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

CRIMINAL APPEAL NO. AAU 054 of 2019
[In the High Court at Suva Case No. HAA 53 of 2018]
[In the Magistrates Court at Nausori case No. CF522/18]

BETWEEN : **PARVIN KUMAR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **29 September 2021**

Date of Ruling : **01 October 2021**

RULING

[1] The appellant had been arraigned in the Magistrates' Court at Nausori with one count of indecent assault contrary to Section 212 (1) of the Crimes Act, 2009 and one count of sexual assault contrary to Section 210 (1) (a) of the Crimes Act, 2009 committed on 14 July 2018 at Nausori Town in the Central Division.

'***Count 1***

Statement of Offence (a)

INDECENT ASSAULT: *Contrary to Section 212(1) of the Crimes Act of 2009.*

Particulars of Offence (b)

PARVIN KUMAR *on the 14th day of July, 2018 at Nausori Town in the Central Division, unlawfully and indecently assaulted KAVITA DEVI LIGAM by touching her breast.*

Count 2

Statement of Offence (a)

SEXUAL ASSAULT*: Contrary to Section 210[1] (a) of the Crimes Act of 2009.*

Particulars of Offence (b)

PARVIN KUMAR *on the 14th day of July, 2018 at Nausori Town in the Central Division, unlawfully and indecently assaulted KAVITA DEVI LIGAM by touching her vagina.'*

[2] The appellant had pleaded guilty to both charges and sentenced on 30 July 2018 to an aggregate sentence of 04 years of imprisonment with a non-parole period of 03 years.

[3] The summary of facts is as follows:

On the 14th day of July, at about 1635 hours ***KAVITA DEVI LIGAM*** *(A-1), 24 years, sales girl of One Dollar Shop Viria Road, Nausori Town call in the Station and reported that one male Fijian man namely Parvin Kumar B1, 43 years, self-employed of Lot 30 Beaumount Road, Narere unlawfully and indecently assaulted her.*

On the above mention date, time and place (A-1) was standing inside the shop when (B-1) entered the shop and approached (A-1) straight away and greeted her by telling her that it's been a long time they haven't met and told (A-1) and (B-1) start touching her breast and her private part at the same time and told (A-1) that he will be back by 7pm. (A-1) did not like what (B-1) did to her and reported the matter to the Police.

(B-1) was arrested, under cautioned whereby he admit the allegation which was put to him (Refer to Q.27) and was formally charged for the offence of INDECENT ASSAULT contrary to section 212(1) and to be produced in custody.

Tender following documents:

- *Original caution interview of PARVIN KUMAR*
- *Original Charge Statement of PARVIN KUMAR*
- *Original Statement of PC 5279 MELVIN*
- *Original Statement of WPC 3225 MERE*

[4] The appellant in person had appealed to the High Court at Suva against conviction and sentence on the following grounds (in verbatim).

> i. *He failed to take into account that I was a friend of the victim and my action was not in any way intended to offend, insult or harm my friend in any way,*
>
> ii. *The learned Magistrate allowed irrelevant matters to affect him while passing the sentence, which is quite harsh and excessive as the incident stated by the victim is of a non-penetrative and fleeting type, compared to the case reference 1169/16, where the offender had actually licked the vagina of a 8 years student, breached the had received a sentence of 3 years.*
>
> iii. *The learned Magistrate failed to take into account that I am remorseful for my actions, while I am incarcerated there is no one to look after my elderly sick mother and my property and my pending jobs.*

[5] In addition, appearing in person before the High Court the appellant had submitted during the hearing that the plea of guilty was unequivocal in that he did not fully understand the charges when he pleaded guilty to the offences in the Magistrates' Court and the learned High Court judge had dealt with his complaint *inter alia* as follows and rejected it.

> 8. *According to the record of the proceedings in the Magistrate's Court, the Appellant was represented by a lawyer at the time he took his plea. The charges were explained to him in his preferred language that was in Hindi, which he had understood. Having understood the charges, the Appellant had pleaded guilty to the two counts on his own free will. He was then explained the summary of fact, which he had admitted. Furthermore, the Appellant had admitted the correctness of the record of his previous convictions.*
>
> 9. *In view of the record of the proceedings in the Magistrate's Court, it is clear that the Appellant was given all his rights and explained him the nature of the charges which he had understood. Accordingly, I am satisfied that Appellant had pleaded guilty to these two offences after understanding the charges properly. Therefore, I do not find any merit in the contention that the plea was equivocal.*

[6] Since all grounds of appeal preferred in writing by the appellant related to the sentence, the High Court judge had then proceeded to consider them within the framework of relevant law applicable to sentence appeals and guided himself according to the principles set out in **Kim Nam Bae v The State** [1999] FJCA 21;

AAU 0015 of 1998, **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015) and **Saqainaivalu v State** [2015] FJCA 168; AAU0093.2010 (3 December 2015).

