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

CRIMINAL APPEAL NO. AAU 96 of 2023
[In the High Court at Suva Case No. HAA 10 of 2023]
[In the Magistrates Court at Savusavu case No.213 of 2020]

BETWEEN : **JOE NEWTON WAQA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. S. Prakash for the Appellant**
: **Ms. L. Latu for the Respondent**

Date of Hearing : **17 June 2024**

Date of Ruling : **18 June 2024**

RULING

Prematilaka, RJA

[1] Following a trial at Savusavu Magistrates court the appellant had been convicted of possession of 4.4869 kg of cannabis sativa contrary to section 5(a) of the Illicit Drugs Control Act, 2004.

[2] The learned Magistrate on 29 December 2022 had sentenced him to 08 years of imprisonment with a non-parole period of 06 years to be served.

[3] The appellant had appealed to the High Court against conviction and sentence and on 12 October 2023 the learned High Court judge in the Order had made the following orders and summarily dismissed the appellant's appeal pursuant to section 251 of the Criminal Procedure Act.

'[1] Notice of Dismissal of Appeal

[2] Upon consideration of the informal petition of appeal and the record of proceedings in the Magistrates' Court, I am satisfied that the appeal against sentence has been lodged without any sufficient ground of complaint.

[3] The appeal is summarily dismissed pursuant to section 251 of the Criminal Procedure Act.

[4] The Notice of Dismissal to be served on the appellant and the Office of the Director of Public Prosecutions.'

[4] The appellant had then preferred a second tier appeal to this court on the following ground of appeal against sentence through the Legal Aid Commission.

> *'THAT the Learned High Court Judge erred in law by incorrectly applying section 251 (2) of the Criminal Procedure Act 2009 and summarily dismissing the appellants appeal against sentence without properly considering the appeal*.'

Scope under section 22 of the Court of Appeal Act

[5] The appellant's appeal to this court is against the High Court judgment delivered on 18 January 2022 in terms of section 22 of the Court of Appeal Act as a second tier appeal. In a second tier appeal, a conviction could be canvassed on a ground of appeal involving a question of law only [also see **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)]. A sentence could be canvassed only if it was unlawful or passed in consequence of an error of law or if the High Court had passed a custodial sentence in substitution for a non-custodial sentence [vide section 22(1)(A) of the Court of Appeal Act].

[6] Though, leave to appeal is not required under section 22, a single judge could still exercise jurisdiction under section 35(2) in order to determine whether the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal [vide **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012) and **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)]. In doing so, a single judge is required to consider whether there is in fact a question of law that should go before the full court, for designation of a point of appeal as a question of law by the

appellant or his pleader would not necessarily make it a question of law [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014)]. It is therefore a counsel's or an appellant's duty to properly identify a discrete question (or questions) of law in prosecuting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005).

[7] What is important is not the label but the substance of the appeal point. This exercise is undertaken by the single judge not for the purpose of considering leave under section 35(1) but as a filtering mechanism to make sure that only true and real questions of law would reach the full court. If an appeal point taken up by the appellant in pith and substance or in essence is not a question of law then the single judge could act under section 35(2) and dismiss the appeal altogether [vide **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020) and **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014)].

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

[9] In a second tier appeal under section 22 of the Court of Appeal an appellant cannot seek to re-open and re-argue facts or mixed fact and law of the case or re-agitate findings of pure facts or mixed fact and law. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the court to rectify any error of law or clarify any ambiguity in the law and not to deal with any errors of fact or of mixed fact and law which is the function of the High Court. That is the intention of the legislature and this court must give effect to that legislative intention.

01st ground of appeal

[10] Section 251 of the Criminal Procedure Act is as follows:

> *'251. — (1) When the High Court has received the petition of appeal and the record of proceedings, a judge shall consider the petition.*
>
> *(2) Where an appeal is brought on the grounds that —*

(a) the decision is unreasonable; or
(b) the decision cannot be supported having regard to the evidence; or
(c) the sentence is excessive —

and ***it appears to the judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead to the opinion that the sentence ought to be reduced****, the appeal may be summarily dismissed by an order of the judge certifying that the judge has perused the record and is satisfied that the appeal has been lodged without any sufficient ground of complaint.*

(3) Whenever an appeal is summarily dismissed, notice of the dismissal shall be given by the Chief Registrar of the High Court to the appellant or the appellant's lawyer.

[11] There is no dispute that the appellant had appealed against his conviction and sentence to the High Court. Thus, a summary dismissal could be effected only if *'it appears to the judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead to the opinion that the sentence ought to be reduced'.*

[12] This passage outlines a situation where an appeal on conviction and sentence can be dismissed without a full hearing, based on the judge's assessment of the case. Here is a breakdown of the meaning:

1. ***Sufficient Evidence for Conviction****: The judge believes that the evidence presented in the original trial was adequate to justify the conviction. This means that, in the judge's view, the evidence supports the guilty verdict beyond a reasonable doubt.*

2. ***No Material Raising Reasonable Doubt****: There is nothing in the case that could lead to a reasonable doubt about the correctness of the conviction. This means that the judge sees no significant errors or new evidence that could question the validity of the conviction.*

3. ***No Grounds for Reducing the Sentence****: The judge finds no factors or circumstances that would justify reducing the sentence imposed by the lower court.*

[13] If both conditions are met *i.e.* the evidence supports the conviction and there is no reasonable doubt or reason to reduce the sentence, the judge can decide to dismiss the appeal summarily. This means the appeal is rejected without a full, detailed examination or hearing, effectively upholding the original conviction and sentence.

