined was whether immediate imprisonment was required or whether a suspended sentence could be given. If, at the previous stages of the inquiry, the Court had applied the correct approach, all factors relevant to the sentence were likely to have been taken into account already; the sentencer must either give double weight to some factors, or search for new ones which would justify suspension although irrelevant to the other issues already considered. Like most sentencing, what was required here was an application of common sense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation (see p.539 line 8, p.539 line 37)."*

[62] Being dissatisfied with the impugned suspended sentence imposed by the Magistrate, upon the extended jurisdiction granted to undertake the trial and sentence of the Respondent, pursuant to section 4 (2) of the Criminal Procedure Act 2009, the Appellant appealed to this Court, advancing the above said two grounds of appeal.

[63] However, the Respondent in his written submissions filed on 17/2/2021 had raised a vital preliminary issue, as to whether the Court of Appeal has jurisdiction to entertain the instant appeal. The Respondent states:

> *"Whether the Appellant was correct in appealing this matter to the Court of Appeal given that the learned Magistrate whilst sentencing exercised her powers as a Magistrate with Magistrates Court Jurisdiction and not a Magistrate with extended jurisdiction having the powers of a High Court Judge?"*

[64] Furthermore, the Respondent in paragraphs 3.3 and 3.4 states the following:

> *"3.3 In the present case, the **Appellant has appealed the sentence passed by the learned Magistrate, Ms. Vandhana Lal** who did not exercise her powers as a Magistrate with extended jurisdiction **but as a Magistrate solely when she pronounced the sentence on the 18th day of September, 2017.***
> *3.4 As such and on the basis of a **practical approach** it is submitted that the Appellant should have rightly appealed the sentence in the High Court and not in the Court of Appeal."*

[65] Article 99 (3) (4) and (5) of the Constitution of the Republic of Fiji deal with the jurisdiction of the Court of Appeal.

> *"(3) The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as prescribed by written law, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by written law.*
> *(4) Appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any manner arising under this Constitution or involving its interpretation.*
> *(5) A written law may provide that appeals lie to the Court of Appeal, as of right or with leave, from other judgments of the High Court in*

accordance with such requirements as prescribed in that written law or under the rules pertaining to the Court of Appeal."

[66] The above constitutional provisions vest Court of Appeal with jurisdiction, to hear and determine appeals from all judgments of the High Court. Further, it is clear that appeals lie to the Court of Appeal, as of right or with leave from the other judgments of the High Court.

[67] Highlighting the well-recognized principle of the *'supremacy of the constitution'*, the supremacy clause of the Constitution of Fiji provides that:

(Article 2)

"The Constitution is the supreme law of the State."

[68] Dealing with the jurisdiction of the Magistrate Court, Article 101 (2) of the Constitution states that, *"The Magistrate Court has such jurisdiction as conferred by a written law."*

[69] Section 4 (2) of the Criminal Procedure Act 2009 confers jurisdiction on the High Court to invest a Magistrate with jurisdiction, to try any offence which in the absence of such order, would be beyond the Magistrate's jurisdiction. The section reads:

"(2) Notwithstanding the provisions of sub-section (1), a judge of the High Court may, by order under his or her hand and the seal of the High Court, in any particular case or class of cases, invest a magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the magistrate's jurisdiction."

[70] In terms of section 27 of the Crimes Act 2009 the offence of assault occasioning actual bodily harm carries a maximum sentence of 5 years imprisonment, and is a summary offence.

[71] However, on the other hand, in terms of section 255 of the Crimes Act the offence of act intended to cause grievous harm carries a maximum sentence of life imprisonment and is classified as an indictable offence.

[72] In terms of section 7 of the Criminal Procedure Act 2009, a Magistrate may pass a sentence of imprisonment for a term not exceeding 10 years.

[73] In terms of section 26 (2) of the Sentencing and Penalties Act 2009 a Magistrate may not suspend a sentence which is more than 2 years.