[7] The conclusion of the High Court in reference to the appellant's first ground of appeal is:

> '15. *Neither the Appellant nor his counsel had submitted in the Magistrate's Court that the victim was a friend of the Appellant. Moreover, the summary of fact does not state such as well. In fact, if the Appellant provided this information that the victim was a friend of him, the learned Magistrate should have taken it as an aggravating factor, to increase the sentence, as to commit such a crime to a friend would undoubtedly amount to a breach of trust of the friendship. Accordingly, I do not find any merit in this ground.'*

[8] Having examined the second ground of appeal in detail *vis-à-vis* the contention that the sentence is harsh and excessive the High Court judge had concluded:

> '20. *Taken into consideration the aggravating and mitigating circumstances of the offences, the learned Magistrate has finally reached to an imprisonment period of 4 years, which is well within the stipulated limitation of the aggregate sentence pursuant to Section 17 of the Sentencing and Penalties Act. Moreover, the final sentence is within the tariff limits of the offences of indecent assault and sexual assault. Therefore, I find that the sentence is neither harsh nor excessive.'*

[9] Regarding the third ground of appeal that the learned Magistrate has failed to take into consideration the remorse of the appellant and also his family and personal circumstances in the sentence the High Court judge's conclusions was:

> 22. *In paragraph 16 of the Sentence, the learned Magistrate has taken into consideration the family and personal circumstances of the Appellant and concluded that they are not relevant in sentencing an offender for an offence of sexual nature. Accordingly, I am satisfied that the learned Magistrate has considered the personal and family circumstances of the Appellant in his sentence.*
>
> 23. *The learned Magistrate has given full discount of one-third for the early plea of guilty of the Appellant, acknowledging his remorse in committing this offence. Accordingly, I do not find any merit in the third ground of appeal as well.*

[10] Having perused the relevant parts of the appeal record myself, summary of facts and the sentencing order of the learned Magistrate I cannot find anything wrong with the decision of the High Court judge to reject all grounds urged by the appellant and dismiss his appeal on 28 January 2019.

[11] The appellant had appealed against the High Court decision belatedly (16 May 2019). The appeal grounds relate both to conviction and sentence. Since the appellant had filed his appeal papers in person and he had prosecuted his appeal in the High Court also in person and also because the delay is less than 03 months, I shall disregard the delay and consider his appeal as timely. Thereafter the appellant had tendered four sets of papers (09 September 2020, 27 October 2020 and 15 December 2020 and 23 February 2021) seeking enlargement of time, bail pending appeal and containing amended grounds of appeal against conviction and sentence and written submissions. The state had filed its written submissions on 27 January 2021. The appellant and the counsel for the respondent participated at the hearing *via* Skype. The appellant informed court that he would rely on matters stated in his document received by the registry on 23/25 February 2021.

[12] 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 of the Court of Appeal Act, a conviction could be canvassed on a ground of appeal involving a question of law only [see also 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].

Jurisdiction of a single Judge under section 35 of the Court of Appeal Act

[13] 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) [*vide* **Kumar v State** [2012] FJCA 65;

AAU27.2010 (12 October 2012] and if the single 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 under section 35(2) of the Court of Appeal Act (vide **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)].

[14] Therefore, upon filing an appeal under section 22 of the Court of Appeal Act a single judge of the Court of Appeal is still required to consider whether there is in fact a question of law that should go before the full court. 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). 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 [vide **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014), **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020)], **Munendra v State** [2020] FJCA 234; AAU0023.2018 (27 November 2020) and **Dean v State** AAU 140 of 2019 (08 January 2021), **Verma v State** [2021] FJCA 17; AAU166.2016 (14 January 2021) and **Narayan v State** [2021] FJCA 143; AAU39.2021 (10 September 2021)].

[15] It is therefore the appellant's or the counsel's duty properly to identify a discrete question (or questions) of law in promoting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005). 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.'

