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

CRIMINAL APPEAL NO. AAU 01 of 2021
[In the High Court of Suva Miscellaneous Action No. HAM 277 of 2020, Criminal Appeal No. HAA 015 of 2019]

BETWEEN	:	**TIMAIMA SAGALE BUADROMO**
		Appellant
AND	:	**FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION ('FICAC')**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. R. Singh for the Appellant**
	:	**Mr. R. Aslam for the Respondent**
Date of Hearing	:	**18 January 2021**
Date of Ruling	:	**19 January 2021**

RULING

[1] On 11 February 2015, the appellant had been arraigned in the Magistrates court of Suva on one count of 'abuse of office' contrary to section 111 of the Penal Code, one count of 'abuse of office' contrary to section 139 of the Crimes Act, 2009 (alternative charge of 'obtaining financial advantage') and one count of 'abuse of office' contrary to section 139 of the Crimes Act, 2009.

[2] The appellant had pleaded not guilty to all three charges on 16 July 2015 and subsequently the trial had been concluded on 16 August 2018 and the appellant had been acquitted of all charges by the learned Magistrate on 13 May 2019. The respondent had timely appealed against the acquittal on 06 June 2019 to the High Court.

[3] The appeal had been listed for first call in the High Court on 18 June 2019 and the matter had been adjourned several times due to complaints from the appellant on incompleteness of the appeal records and for steps to perfect the same. On 15 September 2020 the respondent is said to have indicated that it would proceed with the appeals despite the alleged discrepancies and the appellant had indicated that in that event he would apply to court for a stay of the matter. On 15 October 2020 the High Court judge once again had looked into the appellant's complaint and the respondent had sought 21 days to rectify the appeal records.

[4] On 28 October 2020 the appellant's solicitors had filed summons to permanently stay the appeal proceedings which was listed for first call on 05 November 2020. After hearing counsel for both parties the High Court judge on 02 December 2020 had ruled that it did not have inherent jurisdiction to stay proceedings of the appeal and dismissed the appellant's application.

[5] On 03 December 2020 lawyers for both sides had met with the Registry staff and been told that the discrepancies in the appeal records had been rectified. The substantive appeal had come up again on 08 December 2020 and the High Court judge had directed both parties to file written submissions and fixed the hearing of the appeal on 20 January 2021. Both parties had accordingly filed written submissions for the substantive appeal as directed by court.

[6] In the meantime, the appellant's solicitors had filed a notice of appeal on 12 January 2021 in the Court of Appeal against the said ruling of the High Court on a single ground of appeal as to whether the learned High Court judge had erred in law by ruling that the High Court in exercising its appellate jurisdiction did not have power to invoke its inherent jurisdiction and to grant a stay of proceedings. The solicitors for the appellant had also filed a notice of motion seeking *inter alia* an order from this court staying the proceedings in Criminal Appeal No. HAA 015 of 2019 pending determination of this appeal.

[7] This court directed the matter to be mentioned on 18 January 2021 and both parties to make brief oral submissions on the following two issues.

(i) Whether there is a right of appeal against the impugned ruling dated 02 December 2020 by the High Court refusing to issue a permanent stay on the appeal proceedings in HAA 015 of 2019.

(ii) Whether a single judge of this court has power to stay proceedings under section 35(1) of the Court of Appeal Act.

Whether there is a right of appeal against the impugned ruling dated 02 December 2020 by the High Court refusing to issue a permanent stay on the appeal proceedings in HAA 015 of 2019.

[8] In **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014) all three appellants applied in the High Court for a stay of proceedings in the Magistrates' Court on the ground of post charge delay. The applications were made under the inherent and supervisory jurisdiction of the High Court. All three applications for stay were refused by the High Court. The appellants appeal against the High Court judgments refusing stay of proceedings in the Magistrates' Court. The state submitted that a refusal of stay of proceedings is not a final judgment and therefore the appellants had no right of appeal. Gounder J held that all three appeals were bound to fail because the appellants had no right of appeal and accordingly, the appeals were dismissed under section 35(2) of the Court of Appeal Act. Gounder J stated:

> ***'Is there a right of appeal?***
>
> *[8] The Court of Appeal Act provides for three avenues to bring criminal appeals. Section 21(1) of the Court of Appeal Act applies to an appellant convicted on a trial held before the High Court. The appellants have not been convicted on a trial held before the High Court and therefore section 21(1) is not relevant.*
>
> *[9] Section 22(1) of the Court of Appeal Act concerns appeals from the High Court in its appellate jurisdiction. The stay applications were not heard by the High Court in its appellate jurisdiction. Section 22 (1) is not relevant.*
>
> *[10] Section 3(3) of the Court of Appeal Act provides for a right of appeal from the final judgments of the High Court given in the exercise of its original jurisdiction.*
>
> *[11] The High Court judgments refusing stay were given in its original jurisdiction. The issue is whether the judgments are final. The question whether a refusal of stay in criminal proceedings is a final judgment must be*

determined by the principles enunciated by the Full Court in Takiveikata v State Criminal Appeal No: AAU0030 of 2004S at pp 4-5:

> *"The Court noted that two schools of thought had developed as to what constituted a final judgment. These were categorised as "the order approach" and "the application approach". The "order approach" required the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end it was a final order, if it did not it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter would be finally determined whichever way the court decided the application.*

The Court concluded that it was preferable at least in the criminal jurisdiction for the court to maintain "the order approach."

[12] Applying 'the order approach', the question that must be asked is whether the order refusing stay of prosecution brought the proceedings to an end. The answer is obvious. The order refusing stay has not brought the proceedings to an end, as the trials are pending in the Magistrates' Court. It therefore follows the judgments of the High Court are not final. Of course if stay was granted, the proceedings in the Magistrates' Court would have come to end, and the order granting stay would have been final to give the State a right of appeal under section 3 (3) of the Court of Appeal Act.

[9] In **Takiveikata v State** [2004] FJCA 39; AAU0030.2004S (16 July 2004) the Court of Appeal dealt with an appeal against the decision of the High Court judge fixing the trial date where the state had argued that it was an interlocutory decision not subject to appeal.

'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.

The meaning of the term "final judgment" as used in section 3 has been a matter of dispute. The whole subject was considered in this court in the case of ***Josefa Nata v The State,*** *Criminal appeal No. AAU0015.2002S. In that case a submission made in the High Court that the crime of treason was not a crime under the law of Fiji had been rejected by the trial judge. That determination was made as a preliminary question and at the time the appeal was brought before the Court of Appeal the appellant had not been arraigned*

nor had assessors been empanelled. The State contended that the judgment of the Judge in the High Court was not a final judgment. The Court noted that two schools of thought had developed as to what constituted a final judgment. These were categorised as "the order approach" and "the application approach" . The "order approach" required the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end it was a final order, if it did not it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter would be finally determined which ever way the Court decided the application.

The Court concluded that it was preferable at least in the criminal jurisdiction for the court to maintain "the order approach" . In consequence the court concluded that there was no final judgment before it.

The decision in Nata (supra) would exclude jurisdiction to hear the appeal.

In view of the conclusion at which we have arrived, that this Court does not have jurisdiction to entertain the proceedings before us the appeal will be dismissed.

[10] The Court of Appeal in **Nata v The State** [2002] FJCA 75; AAU0015U.2002S (31 May 2002) considered a notice of motion filed on behalf of the state for an order that an appeal filed on behalf of the appellant be dismissed for want of jurisdiction. The appeal in question was brought against a judgment of the High Court in which the court had rejected a submission made on behalf of the appellant that the crime of treason, with which the appellant has been charged, was not a crime known to the law of Fiji. If the submission had been upheld, the charge would have been dismissed with the consequence that the appellant would have been entitled to be acquitted.

"In the present case nothing turns on these considerations because we are concerned with a criminal matter which will eventually be tried by assessors. The trial cannot be split any more than could a civil case which was being tried by a jury. It is true that the question whether or not the crime of treason exists in Fiji was dealt with as a preliminary issue. It may be thought desirable that the applicable legislation should permit an appeal by leave from a judgment on a preliminary issue which goes to the heart of a criminal case. That is a course which is available in New Zealand and in at least some of the Australian states. But we can find no provision in the relevant legislation or in rules of court here which makes provisions of this kind. Certainly we were referred to none by counsel.

In those circumstances it seems to us to be preferable, at least in the criminal field, for the court to maintain the order approach, which found favour even in civil cases in former years in England, rather than the application approach. But even if one adopts the application approach as propounded by the Court of Appeal in Charan the order would not be final unless the entire cause or matter would be finally determined whichever way the Court decided the application. On that basis it matters not whether one adopts the order approach or the application approach. On neither basis is there here a final judgment with the consequence that an appeal does not lie under s.121 of the Constitution nor under s.21 of the Court of Appeal Act.'

[11] In **Chand v State** [2020] FJCA 221; AAU0130.2019 (9 November 2020) I came to a similar finding against an interlocutory order.

