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

CRIMINAL APPEAL NO. AAU 0023 of 2020
[In the High Court of Suva Case No. HAR 002 OF 2020]
(Nadi Magistrates court case No.619 of 2020)

BETWEEN	:	**RAVIN ROHIT LAL** **SHALVIN P CHAND**
		Appellants
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. V. Tosokiwai for the Appellants**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**24 October 2022**
Date of Ruling	:	**26 October 2022**

RULING

[1] The appellants had been charged in the Magistrates court at Nadi for failing to comply with orders of Prime Minister of Fiji without lawful excuse by breaching the curfew hours on 09 April 2020 at Nadi in the Western Division, an order that was deemed necessary for the protection of the public health from an infectious disease namely Novel Corona Virus, contrary to section 69(1)(c) of Public Health Act, 1935 and regulation 2 of Public Health (infectious Diseases) Regulation 2020.

[2] Both appellants had pleaded guilty to the charge on 10 April 2020. However, the Learned Magistrate in his decision titled 'Sentence' dated 15 April 2020 had acquitted both on the basis that the charge was bad in law.

[3] The record of the proceedings before the Magistrates court had been called for and examined by the High Court in terms of section 260(1) of the Criminal Procedure Act 2009 ("Criminal Procedure Act") pursuant to a directive made under the hand of the Chief Justice in terms of section 260(2) of the Criminal Procedure Act.

[4] In exercising the powers of revision to examine the relevant court record, the learned High Court judge had not found it necessary to hear the parties given the nature of the issue he had to deal with and therefore had not required the presence of the parties in the light of the provisions of section 263 of the Criminal Procedure Act.

[5] Accordingly, the learned High Court judge in its judgment dated 16 April 2020 had quashed the order of the learned Magistrate acquitting the appellants. The plea of guilty entered by each appellant had been vacated. The case had been sent back to the Magistrate Court at Nadi to be dealt with by a different Magistrate.

[6] Vosarogo lawyers had then preferred a timely notice of appeal against the said judgment of the High Court pursuant to section 22 of the Court of Appeal Act.

[7] When the appeal was first mentioned on 17 March 2021 neither the appellants nor their lawyers were present in court. Upon being notified to be present in court on the next date, Vosarogo lawyers had informed the Court of Appeal Registry by email on 05 October 2021 that they wanted to check with the appellants whether they still wished to proceed with the appeal. When the appeal was mentioned on 23 November 2021 once again neither the appellants nor their lawyers were present in court. The Registry had once again alerted Vosarogo lawyers of the status of appeal by a letter dated 26 November 2021. On 09 December 2021, the appellants were again absent but Mr. F. Vosarogo did appear and inform court that he had not been able to get in touch with the appellants to check their stance but expressed his expectation to do so on 24 December 2021. He also informed court that if the appellants were not interested in pursuing the appeal he would file Form 3 in order to abandon the appeal.

[8] The appeal was mentioned on 06 June 2022 but neither the appellants nor their lawyers were present in court. The Registry once again notified Vosarogo lawyers on 07 June 2022 by email to be present and inform court of the appellants' position. However, on 20 July 2022 too neither the appellants nor their lawyers were present in court. The Registry again notified of the next date to Vosarogo lawyers.

[9] The appellants were absent on 23 August 2022 but Ms. J. Qica of Vosarogo lawyers did appear and informed court that they were unable to locate the appellants and wished to withdraw as their counsel. State had informed the Registry on the same day that the appellants were not in the custody of the Corrections Department. The State applied to tender an affidavit and seek a summary dismissal of the appeal, which affidavit had been tendered with written submissions on 28 September 2022.

[10] Regarding the powers of a single judge under section 35(2) of the Court of Appeal Act, the Supreme Court in **Raura v The State** [2006] FJSC 4; CAV0010U.2005S (4 May 2006) said as follows:

> *[17] Central to the first argument is s.35(2). In our opinion the power given by this sub-section is one generally intended to be exercised in a summary way on a consideration of the notice of appeal. It is a power exercisable only where and when it appears from the notice of appeal 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. These are the pre-conditions for the exercise of the power. The power enables a judge to terminate an appeal without a hearing and without prior notice to the appellant, and for this reason it is a power that should be used sparingly and only in cases where one of the pre-conditions is plainly met. In **Sashi Suresh Singh v. Reginam** [1983] 29 FLR 86 at 88 a like view was expressed by the Court of Appeal about a similar statutory provision. That decision also demonstrates that an appeal may lie from an order of dismissal if one of the pre-conditions of the exercise of the power is not met.*
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> *'[18] However, whilst the power is one generally intended to be exercised in a summary way on a consideration of the notice of appeal and without hearing any party, circumstances may arise where the single judge does hear the appellant.*
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> *[21] Section 31(1)(c) on which the appellant bases his argument therefore has application to a consideration of a notice of appeal under s.35(2). However, given the summary nature of the power under s.35(2) a single judge is entitled to exercise that power without prior notice to the appellant and in*

his absence unless the appellant has been given leave to be present if summary dismissal is to be considered. It will probably be rare that leave will be given as many appellants will be unaware of their entitlement to seek it, and in the present case the Petition had not sought to be present. Nevertheless the power of summary dismissal under s.35(2) is clear, and the learned President did not fall into error of law in dismissing the appeal without hearing the appellant.'

[11] In **Vakacereivalu v State** [2014] FJCA 126; AAU09.2011 (25 July 2014) Goundar J dismissed under s.35(2) of the Court of Appeal Act an appeal filed under section 21(3) of the Court of Appeal Act against an order of refusal of bail pending trial because subsequently he had been convicted and sentenced making the appeal frivolous. Calanchini P had dismissed similar appeals against refusal of bail pending trial in **Faiyaz v State** [2019] FJCA 153; AAU51.2018 (19 July 2019) **Raivasi v State** [2018] FJCA 98; AAU0172.2016 (25 June 2018) and **Vunivesi v State** [2018] FJCA 99; AAU0177.2016 (25 June 2018) under section 35(2) of the Court of Appeal Act as during the time the appeal was pending in the Court of Appeal the trial had taken place in the High Court.

[12] In the circumstances above enumerated, the appellants' conduct clearly suggest that they are not interested in prosecuting the appeal against the High Court decision and the only reasonable inference that can be drawn is that they have no desire to do so at present and in the future, most probably because the appeal is now only of academic interest and frivolous. Therefore, this application should be dismissed under section 35(2) of the Court of Appeal Act as being frivolous.

Order of the Court:

1. Appeal bearing No. AAU 0023 of 2020 is dismissed under 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