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

CRIMINAL APPEAL NO. AAU 031 of 2020
[In the High Court at Suva Case No. HAR 046 of 2020S]
[In the Magistrates Court at Suva case No.CF/SUV/756/2020]

BETWEEN	:	**EILEEN ANDERSON**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. R. K Naidu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**13 December 2022**
Date of Ruling	:	**29 December 2022**

RULING

[1] The appellant had been convicted on 22 April 2020 by the learned Magistrate sitting in Suva on her own plea for failure to comply with orders contrary to section 69(1)(c) of the Public Health Act 1935 and Regulation 02 of Public Health (Infectious Diseases) Regulations 2020 and fined $500 to be paid within three months.

[2] On 14 May 2020 the High Court presided over by Justice Selesi Themo (hereinafter referred to as 'High Court 01' for convenience) in Criminal Review Case No. HAR 046 of 2020S purportedly acting under section 260 (1) of the Criminal Procedure Act 2009, had quashed/set aside the appellant's conviction and sentence and dismissed the charge against her without recording a conviction pursuant to section 15(1)(j) of the Sentencing and Penalties Act, 2009. In the same judgment, High Court No.01 had considered 51 similar cases (including the appellant's case) and set aside the fines

imposed except in two cases and directed the respective Magistrates to re-sentence the convicts.

[3] As confirmed by the state counsel, the State had not appealed against the said judgment of High Court 01 to the Court of Appeal.

[4] Thereafter, on 18 May 2020, His Lordship the Acting Chief Justice (as His Lordship then was) sitting in the High Court (hereinafter referred to as 'High Court 02' for convenience) had signed and issued a Declaration/Order with regard to the same cases and declared *inter alia* the order made by High Court 01 regarding the appellant to be a nullity, set it aside and sent 21 cases (appellant's case was not among them) for the sentences to be reviewed by the respective Magistrates.

[5] Thus, the conviction and the sentence entered by the Magistrate on the appellant had been effectively restored or reinstated. Both counsel confirm that the appellant had paid the fine of $500 on 21 July 2020 though she on 20 May 2020 had already appealed against the conviction and sentence of the Magistrate court to the High Court which is currently pending under HAA 26 of 2020.

[6] The appellant had filed the present appeal in a timely manner as a second-tier appeal under section 22 of the Court of Appeal Act against the said Declaration/Order issued by High Court 02 on the following grounds of appeal.

'**Ground 1**

THAT the Learned Acting Chief Justice erred in law in issuing the Declaration/Order in that he lacked jurisdiction to do so.

Ground 2

THAT alternatively, if the Learned Acting Chief Justice acted within jurisdiction (which is denied), the Appellant was denied the right to be heard on the making of the Declaration/Order, in breach of the rules of natural justice.

[7] In a second-tier appeal under section 22 of the Court of Appeal Act, a decision of the High Court 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)].

[8] 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].

[9] However, designation of a ground 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 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).

[10] The phrase 'a question of law alone' is one of pure law to the satisfaction of the court, as opposed to one of law unaccompanied by any other ground of appeal [vide **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)]. Some examples of such questions of law could be found in **Naisua v State** (supra), **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).

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

[11] 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)].

[12] Therefore, if at least one of an appeal points 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 for example in **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), **Wang v State** [2021] FJCA 146; AAU47.2021 (17 September 2021) and **Sukanaivalu v Fiji Independent Commission Against Corruption (FICAC)** [2021] FJCA 171; AAU0092.2020 (22 October 2021)].

[13] Under section 22 of the Court of Appeal the appellants cannot seek to re-open and re-argue the facts of the case in a second tire 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.

Locus standi

[14] The respondent submits that this appeal should be dismissed *in limine* under section 35(2) of the Court of Appeal Act as the appellant has no *locus standi* before this court to challenge the impugned Declaration/Order and she had anyway appealed against her conviction and sentence to the High Court. However, it is clear that the scope of the current appeal is not the same as the appeal before the High Court against the appellant's conviction and sentence.

[15] *Locus standi* is the right or ability to bring a legal action to a court of law, to appear and be heard in a court on a matter before it. *Locus Standi* essentially applies to a

person's attempt to show to court that he has ample relation or correlation to the cause of action or the suit. In other words, it applies to a person's capacity to bring a case before the court of law or to testify before the court of law.

[16] *Locus standi* may conveniently be considered as applying to two groups of applicants; individuals and pressure groups. Where individuals are concerned it is normally be fairly easy for them to demonstrate sufficient interest, so long as they are in some way personally interested in the decision they wish to challenge. For example, in **R v Independent Broadcasting Authority, ex parte Whitehouse** (1984) *Times* 14 April, a television license holder was found to have sufficient standing to challenge a decision to broadcast a controversial film. It was indicated that every television license holder would have *locus standi* in litigation relating to the broadcast of programmes likely to give offence. Thus, the fact that the applicant was a license-holder, rather than simply a viewer, was enough to give her sufficient standing.

[17] Where interest or pressure group is acting in relation to a decision which directly affects its own interests, no problem arises as it is acting in the same way as an individual (e.g. **R v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association** [1972] 2 QB 299). However, where the group has been formed simply to challenge a decision which does not directly concern its members, it will not have sufficient standing (**R v Secretary of State for the Environment, ex parte Rose Theatre Trust** [1990] 1 QB 504. Yet, where the group can demonstrate that some or all of its members are personally interested in the decision *locus standi* will be found (**R v HM Inspectorate of Pollution ex parte Greenpeace Ltd** (No 2) [1994] 4 All ER 329. Furthermore, even where the group cannot demonstrate personal interest on the part of its members, if it is a highly respected 'expert' group standing is still likely to be found (**R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd** [1995] 1 All ER 611).

[18] If a particular applicant is found to have standing then he will be permitted to have his request heard (though determining that an applicant has *locus standi* will not necessarily mean that he will be successful in his final application). On the other

hand, if the applicant is not found to have standing to bring the action, the court will not hear his complaint.

[19] The appellant seems to argue that as a result of the judgment of High Court 01, she stood having no conviction or sentence against her name. However, when High Court 02 declared the said judgment of High Court 01 a nullity and set it aside, her conviction and sentence were effectively restored and therefore, the Declaration/Order affected her rights conferring her required standing to canvass it in the Court of Appeal.

[20] Therefore, it appears that *prima facie* the appellant has *locus standi* to prosecute her appeal in the Court of Appeal notwithstanding the fact that she had exercised her statutory right to challenge in the High Court her conviction and sentence which was in the first instance set aside by High Court 01 but later reversed by High Court 02. However, whether the appellant has *locus standi* or not is a pure question of law and may be considered by the full court.

Lack of jurisdiction

[21] The respondent has referred to section 99 of the Constitution to argue that the appeal should be otherwise dismissed *in limine* for lack of jurisdiction. Section 99(3)&(5) confer jurisdiction on the Court of Appeal to hear and determine appeals from all judgments of the High Court with or without leave subject to the requirements prescribed by written law or under rules pertaining to the Court of Appeal. This will include the Court of Appeal Act and Rules made thereunder. The respondent also argues that her appeal is not covered generally under section 3 or specifically under sections 21 or 22 of the Court of Appeal Act, thus making this court lacking jurisdiction.

[22] The question therefore is whether the Declaration/Order is a judgment and even if it is not described as a judgment in the caption but as a Declaration/Order, whether it could still be considered as a judgment and appealed against.

[23] Section 22 of the Court of Appeal Act confers the right of appeal against a decision made by the High Court in its appellate jurisdiction. The appellant argues based on section 2(1) of the Court of Appeal Act that 'decision' includes an order, judgment or decree and therefore the said Declaration/Order should be considered a 'decision' as defined in the Court of Appeal Act as being justiciable under section 22. The appellant points out that according to section 22(2) of the Court of Act even a decision in the exercise of revisionary jurisdiction by the High Court is deemed to be a 'decision' made in the appellate jurisdiction by the High Court. It is also contended on behalf of the appellant that the Declaration/Order cannot be other than a decision of the High Court as it is intituled or referred to 'High Court of Fiji, Criminal Jurisdiction' and bears the seal of the High Court and signed by the Acting Chief Justice.

[24] Therefore, it appears that *prima facie* the impugned Declaration/Order could be considered a 'decision' within the parameters of section 22 of the Court of Appeal Act and also a judgement in terms of section 99(3) & (5) of the Constitution being amenable to jurisdiction of the Court of Appeal under section 22 of the Court of Appeal Act.

[25] Jurisdiction of a tribunal is a question of law [see **Naisua v State** (supra)]. Therefore, in the circumstances discussed above the question of the jurisdiction of the Court of Appeal to entertain this appeal may also proceed to the full court for determination.

[26] In addition, the appellant has raised two specific questions of law for the determination of the Court of Appeal.

> *'(a) The Learned Acting Chief Justice erred in law in issuing the Declaration/Order in that he lacked the jurisdiction to do so.*
>
> *(b) Alternatively, if the Learned Acting Chief Justice acted within jurisdiction (which is denied), the Appellant was denied the right to be heard on the making of the Declaration/Order in breach of the rules of natural justice.'*

Ground (a)

[27] The gist of the appellant's arguments is that the judgment of High Court 01 is final and could have been challenged only by way of an appeal in the Court of Appeal and High Court 02 could not have overruled it. It is also submitted that High Court 02 had not mentioned under what statutory powers it was acting in setting aside the judgment of High Court 01 and declaring it a nullity.

[28] On the other hand, the respondent argues that the judgment of High Court 01 was set aside and declared a nullity by High Court 02 because the former had been given without an authorising report by the Chief Justice under section 260 (2) of the Criminal Procedure Act.

[29] The Declaration/Order of High Court 02 at paragraphs 3-16 has dealt with section 260 of the Criminal Procedure Act and determined for several reasons set out therein that for the High Court to act under section 260 (1) it is mandatory that a report 'under the hand of Chief Justice' requesting High Court to act under section 260(1) be given. Accordingly, the Declaration/Order had concluded at paragraph 19 that as High Court 01 had acted without such a report the judgment delivered by High Court 01 on 14 May 2020 is a nullity for lack of jurisdiction.

[30] Section 260 of the Criminal Procedure Act is as follows.

> *"Division 2 — Revision by the High Court Power of High Court to call for records*
>
> *260. — (1) The High Court* ***may*** *call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to —*
>
> > *(a) the correctness, legality or propriety of any finding, sentence or order recorded or passed; and*
> >
> > *(b) the regularity of any proceedings of any Magistrates Court.*

(2) The High Court ***shall*** *take action under sub-section (1) upon the receipt of a report under the hand of the Chief Justice which requests that such action be taken."*

[31] Section 260(1) and (2) read together appear to suggest that under section 260(1) the High Court (meaning any High Court judge) has discretion ('*may*') to call for records of the Magistrates Court for the purpose of satisfying itself of matters set out under 260(1)(a) and (b). However, any High Court (meaning any judge of the High Court) is bound ('*shall*') do so upon the receipt of a report from the Chief Justice. In other words, under section 260(1) the High Court can act on its own motion but when a report is received under section 260(2) from the Chief Justice requesting to do so, the High Court must act under section 260(1). This appears to be the literal and purposive interpretation that could be given to the use of word *'may'* in section 260(1) and *'shall'* in section 260(2) by Parliament.

[32] There is nothing to indicate in section 260 that the legislature intended that a report of the Chief Justice is a condition precedent or a *sine qua non* to the exercise of power of revision by any other High Court judge under section 260(1). To interpret it otherwise would be to impose a fetter not intended by Parliament as *'a strong leaning exists against construing a statute so as to oust or restrict the jurisdiction of the superior courts'* and it is a *'....well-known rule that a statute should not be construed as taking away the jurisdiction of the courts in the absence of clear and unambiguous language to that effect...'* (see **Maxwell on Interpretation of Statutes** Twelfth Edition by P. St. J. Langan).

[33] Power of High Court on revision are in respect of any proceedings in a Magistrates Court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge (vide section 262(1) of the Criminal Procedure Act). The words *'which has been called for'* and *'which otherwise comes to its knowledge'* seem to suggest instances where the High Court acts on its own motion or *ex mero motu* under section 260(1) whereas the words *'which has been reported for orders'* appear to refer to the instance of the High Court acting on a report of the Chief Justice under section 260(2).

[34] In the light of the above discussion, it is clear that this is an important pure question law affecting the revisionary jurisdiction of the High Court in general and therefore should be allowed to proceed to the full court for an authoritative pronouncement.

Ground (b)

[35] The appellant submits that High Court 02 did not hear her before overturning the judgment in her favour given by High Court 01 and therefore her right to be heard was violated amounting to a breach of the rule of natural justice *audi alteram partem*.

[36] The appellant's contention is that in terms of section 14(2) of the Constitution a person charged with an offence has *inter alia* a right to defend herself and to be present when being tried. It appears that section 14 of the Constitution deals with the rights of accused persons when originally tried by a court of first instance. Whether these rights coupled with rights under section 15 of the Constitution on access to courts in so far as they are relevant to appellate proceedings, should be *mutatis mutandis* available to a party to an appeal or to revisionary proceedings particularly when the decision in appeal or revision would adversely affect that party is an important question of law. It may be pertinent to note that as far as the Court of Appeal is concerned an appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it and is not prevented by sickness or other cause, on the hearing of his appeal [vide section 31(1) of the Court of Appeal Act].