[16] In **Morgan v Lal** [2018] FJCA 181; ABU132.2017 (23 October 2018) Calanchini P said on an instance of a 'question of law':

> *'[9] The immediate issue that is properly before the Court of Appeal at the leave stage is whether any of the grounds of appeal raise an error of law alone. To that end the issue is whether the learned judge has applied the correct test for determining whether Morgan should be granted leave to appeal the Master's interlocutory Ruling. This is not the same as the question whether the learned Judge has applied the test for granting leave correctly. The first question does not involve the exercise of a discretion and is a question of law only. The second question does raise the issue whether there has been an error in the exercise of the discretion whether to order security for costs and my opinion involves mixed law and fact.'*

[17] In **Ledua v State** [2018] FJCA 96; AAU0071.2015 (25 June 2018) once again Calanchini P had identified 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.'*

[18] In another instance in **Turaga v State** [2016] FJCA 87; AAU002.2014 (15 July 2016) where the High Court dismissed the appellant's application for an enlargement of time to appeal against sentence without giving the appellant an opportunity to be heard and without reasons for the dismissal, Goundar J. held the following grounds of appeal to be questions of law alone.

1. *The Learned Appellate Judge erred in law when he dismissed the Applicant's application without hearing the Applicant contrary to Section 256(1) (a) of the Criminal Procedure Decree.*

2. *The Learned Appellate Judge erred in law when he failed to give a written ruling stating the reasons for the dismissal of the Applicant's application*

seeking leave to appeal out of time contrary to Section 27 of the High Court Act Cap.13 (formerly Supreme Court Act Cap.13).

Grounds of appeal

[19] The grounds of appeal urged on behalf of the appellant could be summarised into the following:

Conviction

Ground 1

THAT the charges preferred on 16 July 2018 were unlawful in as much the appellant had not been charged with or cautioned regarding the count on sexual assault and therefore the conviction and sentence on sexual assault should be set aside.

Ground 2

THAT the Learned Magistrate erred in law in convicting and sentencing the appellant for sexual assault charge too in addition to indecent assault charge as both had happened in one and the same transaction.

Ground 3

THAT the trial counsel was incompetent with the legal advice given to the appellant in the matter of plea of guilty.

Sentence

Ground 4

THAT the Learned Magistrate erred in law and fact when he failed to consider the mitigating factors separately from plea of guilty and he had also failed to consider all the mitigating factors.

Ground 5

THAT the Learned Magistrate erred in law and fact when he failed to impose concurrent sentences instead of an aggregate sentence.

01st ground of appeal

[20] This appeal ground was never raised by the appellant in the High Court. It appears that the appellant or his counsel had not taken any objection to the charge sheet in the

Magistrates' court. The appellant had been charged with the offence of indecent assault of the complainant and this error is reflected in the summary of facts too. Nevertheless, summary of facts specifically refer to the appellant having touched the complainant's vagina. However, it is clear that the charge statement recorded on 15 July 2018 too specifically alleges that he had not only touched the breast but also the vagina of the complainant. Therefore, the appellant had been clearly put on notice of both acts though the offence of sexual assault had not been mentioned.

[21] Then, the charge sheet dated 16 July 2018 contains both charges; indecent assault and sexual assault based on the two acts of touching the breast and the vagina of the complainant respectively. The fact that the appellant elected to be tried in the Magistrates' court on sexual assault charge (indictable but summarily triable charge at the accused's election in the MC) shows that he was well aware that he was facing a charge of sexual assault.

[22] There is no legal basis to contend that because the sexual assault charge was not mentioned by its technical name to the appellant at the charging stage the charges preferred on 16 July 2018 were unlawful. Inclusion of both charges had caused no prejudice to the appellant as he had every right to plead not guilty and to contest the sexual assault charge, if so desired. There is absolutely no basis for the allegation of prosecutorial misconduct or deceit by the prosecutor in relation to preferring a charge on sexual assault.

02nd ground of appeal

[23] This appeal ground too is raised for the first time by the appellant. The two charges had been raised as separate charges and not as alternative charges. The appellant had opted to plead guilty to both charges based on two separate acts constituting separate charges. The fact that both acts had occurred in one transaction is not a bar to prefer two separate charges. Neither, is there a legal impediment to do so. Here again there is absolutely no basis for the allegation of prosecutorial misconduct or deceit by the prosecutor in relation to preferring a charge on sexual assault.

03rd ground of appeal

[24] This is yet another ground raised for the first time. The appellant appearing in person before the High Court never called his counsel's competence into question.

[25] The Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal. The appellant had not complied with those procedural steps and therefore this ground cannot be even entertained and should be dismissed.

[26] In any event the maters revealed in the High Court judgment amply demonstrate that the appellant's complaint against his trial counsel is an afterthought. I find the following paragraphs in the HC judgment.

> '1. *…….He was first produced in the Magistrate's Court on the 16th of July 2018. The Appellant was granted bail on the 16th of July 2018, and matter was then adjourned till 30th of July 2018 for the plea. On the 30th of July 2018, the Appellant was represented by a counsel from the Legal Aid Commission and pleaded guilty to the offence. The Appellant had then admitted the summary of fact and presented his mitigation submissions…..'*
>
> 2. *The matter was first called in the High Court on the 28th of September 2018, and had to adjourn till 16th of October 2018 as the copy record of the proceedings in the Magistrate's Court was not available. On the 16th of October 2018, a lawyer from the Legal Aid Commission, representing the Appellant, sought time to obtain the instructions of the Appellant. The matter was again adjourned till 30th of October 2018. The matter had to adjourn two more occasions as the learned counsel for the Legal Aid Commission sought time to obtain instructions. Subsequent to those adjournments, the learned counsel for the Legal Aid Commission informed the court on the 27th of November 2018, that she withdraws as the counsel as the Appellant wants to engage a private counsel. The matter was then adjourned till 13th of December 2018. On the 13th of December 2018, the Appellant informed that he has no money to retain a private lawyer and ready to proceed in person.'*

[27] Therefore, it is clear that the appellant had placed confidence in the counsel from Legal Aid Commission in the Magistrates' court. Even after the guilty plea and the sentence he continued to repose that confidence in a counsel from LAC to prosecute his appeal until he decided to retain a private lawyer failing which he appeared in person in the High Court. Yet, the appellant did not complain against his trial counsel in the High Court at all.

[28] On the contrary the genesis of the appellant's appeal grounds raised in the High Court does not suggest or even imply any denial of the alleged incident or the acts complained of by the complainant but it rather harps on the quantum of the sentence.

[29] In **Nasilasila v State** [2021] FJCA 138; AAU156.2019 (3 September 2021) I had the occasion to state as follows on a similar ground of appeal based on incompetent advocacy.

> *'[25] In general a tactical election which turns out badly for the accused cannot, in itself, occasion a miscarriage of justice. It may only have contributed to the conviction of the guilty [**Silatolu v State** [2008] FJSC 48; CAV0002.2006 (29 February 2008)]*
>
> *[26] Yet, O' Connor LJ said in **Swain** [1988] Crim LR 109 that if the court has any lurking doubt that an appellant might have suffered some injustice as result of flagrantly incompetent advocacy by his advocate it would quash the conviction. In **Boal** [1992] QB 591 counsel's mistaken understanding of the law, despite having a defense which was likely to have succeeded, was regarded as grounds of appeal though not being a case of 'flagrantly incompetent advocacy'.*
>
> *[27] In **Ensor** [1989] 1 WLR 497 the Court of Appeal held that a conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial which later appeared to have been mistaken or unwise. Taylor J said in **Gautam [**1988] Crim. LR 109 CA (Crim Div)*
>
> *' ... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground of appeal.'*
>
> *[28] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court said:*

‘‘[21]………….. It is not for a court to inquire into the advice tendered by counsel to his client……….. But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client……’

*[29] NSW Court of Criminal Appeal in **R v Birks** (1990) 48 A Crim R 385; (1990) 19 NSWLR 677, 688–9 is an authority (Gleeson CJ, McInerney J and Lusher AJ 4, 11 May, 7 June 1990) to the following propositions.*

‘As a general rule, a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted. Decisions as to what witnesses to call, what questions to ask or not to ask, what lines of argument to pursue and what points to abandon, are all matters within the discretion of counsel and frequently involve difficult problems of judgment, including judgment as to tactics. The authorities concerning the rights and duties of counsel are replete with emphatic statements which stress both the independent role of the barrister and the binding consequences for the client of decisions taken by a barrister in the course of running a case.’

‘As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.

‘However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of "flagrant incompetence" of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.’

*[30] Sir Thomas Eichelbaum NPJ in Court of Final Appeal (Hong Kong) in **Chong Ching Yuen v Hksar** (2004) 7 HKCFAR 126; [2004] 2 HKLRD 681 said*

‘48. It follows, almost inevitably, that ordinarily, a tactical decision by counsel which, in hindsight, ought to have been made differently, will not provide any ground for appeal, any more than if such decision had been made by the defendant personally. Nor will other forms of mere error of judgment.

49. Nevertheless, the courts have recognised that in some exceptional instances*, an error of sufficient proportion and consequence will enable the court to intervene and avert a miscarriage of justice. To describe this ground, the*

expression "flagrant incompetence" has generally been used ....' (emphasis added).'