[74] Even though under section 4 (2) of the Criminal Procedure Act the High Court could invert a Magistrate with jurisdiction to try any offence which would be beyond the Magistrate's jurisdiction, the Magistrate cannot exceed the ceilings imposed on him by section 7 of the Criminal Procedure Act and section 26 (2) of the Sentencing and Penalties Act. This is indicative of the fact that, the inherent statutory jurisdiction vested in the High Court does not get remitted to the Magistrate's Court along with an extension of jurisdiction executed under section 4 (2) of the Criminal Procedure Act.

[75] The jurisdiction of the appellate powers of the Court of Appeal is conferred upon it by the Constitution itself.

[76] As per the rule of the *'Supremacy of the Constitution'*, the constitution is the supreme law of the Republic of Fiji. This means that any legislation that violates the constitution or any of its provisions, any interpretation of law that stands in conflict with the constitution, or any conduct that conflicts with the constitution should be declared invalid or struck down.

[77] The Constitution or any other legislation does not explicitly confer jurisdiction on the Court of Appeal to entertain an appeal against an order or a final judgment made by the Magistrate's Court.

[78] Having regard to the foregoing I hold that the preliminary issue that has been raised succeeds and that this Court has no jurisdiction to entertain the instant appeal.

Rajasinghe, JA

[79] I have read in draft judgments of Prematilaka RJA and Bandara JA. With some reluctance and the greatest respect for their Lordships' views, I am unable to agree with both of their Lordships' conclusions that this Court has no jurisdiction to hear this appeal. I shall now explain as briefly as I can my reasons for the above disagreement with the judgments of Prematilaka RJA and Bandara JA.

[80] Prematilaka RJA and Bandara JA have explicitly explained the factual background of this matter. Therefore, I wish to avoid repeating the same here. The preliminary objection raised by the learned Counsel for the Respondent is that:

> *"Whether the Appellant was correct in appealing this matter to the Court of Appeal given that the learned Magistrate whilst sentencing exercised her powers as a Magistrate with Magistrate's Court jurisdiction and not a Magistrate with extended jurisdiction having the powers of a High Court Judge"*

[81] Section 4 (2) of the Criminal Procedure Act has given the jurisdiction to a Judge of the High Court to invest a Magistrate with jurisdiction to try any offence which, in the absence of such investment, is beyond the Magistrate's jurisdiction. The same legal scheme had been used under the repealed Criminal Procedure Code. (*vide; Section 4 (2) of the Criminal Procedure Code*) Section 4 of the Criminal Procedure Act states that:

> *i) Subject to the other provisions of this Act—*
>
> *b) any indictable offence under the Crimes Act 2009 shall be tried by the High Court;*
> *c) any indictable offence triable summarily under the Crimes Act 2009 shall be tried by the High Court or a Magistrates Court, at the election of the accused person; and*

d) any summary offence shall be tried by a Magistrates Court.

ii) Notwithstanding the provisions of subsection (1), a Judge of the High Court may, by order under his or her hand and the seal of the High Court, in any particular case or class of cases, invest a Magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the Magistrate's jurisdiction.

iii) A Magistrate hearing a case in accordance with an order made under subsection (2) may not impose a sentence in excess of the sentencing powers of the Magistrate as provided for under this Act.

[82] According to Section 4 (1) of the Criminal Procedure Act, the jurisdiction is given to the High Court to hear any indictable offence under the Crimes Act, while the election of the Accused person determines the forum of the hearing of indictable offence triable summarily. A Magistrates Court shall try any summary offence. Section 4 (2) of the Criminal Procedure Act has given a Judge of the High Court a discretionary jurisdiction to invest a Magistrate with jurisdiction to try any offence which, without such order of investment, is beyond the jurisdiction of the Magistrate.

[83] The orders, judgments and sentences made by the Magistrates, exercising the jurisdictions invested in them pursuant to Section 4 (2) of the Criminal Procedure Act, have been considered as decisions made by the Magistrates exercising the High Court jurisdiction; hence, the appeals against such decisions made its way to the Fiji Court of Appeal under Section 21 of the Court of Appeal Act.

