

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

CRIMINAL APPEAL NO. AAU 76 of 2021
[In the High Court at Suva Case No. HAA 88 of 2017]
[In the Magistrates Court at Nadi case No.788 of 2019]

BETWEEN : **ETUATE RULADE SUGUTURAGA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant absent**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **05 June 2023**

Date of Ruling : **12 June 2023**

RULING

[1] The appellant had been arraigned in the Magistrates' Court at Nadi on four counts of obtaining financial advantage by deception contrary to section 318 of the Crimes Act, 2009 alleging that he on four different occasions by deception, dishonestly obtained financial advantage of \$1,500.00 from the victim.

[2] After several adjournments the appellant had pleaded not guilty to all the counts. However, subsequently the appellant had changed his plea and informed court that he was willing to plead guilty and when the charges were again put to the appellant he had pleaded guilty to all the counts. He had also admitted the summary of facts read to him which read as follows:

The appellant and the victim were known to each other, on 1st April 2019 both met at a restaurant in Namaka, the victim told the appellant he had a pending case in court.

The appellant then told the victim he was an employee of a lawyer and he will be able to assist the victim with his court case. The appellant told the victim to pay \$8,000.00.

The victim paid \$1,000.00 on the same day and was given a receipt. Thereafter on 6th May, 2019 the appellant approached the victim and sought another \$250.00 which was given to him by the victim. On 8th May, 2019 the victim went to the appellant's office to check on the progress of his case and then gave another \$150.00. On 10th May, 2019 the victim paid another \$100.00 to the appellant.

On 15th May, 2019 the appellant called the victim and told him to attend to his court case on 24th May which the victim did only to find out that there was no case for him in court. On 29th May, the appellant called the victim and stated that his case had been terminated and for the victim to pick the relevant letter from the appellant. The victim picked the letter from the appellant and discovered that the letter had a wrong case number.

The victim realized the appellant was lying and reported the matter to the police. The appellant was arrested, caution interview and charged.

[3] The Magistrate upon being satisfied that the appellant had entered an unequivocal plea had found him guilty and convicted him as charged. He was sentenced to 2 years, 3 months and 2 weeks imprisonment with a non-parole period of 16 months to be served.

[4] The appellant appealed to the High Court and he had pursued his appeal in the High Court on the following amended grounds of appeal:

- (a) The summary of facts did not disclose the offences the appellant was charged with;*
- (b) The conviction is not safe since the learned Magistrate did not consider the unrepresented status of the appellant and failed to follow the guidelines in Singh vs. State, criminal appeal no. 079 of 2000 before the plea was taken.*
- (c) The right to counsel was continuously denied and ignored by the learned Magistrate resulting in a substantial miscarriage of justice.*

[5] The learned High Court judge in the judgment dated 18 January 2022 had dismissed the appellant's appeal and he had then preferred a second tier appeal to this court on the following grounds of appeal which are in essence the same as those urged in the High Court.

- (a) *The learned trial magistrate and the appellate judge erred in law by failing to consider that the summary of facts did not disclose all the element of the offences;*
- (b) *The learned trial magistrate and the appellate judge erred in law by failing to consider the unrepresented status of the appellant and failed to follow the guidelines in Singh vs. State, criminal appeal no. 079 of 2000 before the plea was taken.*
- (c) *The learned trial magistrate and the appellate judge erred in law by failing to consider that the right to counsel was continuously denied and ignored in the proceedings of the mater.*

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 18 January 2022 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.

01st ground of appeal

- [11] The only contentions issue under 01st ground of appeal had been whether the summary of facts had established the elements of deception and dishonesty on the appellant’s part. The High Court judge’s reasoning to reject this ground of appeal is as follows:

19. A perusal of the summary of facts mentions that when the appellant came to know that the victim had an ongoing case in court he told the victim that he was working for a lawyer and he can help with the case. The appellant told the victim to pay him \$8,000.00 and on the same day the appellant received \$1,000.00.

20. *After the appellant took the money from the victim he did not do anything to help the victim. In the meantime, the appellant continued to accept money from the victim. When the victim started following up on what was happening to his case, the appellant finally informed the victim that his matter had been terminated in court. The appellant then gave a letter of confirmation in respect of the above with a wrong case number written.*
21. *In view of the above, the appellant had deceived the victim into believing that he could help him with his case and had dishonestly obtained money from the victim. The summary of facts in its entirety satisfied all the elements of the offending.*

[12] I see no question of law involved under this ground of appeal except a matter of mixed fact and law and no reason to disagree with the High Court judge either.

02nd ground of appeal

[13] The High Court judge had fully ventilated the appellant's complaint on his unrepresented status and the procedure adopted for taking a plea under paragraphs 23-37 with the aid of what had transpired in the Magistrate's court as borne out by the MC record and dismissed this ground of appeal for very cogent reasons.

[14] There is no question of law only involved here. The appeal ground is on mixed facts and law, and I see no reason to doubt the High Court judge's conclusion.

03rd ground of appeal

[15] The High Court judge had examined the appellant's complaint on his right to counsel at paragraphs 38-43 and concluded after perusing the MC record that lack of counsel had not caused him of any prejudice. It is clear that not to have a counsel was the appellant's own choice.

[16] There is no question of law only and the issue had been considered by the High Court on mixed facts and law. I see no basis to interfere with the decision of the High Court.

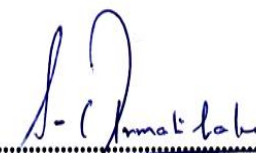
[17] Therefore, I hold that all grounds of appeal urged on behalf of the appellants before this court do not involve questions of law only and consequently his second-tier appeal cannot reach the full court under section 22 of the Court of Appeal Act.

[18] The appellant appeared on 03 August 2022 before this court and he had already filed his written submissions. He informed court that he was contemplating whether to proceed with this appeal or not. On 19 August 2022, he confirmed that he wished to proceed with appeal. On 02 December 2022, he was served with the respondent's written submissions. On 01 March 2023 he was absent and it was reported that he may have served his sentence and got discharged from prison. Since then neither the Registry nor the respondent has been able to locate his whereabouts. There does not appear to be any prospect of the Registry or the respondent doing so either. He was absent on 05 June 2023 as well. The appellant is fully aware of his appeal and the fact that he is expected to appear to prosecute the appeal. Since his release, he has not shown due diligence in prosecuting his appeal. Nevertheless, this court considered his written submission along with those of the respondent in coming to its decision.

Order of the Court:

1. Appeal (bearing No. AAU 076 of 2021) is dismissed in terms of section 35(2) of the Court of Appeal Act.




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

Solicitors:

Appellant absent
Office for the Director of Public Prosecutions for the Respondent