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

CRIMINAL APPEAL NO. AAU 124 of 2020
[In the High Court at Suva Case No. HAA 38 of 2019]
[In the Magistrates Court at Nausori case No.79/2015]

BETWEEN: **RAMAN PRASAD**

Appellants

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Ms. S. Shameem for the Respondent**

Date of Hearing : **18 July 2022**

Date of Ruling : **20 July 2022**

RULING

[1] The appellant was charged in the Magistrates court at Nausori with one count of sexual assault contrary to section 210 (1) (b) (i) and (2) of the Crimes Act No. 44 of 2009 by bringing his penis into contact with the mouth of the 14 year old complainant.

[2] At the conclusion of the trial, on 07 June 2019, the appellant was found guilty and convicted of the said charge. On 30 September 2019, he was sentenced to 68 months of imprisonment with a non-parole period of 60 months. Aggrieved by the said decisions the appellant filed a petition of appeal in respect of both his conviction and sentence on multiple grounds (10 against conviction and 03 against sentence) in the High Court

[3] In a well-considered judgment, the learned High Court judge had dismissed the appellant's appeal on 17 July 2020.

[4] Now, the Legal Aid Commission is pursuing a second tier appeal on conviction and sentence under section 22 of the Court of Appeal Act against the High Court judgment. The grounds of appeal urged are as follows.

> ***Conviction***
>
> *1. The learned Appellate Judge erred in law by not independently assessing the evidence to determine that the conviction is supported by the totality of evidence.*
>
> ***Sentence***
>
> *2. The learned Appellate Judge had erred in law of not considering that the learned Magistrate was wrong to have taken into account an element of the offending as an aggravating factor thereby enhancing the sentence.*

[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 [see **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 **Naravan v State** [2021] FJCA 143; AAU39.2021 (10 September 2021) and **Wang v State** [2021] FJCA 146; AAU47.2021 (17 September 2021)].

[9] The appellant cannot seek a rehearing of the appeal heard 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.

[10] 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).

Is there a question of law only under the first ground of appeal?

[11] The appellant's argument is that the High Court judge had failed to engage in an independent analysis or assessment of the evidence to determine that the evidence in its totality supported the conviction as held in **Ram v State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012) and **Chandra v State** [2015] FJSC 32; CAV 21 of 2015 (10 December 2015).

[12] The High Court judge had considered the evidence at paragraphs 14-29 of the Judgment which according to the counsel for the appellant is not an independent analysis or assessment of the evidence but a reiteration of the prosecution evidence and that of the appellant. However, when this court inquired from the counsel as to what other matters should the High Court judge have considered or in what way he should have evaluated or assessed the evidence of both parties, he did not point out any particular and specific instances but submitted that would involve a re-agitation of the facts.

[13] The legal requirement of independent analysis or assessment of the evidence in exercising a supervisory jurisdiction by an appellate body cannot exist in isolation. It is not a theoretical exercise but an undertaking involving critical consideration of the facts. A party complaining of a failure on the part of an appellate court to engage in an independent and critical analysis of evidence must show in what areas it had fallen short of that duty and how such an exercise would have led to a different finding.

[14] Therefore, I perused the judgment of the Magistrate and the High Court but cannot see any basis for the appellant's complaint. I find that learned the Resident Magistrate had believed the prosecution evidence because of the independent evidence of PW2 Corporal 3834 Josefa Renuku that he saw the appellant standing up under a tree and quickly pulling up his trousers from knee height which corroborates the complainant's evidence that it was while he was sucking the appellant's penis that the police came. In fact the police found both of them together in a bushy area by the side of the road. The complainant had promptly complained to Corporal 3834 Josefa Renuku that the appellant had made him suck his penis under threat of assault and even threatened him not to tell the police. Further, the Resident Magistrate had at paragraphs 16-18 had

observed that the appellant had not put to prosecution witnesses certain vital positions that he took up in his evidence to exonerate himself, while they were giving evidence. Accordingly, the Resident Magistrate who had the opportunity of observing the demeanour and deportment of all witnesses, had considered the prosecution evidence credible and reliable. The judgment by the Resident Magistrate contains a critical analysis and evaluation of all evidence and the conclusion that prosecution evidence in its totality supported the conviction was inescapable.

[15] Therefore, I am convinced that the High Court could not have arrived at a finding different to that of the Magistrate. Thus, the High Court judge's conclusion that he saw no reason to interfere with the learned Magistrate's decision is fully justified.

[16] Therefore, there is no question of law only to be looked into by the full court.

Is the sentence passed in consequence of an error of law?

[17] The appellant submits that the Resident Magistrate had erred in taking the fact that the appellant had threatened to assault the complainant if he did not suck his penis as an aggravating factor.

[18] The State submits that threatening is not necessarily an element of the offence of sexual assault and it could have been the subject of a separate charge of criminal intimidation if the prosecution had chosen to do so. Technically, the relevant element of sexual assault is lack of consent.

[19] 'Consent' means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent to an act is not freely and voluntarily given if it is obtained *inter alia* by threat or intimidation, by fear of bodily harm, by false and fraudulent representations about the nature or purpose of the act, etc. [see section 206(1) and (2) of the Crimes Act, 2009]

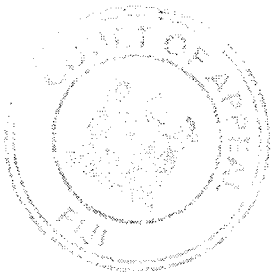
[20] Therefore, the manner in which consent is extracted is not an element of the offence of sexual assault. Thus, threatening the complainant with assault not only to get him to suck the appellant's penis but also to threaten him not to report the matter to police are aggravating features.

[21] The High Court judge had not specifically considered the present argument as the same had not been urged before him. However, the Resident Magistrate had not passed the sentence in error of law. The sentence is within accepted sentencing tariff of 02 -98 years [see **State v Khaiyum** - Sentence [2012] FJHC 1274; Criminal Case 160.2010 (10 August 2012) and **State v Laca** - Sentence [2012] FJHC 1414; HAC252.2011 (14 November 2012)].

[22] Thus, there no question of law alone has been urged by the appellant and the sentence has not been passed in error of law. Therefore, the appeal should be dismissed in terms of section 35(2) of the Court of Appeal Act.

Order

1. Appeal (bearing No. AAU 124 of 2020) is dismissed in terms of section 35(2) of the Court of Appeal Act.



.....

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