[14] The question is whether the High Court judge's statement '*Upon consideration of the informal petition of appeal and the record of proceedings in the Magistrates' Court, I am satisfied that the appeal against sentence has been lodged without any sufficient ground of complaint'* is sufficient compliance with section 251 of the Criminal Procedure Act.

[15] The statement *"Upon consideration of the informal petition of appeal and the record of proceedings in the Magistrates' Court, I am satisfied that the appeal against sentence has been lodged without any sufficient ground of complaint"* may suggest that the judge has reviewed the necessary documents and found no merit in the appeal. However, this statement alone is not sufficiently detailed to show that the judge has specifically considered all three factors (evidence sufficiency, reasonable doubt, and sentence justification). In the context of judicial decision-making, it is generally important for transparency and accountability that the judge provides some indication that they have considered the relevant factors before dismissing an appeal.

[16] Ideally, the record should show that the judge has considered whether:

- *The evidence is sufficient to support the conviction.*
- *There is no material that could raise a reasonable doubt about the conviction.*
- *There are no circumstances that could justify a reduction in the sentence.*

[17] This helps ensure that the decision is well-founded and can withstand scrutiny, particularly if there is any future challenge to the fairness or thoroughness of the process. While a concise statement might meet the legal requirements, providing detailed reasoning helps ensure clarity and demonstrates that the judge has carefully reviewed all relevant aspects. Maintaining a detailed record of the judge's

considerations can protect against claims of oversight or unfairness. It also contributes to the overall transparency of the judicial process.

[18] Therefore, in my view, at least as best practices, the following steps should be followed by the judge under section 251 of the Criminal Procedure Act.

- *Summarizing the evidence and explaining why it supports the conviction.*
- *Indicating that there is no new material that could raise a reasonable doubt.*
- *Reviewing the circumstances of the case to confirm that the sentence is appropriate.*

[19] Thus, while the judge's brief statement might be legally sufficient, it is generally preferable for the decision to include a more detailed account of the considerations regarding the sufficiency of evidence, reasonable doubt, and the appropriateness of the sentence. This practice promotes transparency and helps ensure that the decision is perceived as fair and thorough. Unfortunately, the impugned Order does not satisfy these requirements and it raises the question of law whether there is sufficient compliance with section 251 of the Criminal Procedure Act.

[20] It also appears that the High Court judge had not made any reference in the Order to the appellant's conviction appeal. He appears to have summarily dismissed only the sentence appeal. This glaring and inexplicable omission perhaps may have been due to some misunderstanding where the judge had treated the appellant's appeal as one against sentence only.

[21] The next question of law that arises is whether in any event the High Court judge had the power to summarily dismiss the appellant's appeal at the stage he did. In **State v Khan** [2019] FJCA 90; AAU0085 of 2012 (6 June 2019) the Court of Appeal held:

> *'[26] A summary dismissal of a petition of appeal is allowed only under section 251 (2) of the Criminal Procedure Act. It is well established that the power of summery dismissal is a special jurisdiction and should be exercised strictly and sparingly only on the grounds set out in the relevant provision of law as the effect of the section where applied and implemented is to deprive the appellant of the ordinary right to hearing……'*

> *[27]* ***In any event once the notice of hearing is served on the respondent in terms of section 252 of the Criminal Procedure Code, no appeal could be summarily dismissed under section 251(2) without giving an opportunity to the appellant to be heard****. Because, it is assumed that by that time the High Court Judge, as compelled by section 251(1), has perused the petition of appeal and the record and decided not to act under section 251(2).'*

[22] The High Court record shows that a state counsel on behalf of the DPP had appeared for the State since 13 April 2023. There had been several 'mention' dates since then and the State had been represented by a state counsel throughout. During this time the judge had made inquiries as to whether the parties, particularly the appellant who was appearing in person *via* Skype had received the appeal record. On 31 August 2023 Acting High Court Judge Mr. Ratuvili had given directives for written submissions by both parties and fixed the hearing of the appeal on 20 October 2023 after the appellant confirmed the receipt of the appeal record. It is not clear from the HC record as to how the High Court Judge Mr. Daniel Gounder came to make the impugned Order dismissing the appellant's appeal on 12 October 2023.

[23] Thus, it is very clear that the appellant's appeal had gone past section 251 stage and was ready to be taken-up for hearing with the participation of both parties on 20 October 2023. Therefore, the High Court judge could not have legally acted under section 251 of the Criminal Procedure Act and summarily dismissed the appellant's appeal.

[24] Therefore, I would allow the appellant's appeal to be taken up before the Full Court on the following questions of law:

> *(i) Whether the High Court had substantially complied with section 251 of the Criminal Procedure Act in summarily dismissing the appellant's appeal?*
>
> *(ii) In any event, whether the High Court had not determined the appellant's appeal against conviction?*
>
> *(iii) Could the High Court have acted under section 251 of the Criminal Procedure Act and summarily dismissed the appellant's appeal*

without hearing the parties at the stage when it made the impugned Order of dismissal?

Order of the Court:

1. Appeal (bearing No. AAU 96 of 2023) is allowed to proceed to the Full Court on the three questions of law set out at paragraph [24].

COURT OF APPEAL FIJI

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

Solicitors:

Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for the Respondent