[30] I do not see any evidence of 'flagrant incompetence' on the part of the appellant's trial counsel in this instance.

04th ground of appeal (sentence)

[31] The complaint under this ground of appeal had been dealt with by the High Court as follows:

> *21. The third ground of appeal is based upon the contention that the learned Magistrate has failed to take into consideration the remorse of the Appellant and also his family and personal circumstances in the sentence.*
>
> *22. In paragraph 16 of the Sentence, the learned Magistrate has taken into consideration the family and personal circumstances of the Appellant and concluded that they are not relevant in sentencing an offender for an offence of sexual nature. Accordingly, I am satisfied that the learned Magistrate has considered the personal and family circumstances of the Appellant in his sentence.*
>
> *23. The learned Magistrate has given full discount of one-third for the early plea of guilty of the Appellant, acknowledging his remorse in committing this offence. Accordingly, I do not find any merit in the third ground of appeal as well.*

[32] Thus, the Magistrate had correctly not accorded any discount for personal circumstances. As for the appellant's submission that the learned Magistrate had not considered all mitigating factors, he had failed to point out to the High Court judge any such factors. Nor had he specified the so-called disregarded factors even before this court.

05th ground of appeal

[33] This ground was raised in the High Court and the High Court judge had dealt with it as follows:

19. *The learned Magistrate has correctly taken into consideration the tariff in paragraphs 5 and 6 of the Sentence. Having considered the nature of these two offences, the learned Magistrate has then correctly decided to impose an aggregate sentence pursuant to Section 17 of the Sentencing and Penalties Act. Section 17 of the Sentencing and Penalties Act states that:*

    "If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them".

20. *Taken into consideration the aggravating and mitigating circumstances of the offences, the learned Magistrate has finally reached to an imprisonment period of 4 years, which is well within the stipulated limitation of the aggregate sentence pursuant to Section 17 of the Sentencing and Penalties Act. Moreover, the final sentence is within the tariff limits of the offences of indecent assault and sexual assault. Therefore, I find that the sentence is neither harsh nor excessive.*

[34] There is no error of law in the learned Magistrate acting under section 17 of the Sentencing and Penalties Act in this instance.

[35] All the grounds of appeal raised on conviction are not questions of law alone but questions of mixed law and fact. The appellant had ample opportunity of taking up those grounds of appeal before the High Court. Mere arguments involving law or referring to law cannot turn them into questions of law. The matters raised by the appellant in the Court of Appeal should and could have been canvassed in the High Court as matters of fact or of mixed fact and law. The fact that the appellant has come up with some totally new grounds do not make them pure questions of law either.

[36] The grounds of appeal on sentence had been raised in the High Court and dealt with by the High Court judge. The ultimate sentence is not unlawful or not passed in consequence of an error of law. Nor had the High Court had passed a custodial sentence in substitution for a non-custodial sentence.

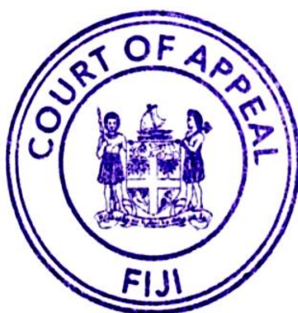
[37] The appellant in this instance cannot seek a fresh hearing of the appeal as if the Court of Appeal is the first court of appeal or a rehearing of the appeal already heard before the High Court. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the Court of Appeal to rectify any error of law or clarify any ambiguity in 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 the court must give effect to that legislative intention.

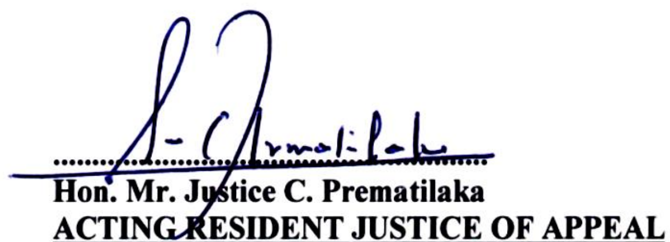
[38] Therefore, I conclude that no question of law alone has been urged by the appellant and grounds of appeal are frivolous and therefore, the appeal should be dismissed in terms of section 35(2) of the Court of Appeal Act.

[39] Therefore, in view of the dismissal of the appeal it is superfluous to consider the application for bail pending appeal, for when there is no pending appeal there is no question of bail pending appeal. Accordingly, application for bail pending appeal too is formally refused.

Orders

1. Appeal (bearing No. AAU 54 of 2019) is dismissed in terms of section 35(2) of the Court of Appeal Act.
2. Bail pending appeal is refused.





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