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

CRIMINAL APPEAL NO. AAU 0023 of 2018
[In the High Court of Lautoka Case No. HAA 88 of 2017]
[In the Magistrates Court at Tavua case No.267/12]

BETWEEN : **MUNENDRA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. N. R. Padarath for the Appellant**
: **Mr. S. Babitu for the Respondent**

Date of Hearing : **26 November 2020**

Date of Ruling : **27 November 2020**

RULING

[1] The appellant had been arraigned in the Magistrates' Court at Tavua on a single count of indecently annoying a person contrary to section 213 (1) (a) of the Crimes Act. It had been alleged that the appellant on 24 October 2012 at Maqere, Tavua with intent to indecently annoy the modesty of Roshni Mudaliar made a gesture by holding his private part intending that such gesture be seen by the said Roshni Mudaliar.

[2] Pursuant to the trial, the learned Magistrate had found the appellant guilty of the charge in his judgment dated 15 May 2017. He had been sentenced to 50 hours of community work on 17 July 2017 with a default sentence of 06 months of imprisonment.

[3] Being aggrieved by the said conviction, the appellant had filed a timely appeal in the High Court on the following grounds of appeal.

"(1) The Learned Trial Magistrate erred in law in his application and interpretation of proof beyond reasonable doubt.

(2) The Learned Trial Magistrate erred in law and in fact at paragraph 19 of the judgment when it was held that the alibi evidence was unbelievable wherein:

(a) The Learned Trial Magistrate did not give adequate reasons to not believe the defence witness given the evidence led.

(b) The Learned Trial Magistrate failed to define and explain the term significant event.

(c) The Learned Trial Magistrate failed to consider the evidence of the alibi evidence despite being satisfied that the evidence was not discredited and took an opinion which was not led in evidence by the prosecution and defence."

[4] The learned High Court judge in the judgment dated 16 February 2018 had dismissed the appellant's appeal.

[5] The appellant through his lawyers Samuel K Ram (Barrister and Solicitor) had filed a timely notice of appeal against the decision of the High Court on 16 March 2018 containing the following grounds of appeal.

'1. The Learned Judge erred in law by holding that the Magistrate was not required to define the term significant event at paragraph 17 when it was accepted by the Learned Judge that the term significant event did not have any legal meaning neither was the term significant event derived from any established legal principle and thus it was necessary for the Learned Magistrate and the Learned Judge to give legal meaning to the term significant event.

'2. The Learned Judge erred in law by holding that there is no substantial miscarriage of justice when it was noted that the Learned Magistrate failed to direct himself to the legal principle laid down in Laisenia Base and Are Amae vs the State AAU 0067 of 2011 and this led to the Learned Magistrate to invent a term significant event and shift the burden onto the Defence.'

[6] Thus, the appellant's current appeal to this court is against the High Court judgment delivered on 16 February 2018 in terms of section 22 of the Court of Appeal Act as a second tier appeal.

[7] Section 21 of the Court of Appeal Act permits an appeal against conviction, sentence, and acquittal on a trial held before the High Court and against grant or refusal of bail pending trial by the High Court. 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.

[8] In a second tier appeal under section 22 of the Court of Appeal Act, a conviction could be canvassed on a ground of appeal involving a question of law only [also see paragraph [11] of **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)] and 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.

[9] Calanchini P had discussed the scope of section 22 of the Court of Appeal Act *vis-à-vis* section 35 (1) and (2) in **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012) and held that 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).

> *'The significant point to note from these provisions is that there is an automatic right to appeal to the Court of Appeal from a decision of the High Court exercising its appellate jurisdiction from a magistrates' court on a question of law only. Leave is not required under such circumstances. The appeal lies in respect of a question of law only. Since leave is not required there is no jurisdiction given to a single judge of the Court under section 35 (1) of the Court of Appeal Act to consider the appeal.*
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> *The position is that a single judge may nevertheless exercise the jurisdiction given under section 35 (2) of the Act:*
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> > *"If on the filing of a notice of appeal or of an application for leave to appeal a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal."*
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> *In the context of the present appeal, it remains open to me to discuss whether the Appellant's notice of appeal which is an appeal under section 22 of the Act*

(a) is bound to fail because there is no right of appeal or (b) is vexatious or frivolous.'

[10] Calanchini P once again remarked in **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016) that leave to appeal is not required under section 22 but a single judge of the Court of Appeal could act under section 35(2).

> *'[3] Section 22 is a stand-alone provision that sets out the appeal procedure for appeals from the High Court in the exercise of its appellate jurisdiction. Pursuant to section 22 (8) certain provisions of the Act apply to such appeals. However leave to appeal is not required under section 22. An appeal under section 22 is subject to the provisions of section 35 of the Act. Section 35 (2) provides:*
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> > *"(2) If on the filing of a notice of appeal _ _ _ a 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."*

[11] I had the occasion to remark in **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020) on section 22 of the Court of Appeal Act as follows.

