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

CRIMINAL APPEAL NO. AAU 0023 of 2018
[In the High Court of Lautoka Case No. HAA 88 of 2017]
[In the Magistrates Court at Tavua case No. 267 of 2012]

BETWEEN : **MUNENDRA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, JA
Qetaki, JA

Counsel : **Mr. N. R. Padarath for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **03 May 2023**

Date of Judgment : **25 May 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been arraigned in the Magistrates' Court at Tavua on a single count of indecently annoying a person contrary to section 213 (1) (a) of the Crimes Act. It had been alleged that the appellant on 24 October 2012 at Maqere, Tavua with intent to indecently annoy the modesty of Roshni Mudaliar made a gesture by holding his private part intending that such gesture be seen by the said Roshni Mudaliar.

[2] Pursuant to the trial, the learned Magistrate had found the appellant guilty of the charge in his judgment dated 15 May 2017. He had been sentenced to 50 hours of community work on 17 July 2017 with a default sentence of 06 months of imprisonment. He has already served the sentence.

[3] Being aggrieved by the said conviction, the appellant had filed an appeal in the High Court on the following grounds of appeal:

> *"(1) The Learned Trial Magistrate erred in law in his application and interpretation of proof beyond reasonable doubt.*
>
> *(2) The Learned Trial Magistrate erred in law and in fact at paragraph 19 of the judgment when it was held that the alibi evidence was unbelievable wherein:*
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> *(a) The Learned Trial Magistrate did not give adequate reasons to not believe the defence witness given the evidence led.*
>
> *(b) The Learned Trial Magistrate failed to define and explain the term significant event.*
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> *(c) The Learned Trial Magistrate failed to consider the evidence of the alibi evidence despite being satisfied that the evidence was not discredited and took an opinion which was not led in evidence by the prosecution and defence."*

[4] The learned High Court judge in the judgment dated 16 February 2018 had dismissed the appellant's appeal.

[5] The appellant through his lawyers had filed a notice of appeal against the decision of the High Court on 16 March 2018 containing the following grounds of appeal:

> '1. *The Learned Judge erred in law by holding that the Magistrate was not required to define the term significant event at paragraph 17 when it was accepted by the Learned Judge that the term significant event did not have any legal meaning neither was the term significant event derived from any established legal principle and thus it was necessary for the Learned Magistrate and the Learned Judge to give legal meaning to the term significant event.*
>
> '2. *The Learned Judge erred in law by holding that there is no substantial miscarriage of justice when it was noted that the Learned Magistrate failed to direct himself to the legal principle laid down in Laisenia Base and Are Amae vs the State AAU 0067 of 2011 and this led to the Learned Magistrate to invent a term significant event and shift the burden onto the Defence.'*

Scope under section 22 of the Court of Appeal Act

[6] The appellant's appeal to this court is against the High Court judgment delivered on 16 February 2018 in terms of section 22 of the Court of Appeal Act as a second tier appeal. In a second tier appeal, a conviction could be canvassed on a ground of appeal involving a question of law only [also see **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017)]. 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].

[7] Though, leave to appeal is not required under section 22, a single judge could still exercise jurisdiction under section 35(2) in order to determine whether the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal [vide **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012) and **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)]. In doing so, a single judge is required to consider whether there is in fact a question of law that should go before the full court, for 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 a counsel's or an appellant's duty to properly identify a discrete question (or questions) of law in prosecuting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005).

[8] What is important is not the label but the substance of the appeal point. This exercise is 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 **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020) and **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014)].

[9] 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)].

[10] In a second tier appeal under section 22 of the Court of Appeal an appellant cannot seek to re-open and re-argue facts or mixed fact and law of the case or re-agitate findings of pure facts or mixed fact and law. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the court 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 this court must give effect to that legislative intention.

[11] After the hearing before the single judge, the court granted the appellant right to proceed to the full court hearing only on the following question of law:

> *'Whether the High Court applied the correct test adopted in* ***Aziz v State*** *[2015] FJCA 91; AAU112.2011 (13 July 2015) in the application of section 256 (2) (f) of the Criminal Procedure Act, 2009.'*

[12] The gist of the appellant's argument revolves around the decision of the learned Magistrate to reject his *alibi* and entered a conviction against him on the complainant's testimony and the learned High Court judge having upheld the conviction despite having admitted that the learned Magistrate had not given his mind to the relevant principles relating to the appellant's *alibi* on the premise that no substantial miscarriage of justice had occurred.

[13] Evidence in support of an *alibi* is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission (per Fatiaki, J in **Andrew Ian Carter v State** (1990) 36 FLR 125). An accused putting forward an *alibi* as an answer to a charge does not assume any burden of proving it and it is a misdirection to refer to any burden as resting on the accused in such a case (vide **R. v. Johnson** [1961] 1 W.L.R. 1478; 46 Cr.App.R.55.). Although there is no rule of law that in

every case where the accused relies on an *alibi* the judge must direct that it is for the prosecution to negate the *alibi,* such a direction is necessary if the jury seem in danger of supposing that, because an *alibi* has been put forward by the defence, the burden must be on the defence to prove it (vide ***Wood*** (1968) 52 Cr. App. R. 74). However, even where such a direction is not strictly necessary, it is nonetheless desirable (vide ***Anderson*** [1991] Crim. L. R. 361, CA; ***Preece*** (1993) 96 Cr. App. R. 264, CA.). If the prosecution fails to satisfy the fact finders beyond reasonable doubt that *alibi* evidence should be rejected then they must acquit the accused.

[14] The appellant argues that the Magistrate had failed to properly direct himself on the principles laid down in **Laisenia Base and Are Amae vs the State** AAU 0067 of 2011regarding his *alibi* evidence.

[15] It is well established that it is for the prosecution to negative an *alibi* as in the case of self-defence or provocation [See **Killick v The Queen** (1981) 147 CLR565; 37 ALR 407, **R v Johnson** (1961) 46 Cr App R 55; 3 ALL ER 969 and **R v Taylor** [1968] NZLR 981 at 985-6] because by raising an *alibi*, the accused was not undertaking to prove anything, and that onus remained on the Crown to remove or eliminate any reasonable doubt which may have been created by the *alibi* claim or any reasonable possibility that the *alibi* was true [see **R v. Small** (1994) 33 NSWLR 575; 72A Crim R 462 (CCA)].

[16] *Alibi* is therefore, analogous to a defense such as self-defense or provocation but should be distinguished from a statutory defense such as insanity or diminished responsibility. In Fiji it has been held that when an accused relies on *alibi* as his defence, in addition to the general direction of the burden of proof, the assessors should be directed that the prosecution must disprove the *alibi* and that even if they conclude that the *alibi* was false, that does not by itself entitle them to convict the accused (vide **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020)].

[17] One way in which a prosecutor can try to refute an *alibi* defense is by showing that the accused never gave notice of *alibi* at all or there was no reasonable explanation for the belated *alibi* notice. On a trial before any court the accused shall not, without the leave of the court, adduce evidence in support of an *alibi* unless the accused has given notice in accordance with section 125 of the Criminal Procedure Act, 2009. The mere fact that the necessary information has not been given within the stipulated time does not by itself, as a general rule, justify the court in exercising its discretion by refusing permission for *alibi* evidence to be called. However, non-compliance of the statutory period for *alibi* notice stipulated in section 125 of the Criminal Procedure Act, 2009 is a matter that goes to the weight of an *alibi* [vide **Nute v State** [2014] FJSC 10; CAV0004.2014 (19 August 2014)]. Requiring the accused to file notice of *alibi* in advance is to give the prosecution time before trial to take steps, if it so wishes, and to check the veracity of *alibi* notice. If true, it may result in the prosecution not putting the accused to trial at all. If not, the prosecution has time to get ready to disprove the *alibi*.

[18] The prosecution also can refute an *alibi* defense by questioning the accused's *alibi* witnesses and challenging their credibility. It can also lead evidence in rebuttal either before or at the discretion of the court after the defence evidence. The latter is a quasi-exception to the general rule that all the prosecution evidence must be adduced before it closes its case unless something arises totally *ex improviso* in the defence case which could not reasonably have been foreseen.

[19] Further, if the prosecution establishes beyond reasonable doubt that the accused was present at the crime scene by its own evidence, then *alibi* evidence has obviously failed to create a reasonable doubt in the prosecution case and the *alibi* would not succeed.

[20] However, in proving beyond reasonable doubt that the accused was at the crime scene, the prosecution must remove or eliminate a reasonable possibility of him being somewhere else according to the *alibi* evidence. This could be considered the intermediary position with regard to an *alibi* the result of which is that if the fact

finders neither reject nor accept the *alibi* but *alibi* evidence still make them regard it to be reasonably true, then the accused will have to be acquitted.

[21] This position is expressed in the following statement on the law as to what would be the appropriate direction on *alibi* by Roden J at 5-6 (Street CJ, Slattery CJ at CL concurring) in **R v Amyouni** NSWCCA 18/2/88 unrep. BC8802201:

> *"………., there are three possibilities, all three of which should be explained to the jury." "One is that they accept the alibi, in which event they would be obliged to acquit The second is that they reject the alibi, in which case they would not necessarily convict but must assess the evidence as a whole. The third possibility is that although they do not accept the alibi, the also do not reject it in the sense that they regard it as something which could reasonably be true. In that event also, in such a case, they must acquit."*

[22] Again in **R v Kanaan** (2005) 157 A Crim R 238; [2005] NSWCCA 385 Hunt AJA (Adams and Latham JJ concurring) said:

> *"[134] It was common ground that the Crown had to establish beyond reasonable doubt that the appellant was present at the crime scene. The appellant complains, however, that at no time did the judge ever in terms direct the jury that, in order to convict the appellant, they had to reject the evidence of alibi beyond reasonable doubt."*
>
> *"[135] …. An alibi asserts that, at the relevant time, the accused was not at X (the scene of the crime) but at Y (somewhere else, according to the alibi evidence). The issue which it raises is whether there is a reasonable possibility that the accused was at Y, rather than X, at that time. To prove beyond reasonable doubt that the accused was at X, the Crown must remove or eliminate that reasonable possibility: Regina v Youssef (1990) 50 A Crim R 1 at 2-3. An appropriate direction to the jury would be:*
>
> *The Crown must establish beyond reasonable doubt that the accused was at X at the relevant time. The Crown cannot do so if there is any reasonable possibility that he was at Y at that time, as asserted by the alibi evidence. The Crown must therefore remove or eliminate any reasonable possibility that the accused was at Y at the relevant time, and also persuade you, on the evidence on which the Crown relies, that beyond reasonable doubt he was at X at that time."*

[23] In Sri Lankan context, **Yahonis Singho v. The Queen** (1964) 67 NLR 8 at 9-11 T. S. Fernando J. said on *alibi* evidence as follows:

> *'…… If Sirimane's evidence was neither accepted nor was capable of rejection, the resulting position would have been that a reasonable doubt existed as to the truth of the prosecution evidence. We think the omission to direct the jury on what may be called this intermediate position where there was neither an acceptance nor a rejection of the alibi was a non-direction of the jury on a necessary point and thus constituted a misdirection.'*

[24] The defence counsel had admitted that even by the close of the prosecution case no notice of *alibi* had been given except suggesting generally to the complainant in cross-examination that the appellant was not at his residence but in Ba Town on the day in question. The appellant's counsel had argued that the appellant had in his cautioned statement stated that he was not present at the relevant time and that in effect amounted to an *alibi* notice. If that be the case, there could not have been any hesitancy on the part of the appellant and his counsel to have given a timely *alibi* notice. However, the cautioned statement had not been led in evidence by either party and as a result its contents cannot be ascertained from the record. The prosecuting counsel had continuously demanded a proper *alibi* notice in terms of section 125 of the Criminal Procedure Act. Finally, the learned Magistrate had given 07 days for the defence counsel to submit an *alibi* notice. It is not clear whether an *alibi* notice had in fact been tendered accordingly but the defence had led the evidence of the appellant, his wife and another in support of the *alibi*. Thus, if at all, the *alibi* notice had been tendered quite belatedly (more than 01 ½ years after the stipulated time). Lack of specific time during which the appellant was said to be absent from the crime scene in the suggestion made to the complainant (the complainant's version being that the alleged incident happened around 8.30 am. and lasted a very short time) and the belated notice of *alibi*, if ever given, significantly reduces the weight that could be attached to the *alibi*.

[25] Ultimately, the decision on the appellant's culpability reduced to the credibility of the complainant and *alibi* witnesses. The learned Magistrate having analysed the complainant's evidence, had found her evidence credible and reliable and he had

accepted it as worthy of belief. The Magistrate had also found all the elements of the offence to have been proved beyond reasonable doubt. Accordingly, he had convicted the appellant.

[26] Turning his attention to *alibi* evidence, the learned Magistrate at paragraph 19 of his judgment had stated:

> *'19. The defence alibi, I find unbelievable as there is no significant event established in the defence evidence to trigger the memories of DW1, DW2, and DW3 in recalling the incident on 24th October, 2012.'*

[27] The Magistrate had then proceeded to elaborate as to what he meant by the absence of a significant event in the paragraphs that followed:

> '*[20] DW1 and DW2 both confirmed that DW2 was looking after the shop at while DW1 left at 7.30am to Ba town to do their shopping for their shop and carry out other errands. In my view this going to town by DW1 to do shopping for their shop and attend to other errand is not significant due to the high possibility that he was doing these on many occasions due to the existence of their shop business. If accused had been doing these on many occasions then obviously DW2 would have been looking after the shop on many occasions too and not necessarily only on 24th October 2012, whilst DW1 was away in town doing shopping for their shop.*
>
> *[21] Likewise for DW3 he stated that he goes to accused shop. Hence there is a high possibility that he had gone to accused shop on many other occasions and not only on 24th October 2012'.*
>
> *[22] As I see it on the evidence, DW1's going to town on the said date at 7.30am and DW3 coming to accused shop on the said date at 8am is not a significant event to prompt their memory as to the alleged date of the incident. The going to town of DW1 and coming to accused shop by DW3 cannot be a random practice hence there's a high possibility that what they've stating occurred on a different date and not on the alleged date of the incident.'*

[28] It is clear from the leaned Magistrate's judgment that he had fully analysed *alibi* evidence and not accepted it. In his analysis of *alibi* evidence, the Magistrate was obviously considering as to whether the *alibi* could reasonably be true or whether there was a reasonable possibility of the appellant being elsewhere. In the end, he had

not regarded the *alibi* to be even reasonably true or there was a reasonable possibility of the appellant being not present at the crime scene at the relevant time. The Magistrate had in fact totally rejected the *alibi* for reasons set out in his judgment.

[29] The first question to be answered is whether the learned Magistrate by his failure to state or remind himself of the correct legal principles, had misdirected himself on the burden of proof regarding the appellant's *alibi*. Admittedly, the Magistrate had not on the record directed himself according to the guidelines set out in the above cases in evaluating the *alibi* evidence of the appellant and his witnesses. However, it is clear from his judgment that upon a through analysis of the evidence he had rejected the *alibi* and considered the prosecution to have proved its case beyond reasonable doubt which means that the prosecution had not only proved that the appellant was at the crime scene at the relevant time but also excluded any reasonable possibility that he was elsewhere at that time. The Magistrate had not erred on the burden of proof or standard of proof as far as the *alibi* was concerned. Thus, there is no substantial miscarriage of justice that had occurred.

[30] The gist of the appellant's argument is that the Magistrate (and the High Court judge) had failed to assign a legal definition or meaning to the phrase 'significant event' used by the Magistrate in his judgment.

[31] As stated above, the Magistrate had treated the defence evidence to be week and unreliable and had refused to accept the *alibi* defence. Therefore, it appears that the Magistrate had rejected the appellant's defence of *alibi* due to the lack of a significant event that made *alibi* witnesses to recollect the events on 24 October 2012. The High Court while examining the appellant's complaint seems to have accepted this by stating:

> *'[18] .....The fact that the defence witnesses told the court that they recalled the 24th day of October, 2012 and maintained their version of events did not mean that when assessing the evidence the learned Magistrate was satisfied of its truthfulness. According to the learned Magistrate, there was no evidence before the court that would have triggered the memories of all the defence witnesses in recalling the date of the incident.'*

[32] The Magistrates' court record reveals that neither the defence nor the prosecution had questioned *alibi* witnesses how and why they could recollect or what made them register in their minds the absence of the appellant around 8.30 in the morning on his compound on the date of the incident. In other words, neither party had afforded an opportunity for those witnesses to give an explanation, if possible, whether there was anything significant associated with the date of the incident as opposed to any other day.

[33] Be that as it may, I do not think that there was any need or it was actually possible for the Magistrate or the High Court judge to have defined in legal jargon what a significant event is. Both courts have understood this expression to encapsulate common experience of life of reasonable people who would remember an event due to some reason which causes it to be imprinted in the memory.

[34] The appellant argues that the High Court judge should have demonstrated by referring to evidence why he thought that there was no substantial miscarriage of justice by the complete failure on the part of the Magistrate to direct himself on the law relating to *alibi* evidence rather than making the general statement in paragraph [25] of the judgment. However, on a perusal of the entirety of the High Court judgment, it becomes clear that the learned High Court judge had indeed given his mind to *alibi* evidence on record as evidenced *inter alia* by the following paragraphs:

> *'[22] Although the defence counsel in his cross examination had put to the complainant that the accused was not at his residence (at page 35 of the copy record) which was denied, however, when one looks at the line of cross examination of the complainant in its entirety it gives a different picture.*
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> *[27] There was no chance of any mistaken identification since both the Appellant and the complainant were known to each other and lived on properties opposite each other. The prosecution had disproved the defence of alibi beyond reasonable doubt which is obvious from the evidence adduced at trial. On the evidence the learned Magistrate had correctly found the Appellant guilty and convicted him.'*

[35] The prosecution evidence had been cogent. I do not think that the *alibi* evidence was so cogent as to engender in any reasonable mind a doubt of the appellant's guilt for the conviction to be quashed and a verdict of an acquittal entered [see **Palmer v R** (1998) 193 CLR1; 151 ALR 16].

[36] The Learned High Court judge had admitted that the Magistrate had not directed his mind to principles on law on *alibi* but dealt with it as follows:

> *'24. A perusal of the judgment does not show that the learned Magistrate had directed his mind to the above principle of law. In this regard, this court will have to consider whether any substantial miscarriage of justice has actually occurred by the above failure in accordance with section 256 (2) (f) of the Criminal Procedure Act. Section 256 (2) (f) states:*
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> > *"the High Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."*
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> *25. After perusing the evidence contained in the copy record, I am satisfied that no substantial miscarriage of justice has actually occurred as a result of the learned Magistrate's failure.'*

[37] Though, the learned High Court judge had applied the proviso to section 256 (2) (f) of the Criminal Procedure Act and dismissed the appeal despite the said omission on the part of the Magistrate, he does not appear to have referred to or applied the test relating to the application of the proviso.

[38] The error of the Magistrate could be considered as a non-direction as to the law applicable to the evaluation of appellant's *alibi* (which is a question of law) and not a misdirection or non-direction as to the evidence which is not a question of law alone. The test that could be adopted *mutatis mutandis* from a trial by jury is whether on a right direction the Magistrate would inevitably have come to the same conclusion (see **ARCHBOLD Pleading, Evidence & Practice in Criminal Cases 26th Edition page 339**). As I have already discussed and determined above, I have no doubt that this is the case here.

[39] The High Court judge too has not specifically referred to and applied the relevant test in respect the application of the proviso in section 256 (2) (f) of the Criminal Procedure Act on *'no substantial miscarriage of justice'*.

[40] The test as propounded on the proviso to section 4(1) of the Criminal Appeal Act, 1907 in UK which is identical with the proviso to section 23(1) of the Court of Appeal Act in Fiji, is that the appellate court may apply the proviso and dismiss the appeal if it is satisfied that on the whole of the facts and with a correct direction the only proper verdict would have been one of guilty [see **R. v. Haddy** [1944] K. B. 442; 29 Cr. App. R. 182; **Stirland v D. P. P.** [1944] A.C. 315; 30 Cr. App. R. 40; **R. v. Farid** 30 Cr. App. R 168)].

[41] The proviso to section 23(1) of the Court of Appeal Act is almost identical with section 256 (2) (f) of the Criminal Procedure Act and therefore, the same test applied to the proviso to section 23 (1) should apply to proviso in section 256 (2) (f) of the Criminal Procedure Act.

[42] The Court of Appeal in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) adopted the same test in the application of the proviso to section 23(1) of the Court of Appeal Act as follows:

> *'[55] ………..if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.*
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> *[56] This test has been adopted and applied by the Court of Appeal in Fiji in **R –v- Ramswani Pillai** (unreported criminal appeal No. 11 of 1952; 25 August 1952); **R –v- Labalaba** (1946 – 1955) 4 FLR 28 and **Pillay –v- R** (1981) 27 FLR 202. In **Pillay –v- R** (supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in **R –v- Weir** [1955] NZLR 711 at page 713:*
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> > *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt. If the Court comes to the conclusion that, on the whole of the facts, a*

reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred."

[57] ………………..when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

*In **Vuki –v- The State** (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*

"The application of the proviso to section 23(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."

[43] In my view, the High Court too should have applied the above test in deciding whether to have recourse to section 256 (2) (f) of the Criminal Procedure Act, 2009. However, unfortunately it appears that the learned High Court judge had not adverted to the relevant test in applying section 256 (2) (f) of the Criminal Procedure Act, 2009 on the omission by Magistrate in dismissing the appellant's appeal. However, he had held that there was no substantial miscarriage of justice which implies that the High Court judge had thought that applying the correct principles on *alibi* evidence the only reasonable and proper verdict would be one of guilty.

[44] Therefore, I have undertaken the task of applying the proper test as articulated above to the facts of this case. Having perused the record, I am also satisfied that on the whole of the facts and with the application of the correct principles of law on *alibi*, the only proper verdict would have been one of guilty. Therefore, I would apply the proviso to section 23(1) of the Court of Appeal Act and dismiss the appeal.

Mataitoga, JA

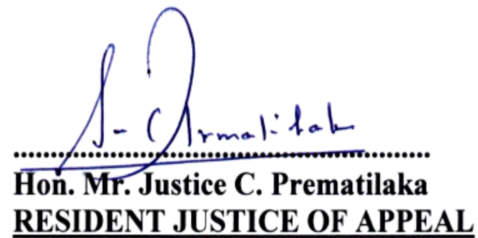
[45] Happy to support conclusions and orders.

Qetaki, JA

[46] I agree with Prematilaka RJA's judgment and its reasons.

The Order of the Court are:

1. Appeal is dismissed.



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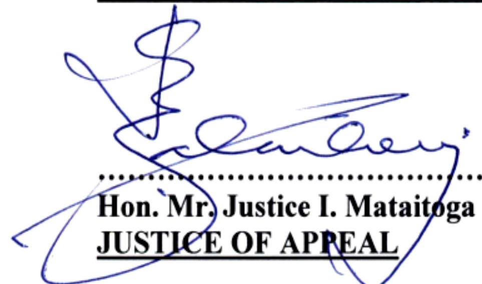
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL



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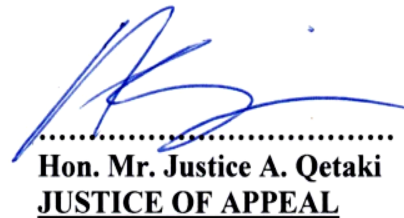
Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL



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Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

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