[37] The appellant also buttresses her argument by referring to Article 14 of the International Covenant on Civil and Political Rights (ICCPR), decisions in **Annetts v McCann** [(1990) 170 CLR 596, 598], **Wiseman v Borneman** ([1971] AC 297, 308-309, **Lloyd v McMahon** ([1987] 1 AC 625, 702-703) and **Ross on Crime** 07th Edition – Mirko Bagaric, 2016.

[38] The pith and substance of these authorities seems to be that when decisions are taken affecting a person's rights, rules of natural justice should be observed unless excluded by plain words. The principles and procedures to be applied in a given situation should be right, just and fair. There is nothing rigid about natural justice which is only

'fair play in action' in that no one shall be condemned unheard and when an order is to be made depriving a person of his right, interest or legitimate expectation, he should be given an opportunity of replying to it or afforded a fair hearing. To achieve that courts will not only require the statutorily prescribed procedure to be followed but will readily imply that much to be introduced by way of additional procedural safeguards to ensure fairness.

[39] Thus, the appellant argues that after she had her conviction and sentence overturned by High Court 01 in its judgment, she had a right to be heard if that decision was to be set aside by High Court 02 as that was going to affect her right, interest and legitimate expectation. Since High Court 02 did not afford her right to be heard before reinstating the conviction and sentence, the Declaration/Order was made in breach of the rules of natural justice.

[40] The appellant also submits that though when the High Court exercises powers of revision under section 263 of the Criminal Procedure Act, no party has any right to be heard personally or by lawyers, High Court 02 in this instance could not have acted under section 263 in as much as revisionary powers are available for calling for and examining the record of any criminal proceedings before any Magistrates Court and these powers cannot be extended to calling for and examining the record of any criminal proceedings in another High Court namely High Court 01.

[41] Secondly, the discretion of High Court as to hearing parties under section 263 is subject to section 262(2) which declares that no order under section 262(1) (a) and (b) shall be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by a lawyer in his or her defence.

[42] The respondent submits that the appellant had been heard neither by High Court 01 (though the appearance of counsel had been marked for both sides) nor by High Court 02. High Court 01 could have exercised its discretion under section 263 of the Criminal Procedure Act as not to hear the appellant or her counsel in as much as the court was not making an order prejudicial to her. However, in the case of High Court 02, the order made was to the prejudice of the appellant. Even assuming only for the

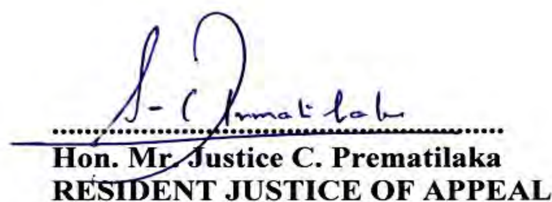
sake of argument that High Court 02 was exercising powers of revision, in terms of section 262(2) it had to hear the appellant personally or her counsel in her defence before making the Declaration/Order effectively restoring the conviction and sentence. Again even assuming that High Court 01 was exercising powers of revision such powers under section 262(1) do not authorise the High Court to convert a finding of acquittal into one of conviction which appears to have been the practical effect of the Declaration/Order as High Court 01 had for all practical purposes acquitted the appellant.

[43] The State also submits that the effect of the Declaration/Order was to administratively setting right a legally incorrect situation. Prima facie it appears that the Declaration/Order has all the hallmarks of a judicial pronouncement and trappings of a decision of the High Court. There is no indication expressly or otherwise in the Declaration/Order that it is anything other than a judicial decision. State concedes that it could have appealed against the judgment of High Court 01 to the Court of Appeal but did not or did not have to do so as High Court 02 set aside the said judgment and declared it a nullity.

[44] Dismissal of an application for enlargement of time without hearing the appellant is a question of law alone [vide **Turaga v State** (supra)]. In all the circumstances highlighted above, I think the 02nd ground of appeal also constitutes a question of law and should be allowed to proceed to the Court of Appeal for a final determination.

Order:

1. Appeal (bearing No. AAU 031 of 2020) may proceed to the Full Court on the questions of law highlighted above.



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