[84] The Fiji Court of Appeal in **Tulele v State [2008] FJCA 97; MISC Action 4.2008S (14 April 2008)** found that the appeal against the sentence imposed by the Magistrate exercising invested jurisdiction lies in the Court of Appeal. In that matter, the Appellant was sentenced to three and half years by the Magistrate, exercising the invested jurisdiction, for one count of possessing 444.9 grams of cocaine. The appeal was initially filed in the High Court. Hence, the High Court heard the appeal, reduced the sentence to one year and three months, and suspended it for two years. The Court of Appeal found that the appeal against the

sentence made under extended jurisdiction must be heard by the Court of Appeal, where the full bench of the Court of Appeal held that;

> *"It seems however that the Magistrate sentenced Mr Tulele under Extended Jurisdiction and that any appeal ought to have been heard by the Court of Appeal, not by the High Court in its appellate jurisdiction."*

[85] Goundar JA in **Kirikiti v State [2014] FJCA 223; AAU00055.2011 (7 April 2014)** delivering his ruling at the leave hearing, found that:

> *"Aggravated robbery is an indictable offence, but a judge of the High Court has power to extend the jurisdiction of the Magistrates' Court pursuant to section 4 (2) of the Criminal Procedure Decree. When an accused is convicted in the Magistrates' Court exercising extended jurisdiction, the right of appeal lie under section 21(1) of the Court of Appeal Act. Leave is required on any ground which involves a mixed question of law and fact, or fact alone." (emphasise added)*

[86] The Fiji Court of Appeal in **State v Prasad [2019] FJCA 18; AAU123.2014 (7 March 2019)** has discussed the correct forum for the appeals against the orders, judgments and sentences made by a Magistrate, exercising the jurisdiction invested on him under Section 4 (2) of the Criminal Procedure Act. The issue before the full bench of the Court of Appeal in **State v Prasad (supra)** was that the Respondent was initially charged in the High Court with an Act with Intent to Cause Grievous Bodily Harm contrary to Section 255 of the Crimes Act, which was an indictable offence. The learned High Court Judge had then invested the Magistrate in Nasinu with the jurisdiction to try the offence pursuant to Section 4 (2) of the Criminal Procedure Act. In the Magistrate's Court, the charge was amended to a summary offence of Assault Occasioning Actual Bodily Harm, contrary to Section 275 of the Crimes Act. The Respondent pleaded guilty, and the learned Magistrate then sentenced him accordingly. The State appealed to the Court of Appeal against the said sentence for which the Respondent objected, claiming the Court of Appeal has no jurisdiction to hear the appeal on the basis that the offence that the Respondent was convicted of and subsequently sentenced to was a summary offence. Having outlined the arguments made by the parties before the Court of Appeal, Chandra JA, in his judgment in **State v Prasad (supra)**,

outlined the scope of Section 4 (2) of the Criminal Procedure Act, where his lordship said that;

> *"[15] The High Court, pursuant to section 4(2) of the Criminal Procedure Act, remitted the matter to the Magistrate's Court thereby conferring on the Magistrate's Court an extended jurisdiction to try an indictable offence which would otherwise have been tried by the High Court. The information filed initially was an indictable offence. If it was tried without any amendments in the Magistrate's Court it had powers to give a sentence which was not in excess of the sentencing powers of the Magistrate. If it was necessary to impose a sentence higher than what a Magistrates Court would be empowered to impose, it could refer the case to the High Court for the imposition of the sentence pursuant to s. 190(1)(b) of the Criminal Procedure Act"*

[87] Chandra JA then found the correct forum of appeal is the High Court as the charge was amended to a summary offence, thus, effectually ceased the jurisdiction invested on the Magistrate by the High Court pursuant to Section 4 (2) of the Criminal Procedure Act, where Chandra JA held that:

> *[22] In the present case, initially the Magistrate's Court had extended jurisdiction as the information against the Respondent was in respect of an indictable offence. If it remained so, then the Magistrate's Court would have been exercising the authority invested on it by the High Court pursuant to section 4(2) of the Criminal Procedure Act. In such a situation, there would have been no doubt that any appeal against the decision of the Magistrate's Court exercising extended jurisdiction would have to be before the Court of Appeal in terms of section 21(2) of the Court of Appeal Act. (emphasis added)*

[88] Goundar JA in **State v Prasad (supra)**, agreeing with Chandra JA held that:

> *"It is settled that the right of appeal against a decision of the Magistrates' Court made under an extended jurisdiction pursuant to section 4 (2) of the Criminal Procedure Act lies with the Court of Appeal pursuant to section 21 of the Court of Appeal Act (Kirikiti v State [2014] FJCA 223; AAU00055.2011 (7 April 2014), Kumar v State [2018] FJCA 148; AAU165.2017 (4 October 2018)).The question is whether the sentence in this case was pronounced in the exercise of an extended jurisdiction or a summary jurisdiction.(emphasis added)*

[89] As held by Chandra JA and Goundar JA above, it is clear that the jurisdiction exercised by the Magistrate under the invested jurisdiction is not an original summery jurisdiction of the Magistrate's Court. Therefore, any appeal against the orders, judgments and sentences made by the Magistrates, in exercising the invested jurisdiction under Section 4 (2) of the Criminal Procedure Act, lies with the Court of Appeal under Section 21 of the Court of Appeal Act. Section 21 of the Court of Appeal Act states that;

> *i) A person convicted on a trial held before the High Court may appeal under this Part to the Court of Appeal—*
>
> *b) against his or her conviction on any ground of appeal which involves a question of law alone;*
> *c) with the leave of the Court of Appeal or upon the certificate of the Judge who tried him or her that it is a fit case for appeal against his or her conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the court to be a sufficient ground of appeal; and*
> *d) with the leave of the Court of Appeal against the sentence passed on his or her conviction unless the sentence is one fixed by law.*
>
> *ii) The State on a trial held before the High Court may appeal under this Part to the Court of Appeal—*
>
> *a) against the acquittal of any person on any ground of appeal which involves a question of law alone;*
> *b) with the leave of the Court of Appeal or upon the Certificate of the Judge who tried the case that it is a fit case for appeal against the acquittal on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the court to be a sufficient ground of appeal; and*
> *c) with the leave of the Court of Appeal against the sentence passed on the conviction of any person unless the sentence is one fixed by law.*
> *d) The Court of Appeal may, if it gives leave, entertain an appeal from the High Court against the grant or refusal of bail, including any conditions or limitation attached to a grant of bail, upon the application either of the person granted or refused bail or of the Director of Public Prosecutions.*

[90] The Court of Appeal in **State v Prasad (supra)** had not invoked any inherent jurisdiction, which the Court of Appeal does not possess, to reach the above conclusion. Their Lordships' judgment is based on the determination that an appeal against the decisions made by the Magistrate exercising the invested jurisdiction lies with the Court of Appeal pursuant to Section 21 of the Court of Appeal.

[91] The decisions made by the Fiji Court of Appeal in **Tulele v State (supra)** and **State v Prasad (supra),** determining the correct appellate forum for an appeal against the Magistrate's decision made under the invested jurisdiction are part of the *ratio decidendi* of the judgments.