*'[15] It has been treated as settled law that the right of appeal against a decision of the Magistrates' court made under extended jurisdiction under section 4 (2) of the Criminal Procedure Act lies with the Court of Appeal pursuant to section 21 of the Court of Appeal Act [vide **Kirikiti v State** [2014] FJCA 223; AAU00055.2011 (7 April 2014), **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018)].*

*[16] However, this view is open to debate in the face of clear constitutional provisions. A discussion on this aspect of law can be found in **Tuisamoa v State** [2020] FJCA 155; AAU0076.2017 (28 August 2020).*

*[17] Assuming that the appellant's right of appeal against the dismissal of his application is to the Court of Appeal under section 21 of the Court of Appeal Act as the learned Magistrates was exercising extended jurisdiction [as also held in **Charan v State** [2020] FJCA 144; AAU179.2019 (24 August 2020)], the crucial question in this appeal is whether the order of dismissal of the appellant's application to transfer the case to the High Court could legitimately be the subject of an appeal to the Court of Appeal.*

[18] It is clear that the appellate jurisdiction of the Court of Appeal as enshrined in section 21 of the Court of Appeal Act could be invoked only against a conviction, sentence, acquittal or grant or refusal of bail pending trial.

[19] Even if one were to argue that section 21 should be read with section 3(3) of the Court of Appeal Act dealing with general jurisdiction of the Court of Appeal, section 3(3) enables appeals to this court as of right only from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court. Thus, the impugned order of the learned Magistrate clearly does not come under section 3(3) either.

*[20] In any event in **Balaggan v State** [2012] FJLawRp 139; (2012) 2 FLR 92 (25 May 2012) Calanchini AP as single judge had held that criminal appeals to the Court of Appeal are restricted to the jurisdiction conferred by Part IV of the Court of Appeal Act effectively ruling out the general*

*jurisdiction under section 3(3). The full court in **State v Chand** [2015] FJCA 64; AAU0085.2012 (28 May 2015) had held that the interpretation of Calanchini P was the correct interpretation.*

[21] Therefore, I determine that the impugned ruling/order of dismissal of the appellant's application by the learned Magistrate to transfer the case to the High Court when the High Court had already invested the Magistrates court with jurisdiction under section 4(2) of the Criminal Procedure Act, 2009 is only an interlocutory order and therefore, not appealable. It does not come under Part IV of the Court of Appeal Act. Therefore, I find that the appellant has no right of appeal against the impugned ruling of the learned Magistrate dated 26 July 2019 and his appeal also has no merits as discussed above.

[12] Therefore, in the light of the above decisions I hold that the impugned order of the High Court judge refusing to stay the proceedings in the appeal before it dated 02 December 2020 is only an interlocutory order and not a final judgment. Section 99 of the Constitution of the Republic of Fiji would not make any difference to that position as the jurisdiction conferred on the Court of Appeal subject to other written law including the Court of Appeal Act. This is the conclusion one could arrive at whether you apply 'order approach' or 'application approach' though at least for criminal matters 'order approach' had been preferred. The said order has not brought the appeal proceedings on HAA 015 of 2019 to an end. Nor has it determined the entire cause or matter finally. The appeal in HAA 015 of 2019 is yet to be determined and is due to be taken up for hearing on 20 January 2021.

[13] The High Court judge has erred in stating that he was exercising appellate jurisdiction in the matter of considering the appellant's application for a permanent stay of the appeal proceedings. The ruling refusing to issue a permanent stay had been given in the original jurisdiction of the High Court [vide **Nacagi v State** (supra)]. However, that error does not make the impugned ruling a final judgment. It is still an interlocutory order. If the permanent stay had been granted as requested by the appellant that order would have become a final judgment and a right of appeal would have accrued to the respondent to appeal against that order to the Court of Appeal under section 3(3) of the Court of Appeal Act, as with a permanent stay criminal proceedings against the appellant would have finally come to an end.

[14] I must also add that if what the High Court judge had meant was whether in any event he could invoke inherent jurisdiction to issue a permanent stay of an appeal before him as opposed to proceedings in the Magistrates court or any proceedings of original jurisdiction before him, that issue is yet to be expressly resolved by the Court of Appeal or the Supreme Court. However, I do not see any reason as to why the same principles should not apply to a situation where the stay of proceedings is sought on an appeal pending in the High Court.

[15] Therefore, I hold that the appellant has no right of appeal against the ruling of the High Court judge dated 02 December 2020 and his appeal should stand dismissed in terms of section 35(2) of the Court of Appeal Act.

[16] Although, my determination above would be sufficient to dispose of this appeal, since I heard counsel on the question whether in any event a single judge of this court has jurisdiction to issue a stay order of the appeal proceedings in the High Court, I shall deal with that as well for the sake of completion.

Whether a single judge of this court has power to stay proceedings under section 35(1) of the Court of Appeal Act

[17] In **Legeleqe v State** [2005] FJCA 2: AAU0005.2005 (21 January 2005) the Court of Appeal dealt with a situation where the High Court judge had refused an application by the appellant to stay hearing of all 21 counts of larceny and the appellant had informed the High Court judge that he intended to file an appeal and sought a stay of proceedings pending the determination of the appeal. The High Court judge rejected the application and proceeded with the trial.

> *'This Court was told today that, following the trial judge's refusal of a stay, the trial proceeded on 19th and a total of 5 witnesses gave evidence. The case is continuing today.*
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> *Filed with the Petition of Appeal yesterday was a notice of motion seeking:*
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> > *a. that the criminal trial in High Court, Lautoka; Action No HAC0206.2003L be stayed pending the determination of this Appeal to the Fiji Court of Appeal.*

b. Any other Order or Orders the Honourable Court deems just.

The applicant faces an insuperable hurdle. The powers of a single judge of this Court in criminal appeals are set out in section 35 of the Court of Appeal Act. It is very specific and it does not give the single judge power to grant a stay of execution pending appeal. The issue was dealt with at length by Tikaram P in ***Seru and Stephens v State****; Crim Apps AAU0041 and 0042.1990, in which he concluded:*

> *"I have no hesitation in ruling that a single judge has no power under section 35 of the Court of Appeal Act to stay a criminal trial or proceedings pending appeal. The Court of Appeal Act has been amended twice in 1998 first by Act No. 13 of 1998 and then by Act No. 39 of 1998. It is significant to note that Section 35 itself was revised and enlarged by Act No. 13 of 1998 but no power was given to a single judge to grant a stay.*

That is the end of the matter and the application for a stay must be refused. However, counsel for the State asks the Court to strike out the appeal under section 35(2) on the grounds that it is frivolous or vexatious and bound to fail because there is no right of appeal or right to seek leave to appeal.

There is no right of appeal and no right to seek leave to appeal and an appeal filed in those circumstances is clearly vexatious.

The appeal is dismissed under section 35(2) but without prejudice to the applicant's right to raise the same matter in any appeal brought against conviction if that is the result of the trial."

[18] **Seru v State** [1999] FJCA 37; Aau0041d.99 (3 August 1999) considered *inter alia* an application for a stay order pending hearing of the appeal. The decision that both appellants wished to appeal against was the refusal of the High Court judge the appellants' application for a permanent stay of the charges before the trial proper commenced on the ground of infringement of Section 29(1) and 29(3) of the 1997 Constitution which required a fair trial within a reasonable time. The state not only opposed the application for a stay but also contended that the order appealed against was not a final judgment but an interlocutory order. The appellants had conceded that there was no provision under section 35 of the Court of Appeal Act giving a single judge power to make a stay order. Sir Moti Tikaram, President, Court of Appeal held as follows.

'I have no hesitation in ruling that a single judge has no power under Section 35 of the Court of Appeal Act to stay a criminal trial or proceedings pending appeal. The Court of Appeal Act has been amended twice in 1998 first by Act No. 13 of 1998 and then by Act No. 39 of 1998. It is significant to note that Section 35 itself was revised and enlarged by Act No. 13 of 1998 but no power was given to a single judge to grant a stay.

In view of the reasons given I hold that a single judge of the Court of Appeal has no power to make a stay order stopping a criminal trial pending appeal whether the appeal (or proposed appeal) is from a final judgment or an interlocutory decision. In the circumstances it is not necessary for me to rule whether Surman J.'s Order dated 19 July 1997 made in Criminal Case No. HAC004 of 1997 constitutes a final judgment or not. However I appreciate that the Applicants' right to appeal under S.121(2) of the Constitution depends on whether the Order in question is a final judgment or not.

[19] In **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014) Chalanchini P held referring to section 35(1) of the Court of Appeal Act regarding an application for a stay of conviction and sentence:

'[44] It is obvious that a single judge of the Court does not have the jurisdiction to determine the application for stay of conviction and sentence pending appeal. Unless the jurisdiction is given by the statute, the jurisdiction does not exist.'

