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

CRIMINAL APPEAL NO. AAU 136 of 2020
[In the High Court at Suva Case No. HAA 47 of 2019]
[In the Magistrates Court at Nausori case No.CF 99/15]

BETWEEN : **RAMENDRA PRASAD**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Yunus for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **29 August 2022**

Date of Ruling : **31 August 2022**

RULING

[1] The appellant was charged (with another) in the Magistrates court at Nausori on one count of indecent assault contrary to section 212 (1) of the Crimes Act, 2009.

[2] After trial he was convicted of the charge and sentenced to 20 months imprisonment suspended for 36 months.

[3] The appellant had appealed to the High Court against conviction and the learned High Court judge had dismissed the appellant's appeal on 16 October 2020.

[4] The appellant thereafter filed a timely appeal against the judgment of the High Court on the following grounds of appeal.

Ground 1

THAT the Learned Appellate Judge erred in law when he failed to consider that pursuant to section 178 of the Criminal Procedure Act, a no case to answer submission is made at the close of evidence in support of the charge, thus he finding that the prosecution case ends with the determination of the no case to answer and not at the close of the evidence of the complainant is erroneous and prejudicial to the appellant.

Ground 2

THAT the Learned Appellate Judge erred in law when he failed to consider that section 182 (5) of Criminal Procedure Act requires adjournment for such period as reasonable, thus his finding that the trial counsel did not apply for an adjournment after the amendment is contrary to this section.

Ground 3

THAT the Learned Appellate Judge erred in law when he failed to consider that section 142 of Criminal Procedure Act requires the court to give cogent reasons for the decision, thus a failure to give reasons for not accepting defense evidence.

[5] 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 designation of a point of appeal as a question of law by the appellant or his pleader would not necessarily make it a question of law [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014). It is therefore counsel's or an appellant's duty to properly 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).

[6] 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

[7] 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)].

[8] Therefore, 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) followed in many a subsequent decisions].

[9] Some examples of actual questions of law could be found in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013), **Morgan v Lal** [2018] FJCA 181; ABU132.2017 (23 October 2018), **Ledua v State** [2018] FJCA 96; AAU0071.2015 (25 June 2018) and **Turaga v State** [2016] FJCA 87; AAU002.2014 (15 July 2016).

[10] The appellant cannot seek a rehearing of the appeal before the High Court in the Court of Appeal. 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 the law and not to deal with any errors of fact or of mixed fact and law which is the function of the High Court. That is the intention of the legislature and the court must give effect to that legislative intention.

01st ground of appeal

[11] The appellant argues that the learned High Court judge erred in his view that the prosecution case ends with the determination of the 'no case to answer' and not at the

close of the evidence in support of the charge as stated in section 178 of the Criminal Procedure Act.

[12] Section 178 of the Criminal Procedure Act is as follows:

> *'If **at the close of the evidence in support of the charge** it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court **shall** dismiss the case and shall acquit the accused.'*

[13] The High Court judge had considered section 178 of the Criminal Procedure Act under the first ground of appeal urged by the appellant. It was as follows:

> '*The Learned Magistrate erred in law and in fact to allow the prosecution to amend the charge after conclusion of the complainant's evidence, causing substantial prejudice to occur to the Appellant.'*

[14] The High Court judge concluded at paragraph 10 of the judgment:

> *'Accordingly, the Prosecution case ends with the determination of the no case to answer. Hence, the close of the evidence of the Complainant cannot be considered as the close of the Prosecution's case. In this matter, the learned Magistrate had granted the Prosecution leave to amend the charge after the Complainant's evidence but before the close of the case of the Prosecution. Hence, I do not find any merit in the first component of the first ground of appeal.'*

[15] Thus, in the context of what transpired in the Magistrates court the High Court judge had determined that the prosecution case had ended only with the determination of the no case to answer application and not at the close of the evidence of the complainant. To understand this issue, it is necessary to examine what had in fact happened at the trial.

[16] The prosecuting counsel had indicated to court just prior to leading evidence at the trial that in addition to the complainant three other police officers (who were identified by names) would be called to give evidence. The complainant (who eventually turned out to be the sole witness for the prosecution) had then been

examined, cross-examined and re-examined by respective counsel and the prosecutor had stated to court *'That's all'*. Then, the court had adjourned the case until 2.00pm.

[17] After the court resumed the prosecutor had informed counsel for the defense and court that she had reconsidered the matter and would not call any other witnesses. However, she made an application to amend the charge to make particulars more specific by replacing *'by touching her private part'* with *'by touching her vaginal area over her cloths'.* The amendment was moved after the complainant's said in her evidence at the trial that she was wearing pants with side pockets (as also stated in her second police statement) as opposed to skirts as recorded in her first statement to the police. The prosecuting counsel had made the application to amend the charge as (according to her) section 182 of the Criminal Procedure Act permits any amendment before the close of the prosecution case.

[18] The defense had objected to the amendment on the basis that the defense was based on the existing charge and the complainant was questioned also based on that charge. The defense had further submitted that the said contradiction of the complainant's evidence came up during the trial and the prosecution had enough time to amend the charge giving sufficient time for the defense lawyers to discuss the defense with the appellant.

[19] The prosecutor had replied that the amendment was being proposed not because of the contradiction brought out in cross-examination but on account of the complainant's version in examination-in-chief itself where the complainant had mentioned pants with side pockets instead of skirts and the amendment was not going to prejudice the appellant as the case theory was developed to meet her evidence at the trial. The appellant's defense was one of total denial of any act of sexual nature towards the appellant.

[20] The Magistrates held that the state had a right to amend the charge prior to closing its case and allowed the amendment. The appellant pleaded not guilty to the amended charge and the trial proceeded after a 30 minute recess where the complainant was further cross-examined by the defense counsel and re-examined by the prosecutor

who had once again said at the end *'That's all'* for the prosecution case. The counsel for the appellant had then made an application for no case to answer. The Magistrate ruled against the appellant's application and the appellant had taken the stand. The defense had not sought a longer adjournment of the case after the appellant pleaded to the amended charge and further cross-examination shows that it had not materially deviated from the line of cross-examination prior to the amendment, for the defense was always a total denial.

[21] Therefore, on the one hand it is clear that the prosecution knew during the evidence in chief of the complainant that she was dressed in pants with side pockets and not in wearing skirts when the act of indecent assault allegedly happened. Therefore, it could have moved to amend the charge prior to cross-examination and examination-in-chief.

[22] On the other hand, it is also clear that the defense counsel knew that when the prosecutor said *'That's all'* after concluding the complainant's evidence, the prosecution case had not closed, for the prosecutor had indicated at the beginning that it would lead 04 other witnesses. This explains why the defense did not make no case to answer application at that stage. However, it took a different turn when after the adjournment the prosecutor said she would summon no other witnesses and moved for an amendment of the charge. The fact that the defense did not make the application for no case to answer even at that stage but continued with the trial having unsuccessfully objected to the amendment shows that the defense did not regard the statement *'That's all'* as signaling the end of the prosecution case. The defense made no case to answer application when it knew that the prosecution case had been closed when the complainant's further evidence was over, for the prosecutor had already informed that there would be no more witnesses.

[23] Therefore, the High Court judge was right in holding in this case that prosecution case ended only when the complainant's evidence finally came to an end which was followed by the determination of the no case to answer application. The High Court judge was also right when he said that the Magistrate had granted the prosecution leave to amend the charge after the complainant's evidence but before the close of the case for the prosecution.

[24] What followed consequent to the amendment was the procedural requirements after an amendment to the charge in terms of section 182(2) [*i.e.* pleading to the altered charge, cross-examination and re-examination of the complainant)] and 182(5) [i.e. adjournment of further trial for 30 minutes]. In fact it is reasonably clear that the change of particulars by way of the amendment was really not required and the charge could have been maintained in its original form despite the inconsistency of the complainant's evidence regarding her attire at the time of the incident which went only to the matter of credibility.

[25] As a matter of law, what triggers the operation of section 178 of the Criminal Procedure Act, 2009 is the close of the evidence in support of the charge (described also as the close of the case for the prosecution) and at that point whether the defense makes an application for no case to answer or not, if it appears to court that a case is not made out against the accused sufficiently to require him or her to make a defence, the court must dismiss the case and acquit the accused.

[26] The High Court judge has discussed section 182 (1) of the Criminal Procedure Act in relation to the appellant's fist ground of appeal and held that the alteration of the charge had not caused any prejudice to the appellant at paragraph 19 of the judgment. I am in agreement with his reasoning and the conclusion.

> *'19. The said amendment has further particularized the alleged incident. It has not altered or changed the basis of the Prosecution case. The amendment had not affected the Defence's contention of the inconsistent nature of the Complainant's evidence. The evidence of the Complainant, stating that she was dressed in pants and the two statements she made to the Police, in one of them, she had said that she was dressed in a skirt, still need to be taken into consideration by the learned Magistrate when she determines the credibility and reliability of the Complainant's evidence. In view of these reasons, I do not find the amendment to the charge has caused any prejudice to the Appellant. Therefore, I do not find any merits in the first ground of appeal.'*

[27] Section 182(1) is as follows:

> *'...Where, at any stage of the trial* ***before the close of the case for the prosecution****, it appears to the court that the charge is defective (either in*

*substance or in form), the court **may** make such order for the alteration of the charge, either by —*

(a) amendment of the charge; or

(b) by the substitution or addition of a new charge —

as the court thinks necessary to meet the circumstances of the case'

[28] It appears that the legislature has used '*the close of the evidence in support of the charge'* in section 178 and *'the close of the case for the prosecution'* in section 182 to mean one and the same stage of the trial. The difference in the application of section 178 and 182 is that under section 178 the court has no discretion (note the word '*shall'*) in dismissing the case and acquitting the accused if it appears to court that a case is not made out against the accused sufficiently to require him or her to make a defense whereas under section 182 (1) the court has to exercise its discretion (note the word '*may*') to make order for alteration of the charge subject to subsections (2) – (5). Secondly, the court should act under section 178 only ***at*** the close of the evidence in support of the charge whereas it can act under section 182 at any stage ***before*** the close of the case for the prosecution'.

[29] Therefore, the Magistrates was right to consider the application to amend the charge under sections 182 ***before*** the close of the case for the prosecution and she was also right in considering the application for no case to answer ***at*** the close of the prosecution case under section 178.

[30] Therefore, there is no question of law alone raised by the appellant under the first ground of appeal.

02nd ground of appeal

[31] This relates to the third ground of appeal raised in the High Court. Contrary to the appellant's assertion the High Court judge had indeed considered the principles embodied in section 182(5) of the Criminal Procedure Act in his judgment in relation

to the adjournment of the case following the amendment of the charge. He said as follows:

> *'20. The third ground of appeal is based upon the contention that the learned Magistrate had erroneously failed to adjourn the hearing after the amendment to allow the Defence to prepare adequately and thus caused prejudice to the Appellant.*
>
> *21. Having carefully perused the record of the proceedings in the Magistrate's Court, the learned counsel who represented the Appellant in the hearing had not made any application for an adjournment. Actually, it was the learned Magistrate, on her own motion, had granted an adjournment of 30 minutes, allowing the Defence to prepare for the hearing's continuation. Neither the Appellant nor his lawyer made any objection to the 30-minute adjournment, seeking more time. As a result of these reasons, I do not find any merits in the third ground of appeal.'*

[32] I do not find any error in the conclusion of the High Court judge. In fact, under section 182(5) of the Criminal Procedure Act, the court should adjourn the trial if it is of the opinion that the accused has been misled or deceived by the alteration of the charge. There is little doubt that in this case the amendment could not have misled or deceived the appellant particularly in his defense which was a total denial. With or without the amendment, the highlighted inconsistency in the complainant's testimony could have affected only her credibility. The appellant had already brought that out in cross-examination of the complainant. Whether the complainant was wearing skirts or pants what the appellant had allegedly done constituted unlawful and indecent assault under section 212(1) of the Crimes Act. It would have been no defense to say that he only touched her vagina or vaginal area over the pants. Thus, he advisedly did not deviate from his defense of total denial even after the amendment of the charge.

[33] Thus, there is no question of law alone to be litigated before the full court under the second ground of appeal.

03rd ground of appeal

[34] The High Court judge had dealt with this ground of appeal under 04th and 13th grounds of appeal raised by the appellant at paragraphs 22-26 of the judgment within

the context of section 142 of the Criminal Procedure Act and the Magistrate's conclusions on the complainant's evidence. The High Court judge had determined that since the Magistrate had found the complainant's version credible and reliable and proved the offending it implied that she had not believed the appellant's denial though she had not specifically said that she was not accepting the appellant's evidence.

[35] There is no question of law alone under this ground of appeal that could be looked into without considering the entirety of the facts of the case which is not the function of the Court of Appeal in a second tier appeal.

[36] Therefore, none of the grounds of appeal raises a question of law alone and therefore, no right of appeal exists and they are also frivolous as far as a second tier appeal under section 22 of the Court of Appeal Act is concerned.

Order

1. Appeal (bearing No. AAU 136 of 2020) is dismissed in terms of section 35(2) of the Court of Appeal Act.

COURT OF APPEAL FIJI

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