[92] Black's laws Dictionary defines the term "*ratio decidendi"* as;

> *"The principle or rule of law on which a court's decision is founded. The rule of law on which a later court thinks that a previous court founded its decision; a general rule without which a case must have been decided otherwise"*

[93] The Oxford Dictionary of Law defines the term " *ratio decidendi*" as;

> *"The principle or principles of law on which the court reaches its decision. The ratio of the case has to be deduced from its facts, the reasons the court gave for reaching its decision, and the decision itself. It is said to be the statement of law applied to the material facts."*

[94] It is prudent to understand the meaning of the term of "*obiter dictum*" which is always use to understand the opposite of r*atio decidendi*. The Oxford Dictionary of law states that:

> *"Something said by the judge while giving judgment that was not essential to the decision in the case. It does not form part of the 'ratio decidendi" of the case and therefore creates no binding precedent, but may be cited as persuasive authority in later cases"*

[95] The Black's Laws Dictionary defines "*obiter dictum*" as;

> *"A judicial comment made while delivering a judicial opinion, but one that in unnecessary to the decision in the case and thereof no precedential"*

[96] The issue before the Court of Appeal in **Tulele v State (supra)** was whether the High Court has appellate jurisdiction to hear the appeal against the sentence made by the Magistrate exercising the invested jurisdiction under Section 4 (2) of the repealed Criminal Procedure Code. This Court in **Tulele v State (supra)** held that the appeal against such sentence should make its way directly to the Court of Appeal; thus, that decision is the *ratio decidendi* of **Tulele v State (supra)**.

[97] The Court of Appeal in **State v Prasad (supra)** found that the right of appeal against a decision of the Magistrate made under the invested jurisdiction lies with the Court of Appeal pursuant to Section 21 of the Court of Appeal Act. The issue before the Court of Appeal in **State v Prasad (supra)** was whether the appeal right still lies with the Court of Appeal when the indictable offence was amended to the summary offence after the matter was remitted to the Magistrate under the invested jurisdiction. Therefore, the issue of appellate jurisdiction was part of the dispute. Thus the said decision forms an important part of the *ratio decidendi* of the judgment. It is not a remark made by the Court of Appeal, which was not essential to the decision.

[98] Accordingly, the Fiji Court of Appeal has been exercising its appellate jurisdiction in respect of any appeals against the decisions of Magistrates made under the invested jurisdiction.

[99] Neither the learned Counsel for the Respondent nor the learned Counsel for the Appellant mentioned the decisions of this Court in **Tulele v State (supra), Kirikiti v State (supra),** and **State v Prasad (supra)**, submitting why this Court should deviate from these judgments of this Court. The learned Counsel for the Respondent made no comments on the **State v Prasad (supra)**. During the hearing, the two learned Counsels for the Appellant

admitted that they were not aware of the judgment of **State v Prasad (supra)**; hence, it was not considered in their submissions. Astoundingly, neither party sought further time to review and consider the judgment of State v Prasad and make a further submission, highlighting why this Court should deviate from its earlier decisions.

[100] Under these circumstances, the decision of Nourse J in **Colchester Estates (Cardiff) v Carlton Industries plc (1984) 2 601, Ch D)** has persuasive assistance to this matter. Nourse J held that:

> *"It is desirable that the law, at whatever level it is decided, should generally be certain. If a decision of this court reached after full consideration of an earlier one which went the other way, is normally to be open to review on a third occasion when the same point arises for decision at the same level, here will be no end of it. Why not a fourth, fifth or sixth case as well? ……*
> *There must come a time when a point is normally to be treated as having been settled at first instance. I think that should be when the earlier decision has been fully considered, but not followed, in a later one. Consistently, with the modern approach of the judges of this court to an earlier decision of one of their number (….), I would make an exception only in the case, which must be rare, where the third judge is convinced that the second was wrong in not following the first. An obvious example is where some binding or persuasive authority has not been cited in either of the first two cases. If that is the rule then, unless the party interested seriously intends to submit that it falls within the exception… "*

[101] The view of Nourse J in **Colchester Estates (Cardiff) v Carlton Industries plc (supra)** could be adopted *mutatis mutandis* to the issue before this Court. Accordingly, this Court should not decide not to follow the judgments of **Tulele v State (supra), Kirikiti v State (supra)** and **State v Prasad (supra)** without considering comprehensively if there are any persuasive reasons and authority to do that.

[102] Gamalath JA in **Tabualumi v State [2022] FJCA 41; AAU096.2016 (26 May 2022)** outlined an *obiter dictum*, expressing his cautionary opinion on the view that the appellate jurisdiction against the decisions of the Magistrate made under the invested jurisdiction should be with the High Court. Gamalath JA said that:

[7] The other issue on which Prematilaka J had directed his attention is a matter of jurisdiction. It is common ground that, as it stands ,the appeals from the magistrates' courts acting under extended jurisdiction , by passing the High Court, straight finds their way in to the Court of Appeal , which Prematilaka J perceives as contributing to the already over- loaded work load of the Court of Appeal. However, the appeals coming to the Court of Appeal from the magistracy are in accordance with the Rules and the Rules permit this exercise under law.

[8] Any change to the existing structure has to be by a legislative intervention. If a person aggrieved by a decision of the magistrates' court exercising the invested jurisdiction is allowed to first challenge the decision in the High Court, then in the Court of Appeal and finally in the Supreme Court, he will have the advantage of seeking the intervention at three levels whereas it will not be available to a person who can only invoke the jurisdiction of the Court of Appeal and thereafter in the Supreme Court on the basis of seeking leave. It in effect is a three tire situation as against a two tire situation and as such it goes contrary to the constitutional right of equality between persons placed in the similar position meaning aggrieved parties of a decision of an original court, be it the High Court or a magistrate's court exercising extended jurisdiction.

[9] Therefore, any change to the existing structure has to be after a careful consideration of all aspects involved in the exercise lets that that would become confusing at the end.

[103] I could not agree more with the above concern of Gamalath JA in **Tabualumi v State (supra)** and fully concur with His Lordship that the possibility of breaching the rights to equality and freedom from discrimination as stipulated under Section 26 of the Constitution and the right to appeal as stated under Section 14 (2) (o) of the Constitution if this Court accepted this preliminary objection. The Court also heard no submissions on these important issues from the Counsel of the Appellant and the Respondent.

[104] N.S. Bindra's Interpretation of Statutes states that [12th ed. at p.208-209]:

"The Legislature is deemed not to waste its words or to say anything in vain. The presumption is always against superfluity in a statute…….A construction which would render the provision nugatory ought to be avoided. No word should be regarded as superfluous unless it is not possible to give a proper interpretation to the enactment, or the meaning given is absurd or inequitable …… No part of a provision of a statute can be just ignored by saying that the legislature enacted the

same not knowing what it was saying. We must assume that the legislature deliberately used that expression and it intended to convey some meaning thereby. Law should be interpreted so as not to make any word redundant, if it is possible to interpret it so as to utilise the meanings of all words used in the legislation."

[105] In view of the above-mentioned rule of interpretation, the Court must not interpret Section 99 of the Constitution together with Section 4 (2) of the Criminal Procedure Act, Sections 3 and 21 of the Court of Appeal Act, making the application of Sections 26 and 14 (2) (o) of the Constitution redundant and superfluous.

[106] N.S. Bindra's Interpretation of Statutes [12th ed., at pp. 665) explained the general rule of statutory construction and said the same applies to the constitutional interpretation as well, where it states;

"The fundamental rule of interpretation is the same, whether it is the provisions of the Constitution or an Act of Parliament, namely, that the court will have to ascertain the intention gathered from the words in the Constitution or the Act as the case maybe. And where two constructions are possible, that one should be adopted which would ensure a smooth and harmonious working of the Constitution and eschew that which would lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory"

[107] According to the principles of constitutional interpretation, as stipulated under Section 3 of the Constitution, any interpretation or application of the Constitutional provisions must promote the values of a democratic society based on human dignity, equality and freedom. Section 3 (1) and (2) of the Constitution states:

"(1) Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.

(2) If a law appears to be inconsistent with a provision of this Constitution, the court must adopt a reasonable interpretation of that law that is consistent with the provisions of this Constitution over an interpretation that is inconsistent with this Constitution. (emphasis added)

[108] In view of the rules of interpretation stated in N.S. Bindra's Interpretation of Statutes and the principles of constitutional interpretation of the Constitution, any interpretation of Section 99 (3) (5), Section 100 (3), and Section 101 (2) of the Constitution must be consistent with the rights stipulated under Section 14 (2) (o) and 26 of the Constitution. If there are two or more views in respect of the interpretation, the Court must adopt a reasonable interpretation which is not inconsistent but in harmony with Sections 14 (2) (o) and 26 of the Constitution.

[109] Taking into consideration the above-discussed rules of interpretation and the judicial precedents in **Tulele v State (supra), Kirikiti v State (supra),** and **State v Prasad (supra)**, I shall now proceed to examine Section 4 (2) of the Criminal Procedure Act.

[110] Section 4 (2) of the Criminal Procedure Act has given the jurisdiction to a Judge of the High Court to invest a Magistrate with the jurisdiction to try any offence which, in the absence of such investment, is beyond the Magistrate's Jurisdiction. The nature of the jurisdiction invested in is the jurisdiction of the High Court conferred by laws.

[111] The Black's Law Dictionary defines the word "invest" as "to supply with authority or power". Accordingly, the Judge of the High Court invests the authority or power given to him with the Magistrate. The scope of the investment of such jurisdiction is to try any offence. Trying an offence includes conducting the hearing, determining guilt and eventually proceeding to a sentence if needed. Accordingly, the Magistrate is invested with the jurisdiction of the High Court to hear, determine the guilt and then sentence the Accused if required in respect of the offence remitted under the invested jurisdiction. Therefore, the sentencing jurisdiction of the High Court is also invested with the Magistrate under Section 4 (2) of the Criminal Procedure Act; thus, the Magistrate is not exercising his original sentencing power under the invested jurisdiction.

[112] However, Section 4 (3) of the Criminal Procedure Act has curtailed the sentencing component of the High Court jurisdiction invested with the Magistrate, making it in line with the sentencing power provided to the Magistrate under the Criminal Procedure Act. It

does not mean the Magistrate exercises the original sentencing jurisdiction stipulated under Section 7 of the Criminal Procedure Act under the invested jurisdiction.

[113] Consequently, Section 4 (2) of the Criminal Procedure Act has not created a new jurisdiction for Magistrate's Court. Neither the Magistrate exercises his original Magistrates' jurisdiction in trying the offences remitted under invested jurisdiction. The Magistrate exercises the jurisdiction of the High Court under section 4 (2) of the Criminal Procedure Act.

[114] In view of the reasons discussed above, it is my opinion that the Magistrate, under Section 4 (2) of the Criminal Procedure Act, exercises the jurisdiction of the High Court. However, the Magistrate does not become a Judge of the High Court as appointed under Section 106 of the Constitution. The Magistrate only acquires the jurisdiction of the High Court to try the offence remitted under the invested jurisdiction. On that basis, an appeal against the decisions of the Magistrate made under the invested jurisdiction lies with the Court of Appeal pursuant to Sections 3 and 21 of the Court of Appeal Act. This interpretation of Section 4 (2) is indeed in harmony with Sections 14 (2) (o), 26, 99 (3), (5), 100 (3), and 102 (2) of the Constitution and conformity with the principle of supremacy of the Constitution as enunciated under Section 2 of the Constitution.

[115] Having considered the reasons discussed above, I find no compelling and persuasive reasons before this Court to deviate from the judgments of **Tulele v State (supra), Kirikiti v State (supra),** and **State v Prasad (supra)**. Thus, this Court has jurisdiction to hear this Appeal and no merit in the preliminary objection raised by the learned Counsel for the Respondent.

[116] Since the majority decision of this Appeal is to refer this Appeal to the High Court, it would be appropriate for me to refrain from dealing with the substantive grounds of Appeal.

Order of the Court:

1. The Registry of the Court of Appeal is directed to refer this appeal to the High Court to be dealt with according to law.

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

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

.....
Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL

Solicitors:

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