> *'[14] However, in my view, upon filing an appeal under section 22 of the Court of Appeal Act a single judge is still 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. What is important is not the label but the substance of the appeal point. This exercise should be 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.'*

[12] Then in **Ledua v State** [2018] FJCA 96; AAU0071.2015 (25 June 2018) Calanchini P had identified one instance of what can be regarded as a question of law in relation to a decision on an application for enlargement of time in the High Court.

> *'[5] ..... Put another way, the issue is whether the learned High Court Judge has applied the correct test for determining the application for an enlargement of time rather than whether he has applied the test correctly. In my opinion the first question involves question of law only and the second involves a question of mixed law and fact.*

'[8] In my judgment the issue that comes up for determination in the Court of Appeal is whether the Court below has applied the correct test for determining the application for an enlargement of time sought by Ledua in to prosecute his appeal. This constitutes a ground of appeal involving a question of law only and as a result the Court of Appeal has jurisdiction. Furthermore the issue is not frivolous or vexatious.'

[13] The following general observations of the Supreme Court in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013) are helpful to identify a question of law in a given situation.

*'[14] A summary of these cases show that questions that have been accepted as a point of law alone include causational issue in homicide cases, jurisdiction to try an offence, existence of a particular defence, mens rea for a particular offence, construction of a statute and defective charge. The list, however, is not exhaustive. In **Hinds** (1962) 46 Cr App R 327 the English Court of Appeal did not define the phrase 'a question of law alone', but suggested that the determination of whether a ground of appeal involves a question of law alone be made on a case by case basis.*

01st ground of appeal

[14] The gist of the appellant's argument is that the both the Magistrate and the High Court judge had failed to assign a legal definition or meaning to the phrase 'significant event' used by the Magistrate in paragraph 19 of his judgment.

'19. The defence alibi, I find unbelievable as there is no significant event established in the defence evidence to trigger the memories of DW1, DW2, and DW3 in recalling the incident on 24th October, 2012.'

[15] The Magistrate had then proceeded to elaborate as to what he meant by the absence of a significant event in the paragraphs that followed.

'[20] DW1 and DW2 both confirmed that DW2 was looking after the shop at while DW1 left at 7.30am to Ba town to do their shopping for their shop and carry out other errands. In my view this going to town by DW1 to do shopping for their shop and attend to other errand is not significant due to the high possibility that he was doing these on many occasions due to the existence of their shop business. If accused had been doing these on many occasions then obviously DW2 would have been looking after the shop on many occasions too and not necessarily only on 24th October 2012, whilst DW1 was away in town doing shopping for their shop.

[21] Likewise for DW3 he stated that he goes to accused shop. Hence there is a high possibility that he had gone to accused shop on many other occasions and not only on 24th October 2012'.

[22] As I see it on the evidence, DW1's going to town on the said date at 7.30am and DW3 coming to accused shop on the said date at 8am is not a significant event to prompt their memory as to the alleged date of the incident. The going to town of DW1 and coming to accused shop by DW3 cannot be a random practice hence there's a high possibility that what they've stating occurred on a different date and not on the alleged date of the incident.'

[16] Thereafter, the Magistrate had treated the defence evidence to be week and unreliable and had refused to accept the *alibi* defence. Therefore, it appears that the Magistrate had rejected the appellant's defence of *alibi* due to the lack of a significant event that made *alibi* witnesses to recollect the events on 24 October 2012. The High Court while examining the appellant's complaint seems to have accepted this by stating

'[18] .....The fact that the defence witnesses told the court that they recalled the 24th day of October, 2012 and maintained their version of events did not mean that when assessing the evidence the learned Magistrate was satisfied of its truthfulness. <u>According to the learned Magistrate, there was no evidence before the court that would have triggered the memories of all the defence witnesses in recalling the date of the incident.'</u>

[17] The Magistrate's court record reveals that neither the defence not the prosecution had questioned *alibi* witnesses how and why they could recollect or what made them register in their minds the absence of the appellant around 8.30 in the morning on his compound on the date of the incident when the alleged incident had taken place according to the complainant. In other words, neither party had afforded an opportunity for those witnesses to give an explanation, if possible, whether there was anything significant associated with the date of the incident as opposed to any other day.

[18] Be that as it may, I do not think that there was any need or it was actually possible for the Magistrate or the High Court judge to have defined in legal jargon what a significant event is. Both courts have understood this expression to encapsulate common experience of life of reasonable people who would remember an event due to some reason which makes it imprinted in the memory. As to whether the Magistrate should have used lack of a significant event as the reason to disbelieve the

alibi witness without any probe into that aspect during the trial by the parties is another matter.

[19] Therefore, in my view the first ground of appeal *ipso facto* does not raise a question of law only. However, the appellant's complaint might have some relevance to the second ground of appeal.

02nd ground of appeal

[20] The appellant argues that the Magistrate had failed to properly direct himself on the principles laid down in **Laisenia Base and Arc Amae vs the State** AAU 0067 of 2011regarding his *alibi* evidence.

[21] In **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) the Court of Appeal said of the required direction in cases where there is a defense of *alibi* in the following words which were reiterated in **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020).

> *'[29] When an accused relies on alibi as his defence, in addition to the general direction of the burden of proof, the jury (in Fiji the assessors) should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (**R v Anderson** [1991] Crim. LR 361, CA; **R v Baillie** [1995] 2 Cr App R 31; **R v Lesley** [1996] 1 Cr App R 39;'*

[22] In **Bese v State** [2013] FJCA 76; AAU0067.2011 (10 July 2013) Gounder J held

> *'[12] When an accused raises alibi as his defence, in addition to the general direction on the burden of proof, the jury should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (R v Anderson [1991] Crim. LR 361, CA; R v Baillie [1995] 2 Cr App R 31; R v Lesley [1996] 1 Cr App R 39; R v Harron [1996] 2 Cr App R 457). Not only these directions were not given, the number of rhetorical questions posed by the trial judge in relation to the applicants' alibi, arguably made the summing-up imbalance and unfair to the applicants. Whether the alleged errors caused miscarriage of justice is for the Full Court to determine. As far as this application is concerned, I am satisfied that leave should be given to both applicants to appeal against their convictions.'*

[23] Admittedly, the Magistrate had not directed himself at all according to the guidelines set out in the above cases in evaluating the *alibi* evidence of the appellant and his witnesses. The Learned High Court judge had admitted that the Magistrate had not directed his mind to those principles but dealt with it as follows.

> *'24. A perusal of the judgment does not show that the learned Magistrate had directed his mind to the above principle of law. In this regard, this court will have to consider whether any substantial miscarriage of justice has actually occurred by the above failure in accordance with section 256 (2) (f) of the Criminal Procedure Act. Section 256 (2) (f) states:*
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> > *"the High Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."*
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> *25. After perusing the evidence contained in the copy record, I am satisfied that no substantial miscarriage of justice has actually occurred as a result of the learned Magistrate's failure.'*

[24] The appellant argues that the High Court judge should have demonstrated by referring to evidence why he thought that there was no substantial miscarriage of justice by the complete failure on the part of the Magistrate to direct himself on the law relating to *alibi* evidence rather than making the general statement in paragraph [25] of the judgment.

[25] The Court of Appeal in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) set out the approach to be taken by the appellate court in the application of the proviso to section 23(1) of the Court of Appeal Act which is almost identical with section 256 (2) (f) of the Criminal Procedure Act, as follows.

> *'[55] The approach that should be followed in deciding whether to apply the proviso to section 23(1) of the Court of Appeal Act was explained by the Court of Appeal in **R v. Haddy** [1944] 1 KB 442. The decision is authority for the proposition that **if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice**. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.*

[56] This test has been adopted and applied by the Court of Appeal in Fiji in ***R –v- Ramswani Pillai*** *(unreported criminal appeal No. 11 of 1952; 25 August 1952);* ***R –v- Labalaba*** *(1946 – 1955) 4 FLR 28 and* ***Pillay –v- R*** *(1981) 27 FLR 202. In* ***Pillay –v- R*** *(supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in* ***R –v- Weir*** *[1955] NZLR 711 at page 713:*

> *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt.* ***If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred."***

[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

In ***Vuki –v- The State*** *(unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*

> *"The application of the proviso to section 23(1) _ _ _ of necessity, must be a very fact and circumstance specific exercise."*

[26] In my view, the High Court too should adopt the approach and apply the test adopted in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) in deciding whether to have recourse to section 256 (2) (f) of the Criminal Procedure Act, 2009.

[27] However, unfortunately it appears that the learned High Court judge had not adverted to the relevant test in applying section 256 (2) (f) of the Criminal Procedure Act, 2009 and dismissing the appellant's appeal.

[28] Therefore, whether the learned High Court judge has applied the correct test adopted in **Aziz v State** (supra) in the application of section 256 (2) (f) of the Criminal Procedure Act, 2009 involves a question of law only. However, whether he has applied the test correctly involves a question of mixed law and fact.

Order

1. The notice of appeal filed by the appellant may proceed to the Full Court only on the question whether the High Court applied the correct test adopted in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) in the application of section 256 (2) (f) of the Criminal Procedure Act, 2009.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL