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

CRIMINAL APPEAL NO. AAU 0025 of 2019
[In the High Court of Lautoka Case No. HAA 2 of 2018]
[In the Magistrates Court at Nadi Private Prosecution No. 9 of 2016]

BETWEEN : **TIMOTHY JOYCE**

Appellant

AND : **CIVIL AVIATION AUTHORITY OF FIJI**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. A. K. Narayan and Ms. V. Buli for the Appellant**
: **Ms. T. Colati for the Respondent**

Date of Hearing : **08 March 2021**

Date of Ruling : **14 June 2021**

RULING

[1] The appellant had been charged in the Magistrates Court at Nadi with twenty-nine counts of Failure to Comply with Safety Aircraft Operation Requirements contrary to Section 70 (1) of the Air Navigation Regulation (ANR) 1981 of 26th February, 2016 punishable under section 157(3) of ANR. The Appellant had pleaded not guilty to the charges on 8 April 2016. An amended charge dated 21 July 2016 had been filed by the respondent and the appellant had changed his plea to a guilty plea to all twenty-nine counts on 04 November 2016.

[2] On 30 October 2017, the summary of facts had been read to the appellant and he, having agreed to the same, had been convicted as charged on all 29 charges. He had been sentenced to pay a fine of $29,000.00 within 3 months with a default sentence of 2900 days of imprisonment on 08 December 2017.

[3] The appellant had filed a timely petition of appeal against sentence in the High Court and he had tendered amended grounds of appeal on 13 June 2018. Both parties had lodged their respective written submissions as well.

[4] The learned High Court Judge had considered 19 grounds altogether and delivered the judgment on 13 February 2019 allowing the last ground of appeal that the sentence imposed by the Magistrate was harsh and excessive and made the following orders:

1. *Appeal is partially allowed.*
2. *The sentence imposed by the learned Magistrate at Nadi is quashed.*
3. *The appellant is sentenced afresh.*
4. *A fine of $ 750/- for each of the 29 counts is imposed.*
5. *Total fine of $21,750.00 to be paid within 3 months in default 3 months' imprisonment.*
6. *Application for discharge upon non-conviction is dismissed.*

[5] The appellant had appealed against the said judgment two days out of time on 15 March 2019 on the following grounds of appeal:

> *'**Ground 1***
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> *THAT the Learned Trial Judge erred in law in failing to consider whether the conviction could be sustained by holding that there was no appeal against conviction (paragraph 75) when he was invited by the Appellant to exercise the Court's Revisional powers under Section 260 of the Criminal Procedure Act 2009 to determine whether:*
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> 1. *The provision of Section 12D of the Civil Aviation Authority Act of Fiji 1979 requiring a Notice of Infringement was mandatory before mounting a prosecution in Court;*
> 2. *If mandatory, the Appellant was entitled to be acquitted and the sentences quashed.*
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> ***Ground 2***
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> *THAT the Learned Judge erred in law in holding that:*
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> 1. *The sentence imposed by the Respondent otherwise than by a Court could not be taken into account in setting a tariff (paragraph)*
> 2. *The Chief Executive Officer's evidence could not be called by the Appellant for the above purposes.'*

[6] The right of appeal against a decision made by the High Court in its appellate jurisdiction is given in section 22 of the Court of Appeal Act. In a second tier appeal under section 22, 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 [vide section 22(1)(A) of the Court of Appeal Act].

[7] 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.'*

[8] 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 Act 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."*

[9] 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 [see also **Munendra v State** [2020] FJCA 234; AAU0023.2018 (27 November 2020),**Dean v State** AAU 140 of 2019 (08 January 2021) and **Verma v State** [2021] FJCA 17; AAU166.2016 (14 January 2021)]:

> *'[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.'*

[10] This aspect had received the attention of the Court of Appeal previously in **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005) where it was held:

> *'[2]. Section 22(1) of the Court of Appeal Act (Cap. 12), which is the source of this Court's jurisdiction in the present case, is clear and unambiguous in restricting a second right of appeal to questions of law. It is therefore*

counsel's duty properly to identify a discrete question (or questions) of law in promoting a s.22(1) appeal. In the present case there has been a failure to do that, and the appeal was presented effectively as a second general appeal incorporating the wide variety of complaints made to the High Court. That is not acceptable….'

[11] Further, in **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014) this court in relation to section 21(1)(a) of the Court of Appeal Act remarked on the notice of appeal casually labelling grounds of appeal as involving questions of law in the following terms:

> *'[12] All the grounds of appeal, except for the first ground, are described in the amended Notice of appeal as raising an error of law. However, it needs to be clearly stated that the mere fact that the ground of appeal is stated in the notice to raise an error of law does not necessarily mean that the ground involves a question of law alone. In **Hinds –v- R** (1962) 46 Cr. App. R 327 Winn J at page 331 when commenting on section 3(a) of the Criminal Appeal Act 1907 (UK) (the terms of which were similar to the present section 21(1) (a) of the Court of Appeal Act) noted:*
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> > *"The court is very clearly of the opinion that the proper construction of those words (against conviction "on any ground of appeal which involves a question of law alone)" is that there must be, in order that the right given by that subsection can be claimed a ground of appeal raised which is a question of law, and that the section cannot be effectively invoked merely by raising a ground which the grounds of appeal or the submissions of counsel at any later stage describe as a ground of law."*

[12] 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.'*

[13] The learned High Court Judge in his judgment had set out a summary of facts as follows:

> *'The accused is 62 years old and holds a dual Australian and Fijian citizenship. He is a Shareholder, Director and the Accountable Manager of Joyce Aviation (Fiji) Limited, which is a group of aviation companies, namely Sunflower Aviation Limited, Pacific Flying School, Heli Tours (Fiji) Limited and Tandem Skydive (Fiji) Limited. He holds both Australian Air Transport Pilot Licence (ATPL) and Fiji Commercial Pilots Licences (CPL) for Aeroplanes and Helicopters. The companies are managed by the Accused and they operate out of the Sunflower Hanger at London Avenue, Nadi International Airport. The company collectively employs a total of 75 employees which includes the administration staff, the technical personnel and pilots.*
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> *The accused is actively involved with all the businesses and is usually involved in the flight operations pertaining to both aeroplanes and helicopters, where he is the Chief Pilot.*
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> *On the 14th of September, 2015, the Accused went to renew his Medical Certificate for his CPL (Helicopter) Licence No. 200928H at the CAAF Head Office. Whilst it was being processed, the Licensing officials noted that his second Licence, the CPL (Aeroplane) Licence No. 200928A had expired about 05 months earlier, on the 06th of April, 2015. This initiated an investigation and evidence indicated that he had flown with an expired Licence on 29 different occasions, i.e. from the 11th of April to the 20th of July, 2015. He was immediately suspended pending a complete investigation, after which he was charged.*
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> *The evidence indicated that the Accused, Mr Timothy John Joyce had piloted an aircraft with an expired license (CPL [Aeroplane] Licence No. 200928A) on twenty nine (29) different flights between the date his licence had expired – on the 06th of April, 2015 to the date the infringements were reported, the 14th of September, 2015, as outlined in detail in the Official Charges he has been charged with, which are the following days:*
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(1)	*03*	*times*	*on*	*11th April*	*2015*
(2)	*05*	*times*	*on*	*19th April*	*2015*
(3)	*07*	*times*	*on*	*15th June*	*2015*
(4)	*04*	*times*	*on*	*22nd June*	*2015*
(5)	*01*	*time*	*on*	*26th June*	*2015*
(6)	*01*	*time*	*on*	*30th June*	*2015*
(7)	*04*	*times*	*on*	*12th July*	*2015*
(8)	*02*	*times*	*on*	*14th July*	*2015*
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> *The Accused has voluntarily pleaded guilty to all the 29 counts as charged.'*

01st ground of appeal

[14] The first ground of appeal challenges the conviction and not the sentence. The gist of it is whether the service of an infringement notice in terms of section 12D(1) of Civil Aviation Authority of Fiji Act (CAA Act) was a condition precedent to the institution of criminal proceedings against the appellant in the Magistrates court. If the answer was in the affirmative, then the question is whether the resulting conviction following the prosecution without the service of an infringement notice was liable to be quashed in appeal as agued by the appellant.

[15] It appears from section 12D(3) that the person receiving an infringement notice could pay the fixed penalty and avoid further proceedings for the alleged offence. The Civil Aviation Authority of Fiji (CAAF) may also serve an improvement notice under section 12(C) before serving an infringement notice. However, the CAAF may also issue in the first instance itself an infringement notice under 12D(1)(b) when a person has not complied with any provision of the CAA Act or its regulations. There is, however, no specific provision in the CAA Act which makes an infringement notice a condition precedent to a criminal prosecution in court.

[16] On the other hand the respondent argues that acting under section 12D(1) of CAA Act was not mandatory and it could have in its discretion instituted criminal proceedings directly against the appellant in the Magistrates court. The CAAF had also argued as reflected in the High Court judgment (see paragraph 73, 76 and 78) that in respect of the appellant other regulatory steps under the CAA Act and its regulations had been rendered ineffective and it was justified in having had recourse to criminal proceedings without issuing an infringement notice or notices in respect of the 29 breaches.

[17] The learned Magistrate seems to have thought that for the ‘integrity of the system’ the CAAF must comply with section 12D of CAA Act requiring a notice of infringement to offenders and court should be used as a last resort for the review of fines imposed. The learned High Court judge had not made any observations on this aspect of the matter.

[18] Therefore, there appears to be a question of law arising from the above arguments for the full court to clarify.

[19] However, there are a few other questions that the full court may have to answer before considering the above issue.

[20] The appellant had pleaded guilty in the Magistrates court and he had not challenged the conviction on his plea of guilty directly in the High Court. None of the grounds of appeal (urged in the High Court) seems to be against conviction. However, the appellant appears to have argued under appeal ground 16 that the learned Magistrate should have discharged him without a conviction being recorded in terms of section 43 of the Sentencing and Penalties Act but not gone so far as to contend that the conviction should be set aside for non-compliance with section12D(1) of CAA Act. Needless to say, that these are two different arguments.

[21] Further, it appears that the appellant had not raised any objection to the criminal proceedings against him on the basis of non-compliance with section 12D(1) of CAA Act in the Magistrates court. Nor had he pursued it in the High Court as a ground of appeal. Thus, the appellant appears to have acquiesced in the jurisdiction of the Magistrates court to try him by pleading guilty to all charges in the charge sheet. In other words, the appellant seems to have waived any objection to the jurisdiction of the learned Magistrate.

[22] The appellant has submitted that he invited the learned High Court judge to exercise revisionary jurisdiction, in particular regarding section 12D of the CAA Act but the learned Judge had failed to do so with no reasons given. The High Court judgment does not reflect that the High Court judge had considered the appellant's application to exercise revisionary jurisdiction, if in deed there had been such an application.

[23] The respondent had taken up the position that the appellant's counsel raised the above issue during the hearing of the appeal in the High Court as an afterthought without pleading it as a ground of appeal. Thus, it can be safely assumed that the appellant had

brought the question involving section 12D(1) of the CAA Act to the notice of the High Court judge at some stage while the appeal was being considered.

[24] Therefore, this Court will have to consider whether the High Court should or could have exercised revisionary jurisdiction merely on an invitation by a party while exercising appellate jurisdiction with regard to an appeal from the Magistrates court. Since the matter involving an infringement notice under section 12D(1) of CAA Act may, if answered in favour of the appellant, affect the jurisdiction and therefore the resulting conviction, the Court of Appeal is required to consider whether the High Court should have considered it anyway in terms of section 260, 262 of the Criminal Procedure Act read with Article 100 of the Constitution when it was brought to its notice.

[25] On the other hand, assuming that the appellant should be deemed to have taken up the first ground of appeal on the jurisdiction of the Magistrates court for the first time before the Court of Appeal, whether, that ground of appeal should be allowed to be raised for the first time is perhaps the first question the full court would have to answer.

[26] Secondly, if the Court decides to entertain the first ground of appeal then the next question is whether the appellant is entitled to challenge the jurisdiction of the Magistrates court at this stage based on section 12D(1) of the CAA Act; or whether he is estopped from doing so upon his voluntary plea of guilty; or whether an issue going to the jurisdiction of the original court and by extension to the foundation of the conviction could be taken up at any stage as a matter of law.

[27] If all the above questions are answered in favour of the appellant, then the merits of the first ground of appeal could be considered for an authoritative pronouncement as to whether the service of an infringement notice in terms of section 12D(1) of Civil Aviation Authority of Fiji Act is a condition precedent to the institution of criminal proceedings against a person.

[28] In the circumstances, I am inclined to consider the first ground of appeal as a question of law worthy of being considered by the full court as it would also involve guidance for future prosecutions under the CAA Act.

02nd ground of appeal

[29] The two parts of the 02nd ground of appeal had been urged before the High Court judge under the first, second and third grounds of appeal by the appellant.

[30] It does not appear from the High Court judgment that either party had sought a guideline judgment on sentencing upon convictions on Failure to Comply with Safety Aircraft Operation Requirements contrary to Section 70 (1) of the Air Navigation Regulation (ANR) 1981 of 26th February, 2016 in terms of section 6(3) of the Sentencing and Penalties Act from the High Court. Nor had the High Court thought it fit to give a guideline judgment on its own initiative either.

[31] The sentences imposed by the Magistrate were within the penalties provided by law. However, the High Court judge had set aside the sentences imposed and substituted them with more lenient sentences mainly on the basis they were harsh and excessive given that the appellant was a first offender and had pleaded guilty. The appellant has not challenged those sentences in the Court of Appeal on the premise that the sentences so imposed by the High Court were unlawful or passed in consequence of an error of law (see section 22(1A)(a) of the Court of Appeal Act) which is the only basis that this court could entertain an appeal against sentence from the High Court.

[32] The guidelines to be followed when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The aforesaid guidelines are as follows:

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*

(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[33] The learned High Court judge had addressed the appellant's arguments relating the matters now being taken up under the 02nd ground of appeal in his judgment. What the High Court judge had stated at paragraphs 28 and 29 of the judgment were relating to the reason as to why the CAAF had claimed to have resorted to criminal action against the appellant. Therefore, appellant has not demonstrated any sentencing error/s committed by the learned High Court judge in his ultimate sentencing decision which is in appeal before this court.

[34] The learned Magistrate had no power to set any sentencing tariffs regarding the offences with which the appellant had been charged. According to the High Court judge the Magistrate had not considered the list of appellant's previous breaches attached to the respondent's sentencing submissions in meeting out the sentences as the appellant had been considered as a first offender by the Magistrate. Nor had the Magistrate considered the list of previous sanctions imposed on similar breaches by the CAA submitted by the appellant along with his mitigation submissions. The Magistrate had not entertained the appellant's application to summon the CEO as part of mitigation to speak to such previous sanctions. The High Court judge too had not considered the appellant's previous breaches or previous sanctions imposed on similar breaches in varying the sentence imposed by the Magistrate. The High Court judge had dealt with this matter in detail in the judgment and explained as to why they are not relevant.

[35] The High Court had the power and authority to do give a guideline judgment on the range of sentences upon convictions on Failure to Comply with Safety Aircraft Operation Requirements contrary to Section 70 (1) of the Air Navigation Regulation (ANR) 1981 of 26th February, 2016 in terms of section 6(3) of the Sentencing and Penalties Act provided either party had applied for such a guideline judgment or had the High Court thought it fit to act on its own initiative. However, neither of those scenarios had happened.

[36] Moreover, neither the appellant nor the respondent had made any application for a guideline judgment from the Court of Appeal either in terms of the Sentencing and Penalties Act. Similarly, neither party has demonstrated that this is a fit case where this court on its own initiative should consider whether a guideline judgment should be given. The mere fact that the case filed against the appellant in the Magistrates court was the first ever prosecution instituted by the CAFF in a court of law under Section 70(1) of ANR is not a compelling reason for this court to act on its own initiative under section 6(1) of the Sentencing and Penalties Act. Though, section 6(1) of the Sentencing and Penalties Act permits this Court to issue a guideline judgment on its own initiative in practice it would rarely do so unless a party to the appeal makes an application with all supporting material and section 8(1) of the Sentencing and Penalties Act is complied with.

[37] In any event, for this court to act under section 6(1) of the Sentencing and Penalties Act the appellant's sentence appeal under the 02nd ground of appeal must first pass the threshold under section 22(1A)(a) of the Court of Appeal Act. I have already determined 02nd ground of appeal not to have passed the test under section 22(1A)(a).

[38] In the circumstances, I do not think that there is any basis for the 02nd ground of appeal to be allowed under section 22(1A)(a) of the Court of Appeal Act or under the Sentencing and Penalties Act. Therefore, I determine it to be a frivolous ground of appeal [see paragraphs [24] – [27] in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)] and therefore, dismiss the same in terms of section 35(2) of the Court of Appeal Act.

Orders

1. The notice of appeal filed by the appellant may proceed to the Full Court only on the 01st ground of appeal.

2. 02nd ground of appeal is dismissed under section 35(2) of the Court of Appeal Act.

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