[20] The counsel for the appellant submitted that section 28 of the Court of Appeal Act read with section 20 (1) (e) and (k) of the Court of Appeal Act empowers a single judge to issue a stay of proceedings as requested by the appellant. He relied on the words '*any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters*" that appear after five specific supplemental powers from section 28 (a) to (e) to be read with powers of a single judge of appeal in civil appeals under section 20 (1) (e) and (k) to buttress his argument.

[21] This argument would fail for two reasons. Firstly, the supplemental powers given under section 28 (a) to (e) are to be exercised by the full court of the Court of Appeal and not by a single judge whose powers are restricted to what are specified under section 35(1). Secondly, as held in **Chaudhry v State** (supra) even the full court would not have the power to stay conviction and sentence pending appeal under section 28 read with section 13 of the Court of Appeal Act. Chalanchini P had elaborated this issue as follows.

'[45] A further question that necessarily follows is whether the Court of Appeal has the jurisdiction under Part IV of the Act to order a stay of conviction and sentence pending appeal. It was conceded by Counsel for the Appellant that there is no express power to that effect given to the Court of Appeal under Part IV.'

[53] Section 28 sets out five specific supplemental powers to be exercised by the Court of Appeal when it is considered necessary or expedient in the interest of justice. They are (1) the power to order the production of documents, exhibits or other things, (2) the power to order the attendance and examination of compellable witnesses, (3) the power to receive the evidence if tendered, of any competent but not compellable witness, (4) the power to appoint a special commissioner and (5) the power to appoint any person with special expert knowledge to act as assessor. It is only after these five specific supplemental powers have been listed that the general power expressed by the words "any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters" appear. In my judgment the intention of the section was to give to the Court of Appeal a criminal matters the same powers that are exercised by the Court of Appeal in civil matters with respect to the admission of evidence and would include the power to apply, for example, the provisions of the Civil Evidence Act 2002.

'[54] If the words in section 28 that are under consideration are to be given a wider meaning then that meaning must be determined by reference to the powers given to the Court of Appeal in civil matters in Part III of the Court of Appeal Act. Those powers are set out in section 13 of the Act which is headed "Powers of Court of Appeal in civil appeals" and states:

> *"13 For all the purposes of and incidental to the hearing and determination of any appeal under this Part ___ the Court of Appeal shall have all the power, authority and jurisdiction of the High Court and such power and authority as may be prescribed by rules of Court."*

[55] In my judgment the purpose of this section is to give to the Court of Appeal during the course of its hearing and determination of any civil appeal the same power, authority and jurisdiction as the High Court possesses under the High Court Act Cap 13 and the High Court Rules for the hearing and determination of civil proceedings. Its purpose is not to give to the Court of Appeal jurisdiction which it possesses in civil appeals a jurisdiction which it does not possess in criminal matters. In my opinion the Appellant cannot rely on section 13 for the claim that section 28 gives either a single judge or the Court the jurisdiction to entertain an application for a stay of conviction and sentence in a criminal appeal.

[56] Finally, on this point, it is quite clear that Part III is in effect a stand-alone Part for the purpose of civil appeals and Part IV is a stand-alone Part for criminal appeals. The provisions of the Act that apply in common to both civil and criminal appeals are set out in Part II of the Act. If the drafter had intended that the Court of Appeal should enjoy the same jurisdiction, powers

and authority in respect of both criminal and civil appeals, there would have been no need for a separate Part III and Part IV.

[57] For all of the above reasons I find that there is no jurisdiction to hear the application for a stay and as a result the application is dismissed.

[22] The same reasoning adduced by Calanchini P is *mutatis mutandis* applicable to the appellant's application to stay appeal proceedings in Criminal Appeal No.HAA015 of 2019 regarding the submission based on section 28 read with section 20 (1) (e) and (k) of the Court of Appeal Act.

[23] Gates J (as His Lordship then was) considered the phrase *'that is incidental to an appeal or intended appeal'* in section 20 (1) (k) in **Silimaibau v Minister for Sugar Industry** [2004] FJHC 530; HBC155.2001L (5 March 2004) and stated

'[15] In section 20(1)(k) the phrase "that is incidental to an appeal or intended appeal" should be interpreted narrowly so that the court could only deal with matters ancillary to an appeal which was afoot. The applicant does not come into this category, nor does the section deal with stay which is separately provided for by section 20(1)(e). Section 20(1) (k) does not apply in this application.'

[24] It is plainly clear that section 20(1)(e) of the Court of Appeal Act has little relevance to criminal matters. Forceful authority can be found on this aspect in **Seru v State** (supra) where it was held

*'**Whether application can be treated as a civil matter***

On the basis of decided cases I am unable to agree with Counsel for the Applicants that I have the power to invoke Section 20(1)(e) of the Act (as amended) to grant a stay. The trial that the Applicants want me to stay albeit temporarily is a criminal trial. The application for a permanent stay was made in that criminal trial. The ruling that the Applicants wish to challenge is a ruling made in that criminal trial which is currently proceeding.....

Criminal law and the criminal justice system abound with civil rights provisions to ensure a fair trial. Any allegation of infringement of those rights cannot change the character of the proceedings.

I therefore hold Part III of the Court of Appeal Act in particular Section 20(1)(e) thereof cannot be invoked to grant a stay order. The words "not being a criminal proceeding" in Section 12(1) are significant.'

[25] The counsel for the appellant also contended that the Court of Appeal (Criminal Division) in the UK has the power to stay proceedings when either the accused can no longer receive a fair hearing (focusing on the trial process) or where it would be otherwise unfair to try the accused (*i.e.* where a stay is necessary to protect the integrity of the criminal system). He relies on **The Queen v. Scott Crawley and Others** [2014] EWCA Crim 1028 (21 May 2014) where it was held:

> *'17. As is clear from decisions such as Attorney General's Reference (No 2 of 2001) [2004] 2 AC 72, there are two categories of case in which the court has the power to stay proceedings for abuse of process. These are, first, where the court concludes that the accused can no longer receive a fair hearing; and, second, where it would otherwise be unfair to try the accused or, put another way, where a stay is necessary to protect the integrity of the criminal justice system. The first limb focuses on the trial process and where the court concludes that the accused would not receive a fair hearing it will stay the proceedings; no balancing exercise is required. The second limb concerns the integrity of the criminal justice system and applies where the Court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself.'*

[26] The appellant's counsel argued that this court should adopt the same line of thinking as permitted by Rule 7(b) of the Court of Appeal Rules.

> *'7. Where no other provision is made by these Rules, or by any other enactment, the jurisdiction, power and authority of the Court of Appeal and the judges thereof shall be exercised -*
>
> *(a) in civil causes or matters, according generally to the course of the practice and procedure for the time being observed by and before Her Majesty's Court of Appeal in England;*
>
> *(b) in criminal proceedings, according generally to the course of the practice and procedure for the time being observed by and before Her Majesty's Court of Criminal Appeal in England.'*

[27] Assuming that the counsel's submission has merits, firstly, still it is the Court of Appeal and not a single judge of the this court that could have recourse to Rule 7(b) of the Court of Appeal Rules. Secondly, the powers exercised by the English Court of Appeal to stay proceedings appear to be in relation to trials and not appeals. Thirdly, as remarked by Sir Moti Tikaram, President, Court of Appeal in **Seru v State** (supra) *'The Court of Appeal Act has been amended twice in 1998 first by Act No. 13 of 1998*

and then by Act No. 39 of 1998. It is significant to note that Section 35 itself was revised and enlarged by Act No. 13 of 1998 but no power was given to a single judge to grant a stay.' This shows that the legislature has deliberately omitted to confer power in a single judge of the Court of Appeal to stay proceedings pending appeal. In fact no such power as held by Chalanchini P in **Chaudhry v State** (supra) seems to have been vested even in the Court of Appeal in respect of criminal matters or proceedings. Therefore, not only a single judge of the Court of Appeal but also the full court would not be inclined to adopt the jurisdiction following the English Court of Appeal to stay proceedings pending the hearing of an appeal.

[28] Finally, the counsel for the appellant submitted that consideration of some of these arguments by the full court could lead to development of jurisprudence in this area of law and therefore the appeal should be preserved for full court hearing in the future. Suffice it to say that ours is not an academy of law. If the appellant's counsel is so keen to explore new vistas in this arena of law and procedure he could still canvass this matter before the Supreme Court.

[29] Therefore, it is clear that whether the impugned ruling of the High Court judge dated 02 December 2020 was a final judgment (I have already held that it was not) or an interlocutory order (I have already held it to be so) a single judge has no power under section 35 of the Court of Appeal Act to stay Criminal Appeal No. HAA 015 of 2019 pending the determination of this appeal.

[30] I have already held that the appeal should be dismissed.

Orders

1. The application to stay Criminal Appeal No. HAA 015 of 2019 pending determination of this appeal is refused.

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

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL