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

CRIMINAL APPEAL NO. AAU0039 OF 2021
[Lautoka High Court No: HAA 52 of 2020]

BETWEEN : **ASISH ASHMEET NARAYAN**

Appellant

AND : **THE STATE**

Respondent

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

Counsel : **Mr Sahu Khan, M.N, for the Appellant**
Ms Latu, L.L for the Respondent

Date of Hearing : **10 September, 2024**

Date of Judgment : **27 September, 2024**

JUDGMENT

Mataitoga, RJA

[1] I have read the draft Judgment. I concur with reasons and conclusion.

Qetaki, JA

Background

[2] The appellant was convicted by the Magistrates Court at Ba on 3rd July 2020, after a hearing, on one Count of the offence of dangerous driving occasioning death. The information laid by the police stated the appellant on the 3rd day of December 2016 at Ba in the Western Division drove a motor vehicle registration LR 3608 on Kings Road, Varoka in a manner dangerous for the passenger involved in an impact while the person is being conveyed occasioning death of one Shylin Shasl Wini Kumar.

[3] The appellant was initially charged for the offence of ***dangerous driving occasioning death contrary to section 97(1) and (2) (b),(5)(d),(8) and 114 of the Land Transport Act 1998.*** On the day of the hearing, the prosecution amended the charge to the offence of d***angerous driving occasioning death contrary to section 97(2) (c), (5) (a), (8) and 114 of the Land Transport Act 1998.*** After the charge was amended, the learned Magistrate did not put the amended charge to the appellant for him to plead to it. The particulars of the offence in the charge remained the same, as follows:

> ***Shish Ashmeet Narayan*** *on the 3rd day of December 2016 at Ba in the Western Division drove a motor vehicle registration number LR 3608 on Kings Road Varoka in a manner which was dangerous to the passenger involved in an impact while the person is being conveyed occasioning death of* ***Shylin Shasl Wini Kumar.***

[4] On being convicted, the learned Magistrate sentenced the appellant on 17th August 2020 to two and half years of immediate custodial sentence with a non-parole period of 1 year and 9 months. He was fined in the sum of $1000.00 payable within 21 days and in default, 100 days or 3 months 10 days in prison, to be served consecutively to any prison term. He was also disqualified from driving for a period of a year.

[5] Being dissatisfied with the conviction and sentence, the appellant filed an appeal in the High Court at Lautoka, on 3rd March 2021. The High Court, set aside the conviction and sentence, and ordered a speedy retrial of the appellant.

[6] The appellant further appealed to this court only with respect to the order for retrial, pursuant to section 22 of the Court of Appeal Act, that is on a question of law only: **Tabeusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017). The appeal to this Court does not challenge the order setting aside the conviction and the sentence by the learned Magistrate.

Facts

[7] The facts may be summarised as follows:

> *The Accused was driving vehicle registration number LR 3608 and racing with vehicle registration number IT 586 driven by one Shaneel.Accused was overtaken by Shaneel at Karavi.Accused then tried to keep up with Shaneel at Varoka as both were racing or playing a teasing game. At Varoka Accused's vehicle came behind vehicle registration number CA 108 driven by one Mohammed Fareed. Due to Accused's vehicle being driven at high momentum, Accused failed to properly control and manoeuvre his vehicle and it bumped into the rear side of vehicle CA 108 whilst trying to overtake the same .Accused's vehicle then tumbled as a result of the impact. The impact at Varoka was also at the slight hill and it resulted in Accused's vehicle tumbling more than 100 meters due to the high momentum at which the vehicle was being driven. The passenger in Accused's vehicle namely Shaylin Shasl Wini Kumar sustained serious injuries that resulted in death.*

In The High Court

[8] The appellant had filed 14 grounds of appeal against the conviction and sentence. The learned High Court judge, Morais, J dealt only with the first ground of appeal, which in his view would dispose of the appeal. Ground 1 of the appeal states:

> *The learned Magistrate erred in law and in fact in proceeding to hear the case in the matter without taking the plea of the accused on the Amended Charge.*

[9] In a brief judgment (12 paragraphs) the High Court judge, held that the respondent concedes that the amended charge was not read over to the accused, and the accused had not pleaded to it. The perusal of the case record substantiates that fact. As a consequence the trial is a mistrial, the conviction cannot stand, and was set aside. Next, he considered

whether a retrial is to be ordered or the accused has to be acquitted or discharged. He held that an accused can only be acquitted after a valid trial, and since the trial has been decided a mistrial, there has been no proper trial at the Magistrates Court. He decided that, the proper order should be to have a trial afresh on the amended charge. Accordingly, he ordered that there be a speedy retrial on the amended charge. He did not provide any other reasons for the decisions made.

Before a Single Judge

[10] The learned single judge discussed the authorities that were cited in argument by both the appellant and the respondent. He found that the authorities cited by the appellant were of offences/charges under the Criminal Procedure Code, now repealed, observing that their application need to be considered afresh in light of the Criminal Procedure Act 2009, which replaced the Code. Of the authorities cited by the respondent, he commented that none of the decisions directly deal with a situation where an accused had been convicted on a charge which was not read over or explained, and without taking a plea. The learned single judge concluded that it was not possible to determine whether the High Court judge had applied the correct legal principles when he made his decision, and that amounts to a question of law, which can be considered by the full Court. He allowed leave on a question of law, which is the issue of '*retrial'*.

Amended Grounds of Appeal

[11] The initial grounds of appeal were amended by the amended notice of appeal on question of law, filed on 15 September 2021, as follows:

> **Ground 1-***That the learned appellate judge erred in law in not declaring that the trial in the Magistrate' Court was a nullity.*
>
> ***Ground 2-****The learned judge erred in law in all the circumstances of the case when he ruled that:" 10…. Therefore, as I see, the proper order should be to have a trial afresh on the amended charge."*

Ground 3 - *That the learned appellate judge erred in law in all the circumstances of the case when he ruled in paragraph 11ii) of his judgment that: "11ii) A speedy retrial is ordered on the amended charge."*

Ground 4 - *That the learned appellate judge erred in law in all the circumstances of the case when he ordered a retrial in the matter.*

Ground 5 *- That the learned appellate judge erred in law when he ordered a speedy trial in the matter without considering the appellants legal right to appeal his Lordship's judgment to the Fiji Court of Appeal.*

Ground 6 - *That (without prejudice to Grounds of Appeal 1 to 5 above) the learned appellate judge had erred in law in all the circumstances of the case when he had failed and/or neglected to order that the retrial is to be heard by a different Magistrate than the one who had initially heard the matter in the Magistrate's Court.*

The appellant had in his written submissions withdrawn grounds 5 and 6.

Discussion

Appellant's Case

[12] I intend to deal with the 4 grounds of appeal together as they are closely connected. The grounds allege that the learned High Court judge (first tier appeal) erred in law in: not declaring that the Magistrate's Court trial was a nullity; when he ruled that the proper order should be to have a trial afresh on the amended charge; when he ruled that "*a speedy retrial is ordered on the amended charge"*, and when he ordered a retrial in the matter.

[13] He submitted that, the crux of the appeal is, whether, the learned High Court judge erred in law in holding that the trial conducted at the Magistrates Court was a mistrial, instead of holding the trial a nullity. The appellant submits that as a result of the amended charge not being read over and explained to the appellant, and his plea not being taken on the

amended charge, the proceedings in the Magistrates Court was a nullity The High Court judge erred as he could not have ordered a new trial against the appellant under the circumstances. It is inferred, that after setting aside the conviction and sentence, at that point, the learned judge should have discharged or acquitted the appellant. He relied on a number of authorities which I shall discuss later in this judgment.

[14] The appellant submits that the finding by the learned judge to have a retrial, rather than declaring the proceedings a nullity, is not based or supported by the relevant long-standing legal authorities /precedents in cases where the Magistrate failed to follow the requirements of section 214(1) (a) of the Criminal Procedure Code, or its replacement, section 182(2) (a) of the Criminal Procedure Act 2009. That the judge did not provide reasons or authorities to clarify and support his conclusions. That the decision for a retrial, undermines the principles of *Stare decisis* or *the Doctrine of precedents.* He argues that the authorities cited in his submissions persistently ruled that there cannot be an order for retrial once there has been a "*nullity*" of the hearing conducted in the Magistrate's Court.

[15] Further, the appellant submits that, the power of the High Court to order a retrial, pursuant to section 256 (2) (c) of the Criminal Procedure Act 2009, would not apply in this case. The precedents have established that, under circumstances as in this case, the trial is a "*nullity*". That section 182(2) (a) of the Criminal Procedure Act 2009 is mandatory, and any amended charge shall be put to the accused: Hemmet CJ in **Attorney General v Parmanandam** (1968) 14 FLR 6 SC HAA22/68S 13 March 1968. This was decided in context of section 214 (Variance between charge and evidence and amendment of charge) of Criminal Procedure Code.

[16] The appellant submits that the respondent had conceded certain grounds of appeal, namely:

(a) that the learned Magistrate erred in law and in fact to hear the case without taking the plea of the accused on the amended charge;

(b) that the learned Magistrate erred in law and in fact in proceeding to hear the case without the accused been called upon to plead to the amended charge thus rendering the proceeding null and void and the subsequent conviction on the amended charge a nullity;

(c) that the respondent had been inconsistent in their position on the issue of pleading to the charge; and

(d) that at paragraph 2.2 of its submissions, the respondent submits that if this was not an actual mistrial then the High Court judgment may be set aside with the learned Magistrate's judgment affirmed.

[17] The appellant submits that the respondent did not file a cross-appeal against the High Court judgment, including any of the issues below that were raised in its submissions, as follows:

(i) In paragraph1.17, it is submitted that from the prosecution's perspective the amendment to the charge seemed minor, while counsel for the defence had informed the Court that the amendment had affected the defence The question that arises is, whether the charge as amended was defective?

(ii) In paragraph 1.19, the respondent clarified that the dispute at the trial remained the manner of the appellant's driving and he was found guilty after the trial where the prosecution's evidence was robustly tested but remained consistent regarding the dangerous manner of the appellants driving.

(iii) In paragraph 1.20, the respondent questions whether the learned High Court judge had fully considered the issue of the amending of the charge given the brevity of his judgment.

(iv) In paragraph 1.28, the respondent makes the point that, if this Court accepts this was not an actual mistrial which was fatal to the conviction, then the

order for the initial retrial was premature. This allows for an inquiry on whether the learned judge had applied the proper test when considering a retrial.

(v) In paragraph 2.2, the respondent submits that, if it is accepted that this was not an actual mistrial, then the High Court judgment may be set aside with the learned trial Magistrate's judgment being affirmed, and in the overall interests of justice, it may be properly concluded that the appellant has faced just punishment vis a vis the passage of time, with his sentence deemed served.

[18] The appellant is seeking orders that the trial in the Magistrate's Court is a nullity, not a mistrial; and that the learned appeal judge in the High Court erred in law in ordering a retrial – such retrial order to be dismissed and or vacated.

Respondent's case

[19] The respondent submits that the appellant was originally charged on 6 December 2016, before the Magistrate's Court at Ba, with a single count of dangerous driving occasioning death, *contrary to section 97(1) and 2(b) and (5) (b) and (8) and 114 of the Land Transport Act No.35 of 1998.* The charging section was amended on the trial date (17 March 2020) to read as, *contrary to section 97(1) and (2) (c) and (5) (a) and (8) and 114 of the Land Transport Act No.35 of 1998.*

[20] The effect of the charge is that, **(2) (b)** which state *at a speed dangerous to another person or persons*, is amended/changed to **(2) (c)** which reads, ***in a manner dangerous to another person or persons.*** In addition, **(5) (b)** which states, *an impact between any object and the vehicle while the person is being conveyed in or on that vehicle (whether as a passenger or otherwise)*, is amended/ changed to **(5) (a), which** states, the ***vehicle overturning or leaving a public street while the person is being conveyed in or on that vehicle (whether as a passenger or otherwise).***

[21] The test for retrial was established in **Au Pui Kuen v Attorney General of Hong Kong** [1980] AC 351, and the respondent submits that the learned High Court judge should have considered, before exercising the discretion to order a retrial. Also, guidance is provided in the case **Abourezk v State** [2022] FJSC 29; CAV0012.2019 (25 August 2022), for an appellate Court when considering the issue of a possible retrial.

[22] The respondent submits that the case **Samisoni Narayau v Reginam** (1964) 1 FLR 125, a decision of the then Supreme Court (now High Court) in its appellate jurisdiction, would assist in the resolution of the appeal. The case was considered in the context of the provisions of section 204(1) of the Criminal Procedure Code (*Laws of Fiji, (Cap. 9))*, which is partly similar to section 214 of Criminal Procedure Code (*Laws of Fiji (1985*) and section 182(2) of the Criminal Procedure Act 2009. In that case, there was a conviction after trial for giving false information to a public servant. The amendment of the charge was held to be technical or minor, and the failure to retake the plea on the amended charge was not an irregularity which was fatal to the conviction given the evidence in support of the conviction. It is submitted that although the present appeal is about the order for a retrial, it being held by the Supreme Court (now High Court), that the trial was a mistrial, evidence is still an important factor to consider.

[23] The respondent submits, there was no dispute as to the evidence that, the appellant had been driving the relevant vehicle, where the deceased had been a passenger, when the vehicle overturned and left the public road where the impact led to the death of the deceased. The respondent submits that having regard to the evidence of PW2 and PW3 , the learned Magistrate was correct in concluding that the appellant was driving dangerously, and which led to his vehicle to colliding with PW3's vehicle resulting in the overturning of the appellant's vehicle, off-road, resulting in the ultimate death of the passenger.

[24] The issue in the trial at the Magistrate's Court is the manner of driving of the accused. The collective evidence of PW1, PW2, and PW3 supported the conclusion that the manner of the appellant's driving at the material time was dangerous. The prosecution

had proven its case beyond reasonable doubt and the conviction and sentence were appropriate to the findings of the trial Magistrate.

[25] Also, the respondent submitted that the appellant has not shown at trial, and in particular, his own evidence does not show, that the appellant was unable to fully and fairly defend his interests and case, or that the defence was prejudiced. Admittedly, the prosecution had made a mistake which required the charge to be amended, and the learned Magistrate did not provide the opportunity for plea to be taken on the amended charge, but the omission did not lead to an irregularity which is fatal to the finding of guilt and conviction of the appellant.

[26] Finally, the respondent submitted that the High Court judge is mistaken, as this is neither a mistrial nor a nullity, as there was a minor procedural irregularity. The respondent submits that, the circumstances of the case may require the overall interest of justice be considered in light of what had transpired since the trial, and the circumstances of the appellant.

Case Analysis

[27] The appellant seems to emphasise repetitively and insistently in written submissions the significance of adhering to the principles of *Stare decisis* or *the Doctrine of precedents*, that this Court cannot deviate from such precedents and that the trial at the Magistrates Court is a nullity. He relies on the cases, which I now discuss. In **Pratap v Reginam** [1968] FJLawRp 16, [1968] 14 FLR 93 (22 May 1968), the appellant was tried in the Magistrate's Court on four counts of receiving money on a forged document. During the trial the prosecution was given leave to add four alternative counts, which were read and explained to the appellant and to which he pleaded not guilty. He had already pleaded not guilty to the original counts and was not asked to plead to them again. He was convicted by the Magistrate on the four original counts, and not on the alternative counts. The proviso (a) of section 204(1) of the Criminal Procedure Code (*Cap.14, Laws of Fiji (1967)* provides that, where a charge is altered the court shall then call upon the accused to plead to the altered charge. This Court held, that, as no plea was taken at the time of the

amendment to the original counts, the appellant was not properly before the court and the proceedings were null and void.

[28] The fact that the appellants did not plead to the whole charge rendered the trial in the Magistrates Court a nullity. The appellant was not properly before the Court. The proceedings were therefore null and void and the evidence given could not be regarded. Gould V.P in delivering the Court's judgment stated (pages 9 to 10) of judgment:

> *"In our judgment the result of failure to take the appellants plea to the whole charge upon the amendment is that the proceedings thereafter become a nullity. On not dissimilar legislation in Nigeria similar conclusion was reached in Fox v Commissioner of Police; Vol.12 Selected Judgements of West African Court of Appeal at p.215 and Eronini v The Queen (supra)…. .....Under section 204 the charge must first be altered and then ("thereupon"is the word used) the plea must be called for. If the plea was completely forgotten and never called for, the charge would nevertheless be amended.*
>
> *The learned Chief Justice expressed the view that if he was incorrect in his construction of section 204, he would have applied the proviso of section 325 (1) of the Criminal Procedure Code (now section 300(1), Cap 14, Laws of Fiji 1967), on the ground that no conceivable miscarriage of justice could have occurred. While we sympathise with this opinion from a factual point of view, we are unable to agree that this omission was one which was curable by the application of the proviso……..*
>
> *In our opinion the defect in the case before us was more fundamental, from the time the plea should have been taken, but was not, the appellant was not properly before the court The proceedings were null and void and the evidence given could not be regarded. We do not think it open to this court to say that by virtue of the proviso, we can give full value to the evidence which we have held the magistrate must disregard, and convict the appellant where the magistrate could not lawfully do so. In our judgment such a course would do violence to establish principles concerning the trial of persons accused and would therefore involve a miscarriage of justice.*
>
> *From the point of view of the case before us we have arrived with reluctance at the conclusion we have expressed as there were ample evidence which, if it could lawfully be regarded, would justify the conviction of the appellant. Nevertheless, we must apply the law as we find it and accordingly the appeal is allowed and the conviction and sentences of the appellant on three remaining counts are quashed."*

[29] An appeal was lodged with the Privy Council as **Attorney General v Harry Pratap** (Privy council Appeal No.10 of 1969) (Unreported), where it was held that, where an amendment is made to a charge in respect of any particular count therein a fresh plea must be obtained from the defendant with respect to such count. The amendments envisaged under section 204(1) may take three forms, namely by: (i) an amendment of any count contained in the formal charge , (ii) substitution of a new count for any count contained in the formal charge, or (iii) addition of any new count:

> *"The amendment in the present case clearly falls under (i) above; and in R v West 64 TLR 241," It is an essential feature of criminal law that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him so as to be in a position to put forward his defence and to direct his evidence to meet them. "If the particulars of a charge do not comply with these long-established requirements the charge is defective. In the case the subject matter of this appeal, the particulars were altered so extensively as to render the original charge defective in that it no longer represented the offences with which the appellants were faced under the amended counts. The fact that some of the particulars contained in the original charge may have been unnecessary does not affect the position.*
>
> *I am satisfied that both counts 1 and 2 were amended within the meaning of section 204(1). In my view therefore the amendment to the charge which was effected on the 4th November 1970 initiated entirely new proceedings so far as the magistrate's courts and the appellants were concerned. It follows that the amended charge should have been read and explained to the appellants, whose consent should have been obtained in accord with the provisions of section 204(1) of the Criminal Procedure Code and fresh pleas obtained in accord with the provisions of section 204(1).The failure of the Magistrate's Court to put the appellants to their election after the amendment of the original charge and call for a plea from each of the appellants as required by law renders the whole proceedings null and void.*
>
> *In these circumstances the appeal must be allowed and the conviction and sentence entered against each of the appellants are accordingly quashed.*

[30] In **Hassan v Reginam** [1973] FJLawRp 3; [1973] 19 FLR 11(11 May 1973), the appellants were originally charged in court with larceny and receiving stolen photographic property to which they pleaded not guilty. In the original charge the goods were divided into 185 instamatic cameras valued at $2,177.00, camera cases valued at $38.00 and 20 projector magazines valued at $32.00 of total vale $2,247.00, the property

of Her Majesty the Government of Fiji. Subsequently, at the commencement of the trial, the description of the property was amended to read, *"4 cases of photographic goods marked P.D. Stinson, Lautoka of the approximate value of $2,247.00".* No fresh plea was taken. The appellants contended on appeal that the failure to comply with the Criminal Procedure Code (Cap.14) s.204 (1) rendered the proceedings null and void. It was held that the amendment clearly fell within Criminal Procedure Code (Cap. 14) as particulars of the charge had been so extensively altered so as to render it defective. It followed, therefore, that the proceedings were null and void.

[31] Counsel for the appellant submitted that the conviction entered in the Magistrates Court cannot be allowed to stand because of the failure of the learned Magistrate to comply with the provisions of section 204(1). As the charge was amended by the Court upon the application of the prosecution by rewording the particulars of the offence in both counts, the Court was under a legal duty to put the right of election again and obtain fresh pleas to the amended charge; and that as this was not done the trial was a nullity :**Attorney General v Harry Pratap** (supra):

[32] In **Narayan v Reginam** [1983] FJLawRp 16; [1983] 29 FLR 139 (28 November 1983), an appeal from the Supreme Court (now High Court) in its appellate jurisdiction, the charge was an attempt to steal $2.00 from a postal packet contrary to section 267(c) and 381 of the Penal Code. The proceedings were heard before a Resident Magistrate pursuant to section 4 & 5 of the Criminal Procedure Code. Section 267 of the Penal Code declares the offence to be a felony and provided a maximum penalty of 3 years. The Magistrate convicted the appellant of an attempt to commit an offence against section 267(b) and fined the appellant in the sum of $80.00. On appeal to the Supreme Court against his conviction in the Magistrates Court the conviction was set aside but a retrial ordered. On appeal to the Court of Appeal, it was held: (1) The Magistrate having had no jurisdiction to convict the appellant on a charge which he had never faced there was no power to order a retrial on that charge. (2) When a court wishes to prefer an amended charge it is mandatory that the accused be called upon to plead to the amended charge. A failure to

comply with this requirement renders any subsequent conviction on the amended charge a nullity. Henry J, stated:

"In our view, compliance with section 214(1) (a) which requires an accused person to be called upon to plead to an amended charge, is mandatory and a condition precedent to any amendment which is not expressly excepted. Any purported conviction of an offence which contravenes section 214(1) (a) is a nullity. Accordingly, the Magistrate's Court never at any time during the hearing had power to deal with a charge under section 267(b). It follows that the Supreme Court also had no jurisdiction to order a new trial on a charge which had never come within the jurisdiction of the Magistrate's Court." The appeal was allowed and order for a new trial will be quashed.

[33] In **Cerevakawalu v State [2001]** FJCA 25; AAU 24U.2001S, was an appeal against conviction entered in the Magistrate's Court in Suva on 11 the May 2001 where the appellant pleaded guilty to what purported to be a charge laid pursuant to section 253 (Wrongfully concealing or keeping in confinement kidnapped or abducted person) of the Criminal Code. He also pleaded guilty to a second charge laid pursuant to section 330(b) (Criminal intimidation) of the Penal Code. The learned Magistrate erroneously believing each charge carried a maximum penalty of 10 years sentenced the appellant to 12 months in each charge. The sentences were to be served concurrently upon a 10 year sentence the appellant was already serving. The first charge was defective and there were errors of law in that the maximum penalties for the two offences under consideration were 7 years and 2 years respectively. These errors of law were not brought to the attention of the learned judge who heard the appeal in the High Court and as a result they were perpetuated there. The sentences imposed in the Magistrates Court were upheld. This Court held that, the errors of law which have emerged in relation to convictions and sentences were such that it had no doubt the proper cause was to declare the entire proceedings a nullity and quash both the convictions and sentences. It was made clear to the appellant during the hearing that this procedure would not necessarily prevent the state from laying fresh charges and as the entire proceedings were a nullity, As the entire proceedings was a nullity the convictions and sentences be quashed. In the view of the Court, to remit the case for a

rehearing in the Magistrates Court or to exercise a power originally vested in the Magistrate was to ignore the incurable invalidity of what had happened.

[34] I agree with the learned single judge that the cases relied upon by the appellant deal with offences under the repealed Criminal Procedure Code *(Under the (1967) and (1985)Laws of Fiji),* the "*old regime*". Their application at this time will need to be considered in light of the new Criminal Procedure Act 2009 . These authorities relate to situations where the amended charges were not read over or explained to the accused, once the amendments were made, somewhat similar to the circumstances that gave rise to the appeal, but also, situations where there has been a defect or a discrepancy in the charge and proceedings in the Magistrates Court. However, the authorities have established and support the proposition that, conformity with section 204 (2) of the Criminal Procedure Code, section 214 , and now section 182(2) of the Criminal Procedure Act 2009, is mandatory. Any deviation from it renders the trial a nullity. In one of the cases, non-compliance is labelled as an "*incurable defect".* In my perusal of the Criminal Procedure Code, now repealed and the equivalent current sections in the Criminal Procedure Act 2009, as applicable to the cases cited in support of the appellants case, it can be said that except in one case, the provisions in the repealed Code and the new Act, are substantially but not completely similar in substance and content.

[35] A closer scrutiny of the facts and circumstances of the cases, may provide enlightenment on the appropriateness of their application at this time, especially read and considered together with the developments and growth in legal reasoning and the interpretation and application of legal concepts such as "*in the interest of justice*", *"miscarriage of justice,* and '*substantial miscarriage of justice"* which appear in sections 22, 23,and 35 of the Court of Appeal Act and in the Criminal Procedure Code, and the Criminal Procedure Act 2009. The power of this Court to adjudicate as a second-tier appeal court on an appeal from a decision of the High Court in its appellate jurisdiction, also requires clarification. In the appellant's submissions, it seems that, given the facts and circumstances of this case, this Court does not have an option but to allow the appeal and grant the orders that

are being sought by the appellant. It is surprising that the cases cited by the appellant, were almost all decided prior to 1980, over four decades ago.

New legal developments "the interests of justice"

[36] In **Au Pui Kuen v Attorney General of Hong Kong** (supra), the appellant was convicted in the High Court of Hong Kong of murder and appealed against his conviction to the Hong Kong Court of Appeal, which allowed the appeal on the ground of the trial judge's erroneous direction on self-defence, and quashed the conviction. The court's exercise of the discretion is in accord with the relevant section on retrial in the Hong Kong Civil Procedure Ordinance. The relevant section states:

> *"Where the Court of Appeal allows an appeal against conviction and it appears to the Court of Appeal that the interests of justice so require, it may order the appellant to be retried."*

[37] The appellant's appeal against the order for retrial to the Judicial Committee of the Privy Council contends amongst other things, that the court had erred in law in holding that it was not required to be satisfied that conviction would be probable on the retrial before exercising its discretion. The Privy Council held that, in the interests of justice, the discretion to order a new trial must be exercised judicially, and that is implicit the requirement. There must be a balancing of interests. Lord Diplock stated:

> *"To exercise it judicially may involve the court in considering and balancing a number of factors some of which may weigh in favour of a new trial and some may weigh against it. The interests of justice are not confined to the interests of the prosecutor and the accused in a particular case. They include the interest of the public in Hong Kong that those persons who are quality of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge in the conduct of the trial or his summing up to the jury."*

The Privy Council also observed, that it would not be helpful to attempt a catalogue of the various factors which the court ought to take into consideration in determining how to exercise their discretion, still less to make any suggestion as to the relevant weight to be given to them.

[38] In **Azamatula v the State** [2008] FJCA 84; AAU0060.2006S (14 November 2008), the Court of Appeal had made the following observations on the power to order a retrial in the High Court:

> *"The power of a High Court judge to order a retrial is found in the provisions of section 319 of the Criminal Procedure Code. The power is discretionary and as such the power must always be exercised judiciously (**Shekar v State** [2005] FJCA 18). As was said by the Privy Council in **Ai Pui Keun v Attorney General of Hong Kong** "no judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it."(See also **Ting James Henry v HKSAR** [2007] HKCFA 71).**The overriding consideration in the exercise of power is the interests of justice (Aminiasi Katonivualiku v The State** (CAV 00011/1999S; 17 April 2003)."*

[39] In a sense of approval of the decisions in **Au Pui Kuen** (supra) and **Azamatula**, (supra), this Court, in **Laojindamanee v State** [2016] FJCA 137; AAU004.2013 (30 September 2016), where the appellants were appealing their conviction on charges of aggravated trafficking in persons and other lesser charges, held that, the misdirection on the elements of the offence is a basic error. The appellants were not convicted according to law. This is not a case for the proviso. Consequently, the Court allow the appeals of all four appellants and set aside their convictions pursuant to section 23 (1) of the Court of Appeal Act, adding that the power to order a retrial is granted under section 23(2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require.

Conclusion

[40] I have carefully considered the submissions of both the appellant and the respondent in this case. And, I have also considered the cases cited in support from both sides in this appeal. In **Abourizk v The State** (supra), the respondent ODPP), in justifying why it decided that there be a retrial, based its application on the principles formulated by the Hong Kong Court of Final Appeal in **HKSAR v Zhou Limei (no.2**) [2017] 20 HKCFAR 414 after consideration of decisions given in the following cases: **HKSAR v Tum Ho Nam (No.2) [1980]AC 351,Au Pui Kuen v Attorney General of Hong Kong** (supra),

Ting James Henry v HKSAR[2007] 10 HKCFAR 632, **Kissel v HKSAR** [2010] 13 HKCFAR 27. The principles are briefly stated below, as follows:

(i) Whether or not a retrial should be ordered is a matter of discretion. This discretion is usually exercised, as it should be, by the Court of Appeal, relying on the "*collective sense of justice and common sense"*.

(ii) The discretion whether or not to order a retrial depends entirely on what justice requires (this being the critical question).

(iii) The interest of justice includes a consideration of an accused's interest and circumstances; the need to bring matters to a conclusion without undue delay and without oppression; the interests of the public in seeing those who are guilty of serious crimes brought to justice and not escape merely because of technical error in the conduct of a trial etc.

(iv) The interest of justice requires that all relevant factors, both for and against a retrial to be taken into account. Such factors will not only vary from case to case but their relative importance and weight will also be different in any given case.

(v) The fact that the accused has already undergone a trial must be given significant weight.

(vi) The time the accused had spent in custody should be taken into account.

[41] The Court is also guided by the judgment of Lord Diplock in **Au Pui Kuen** in that it focusses on three contingencies that may arise in deciding whether to order a new trial or not. The three contingencies are,

(A) Where the strength of the evidence is so tenuous that a verdict of guilty on that evidence would be set aside as unsafe or unsatisfactory;

(B) Evidence so strong that any reasonable jury if properly directed would have convicted the accused and no miscarriage of justice had actually occurred; and

(C) The third contingency is between these two extremes, which is that the apparent credibility and cogency of the evidence adduced at the trial is rendered abortive by some technical blunder of the judge.

[42] There is nothing in the record to confirm that the speedy retrial ordered by the High Court was held. The appellant's conviction and the sentence were set aside. The learned High Court judge had not given any reason/explanation to support the orders he had made. It cannot be said that he learned High Court judge had evaluated, assessed and weighed the evidence before the trial Magistrate, and had considered the submissions made by the appellant and the respondent, prior to making the orders. This court is left in a difficult position to resolve a question of law, in a situation such as this, where the decisions and orders are made in the High Court, in its appellate jurisdiction, without proper or cogent reasons, or explanation in support.

[43] Non-compliance with section 182(2) is not fatal to the prosecution case: **Samisoni Narayau** (supra), also **Sucha Singh v Reginam (1968) 14 FLR 222** and **Dhani Chand v Reginam,** Court of Appeal, 28 November 1979.In the latter case, which is an appeal to this Court from a decision of the then Supreme Court where the learned judge allowed an appeal against conviction of the appellant for arson, a new trial was ordered, although the appellant had opposed to a new trial. The Court held that the case involve a serious crime in which considerations relating interests of the public played an important part. The potentially admissible evidence against the appellant was strong. The appellant should not be *"relieved of the necessity to answer this case, e.g. because of what could be a little more than a technical error..."* More significant for this appeal is the Court's determination that a new trial can be ordered pursuant to the then Criminal Procedure Code, section 300 , as amended. The Court said it was implied, this (retrial) can be done- "*if the interest of justice so required;"* even though those words were not used in that section.

[44] In consideration of the above discussions, in particular the test for retrial in **Au Pui Kuen** (supra), and the guiding principles set out in **Zhou Lemei (No.(2)** (supra), and applied in **Abourizk** (supra), I hold that the trial in the Magistrate's Court to be a mistrial, and not null and void or a nullity. In the interests of justice, a retrial is to be held in the Magistrate's Court at Ba. In the circumstances, there is no prejudice to the appellant. The appeal is dismissed. Orders of the High Court is amended as appropriate.

Andrews, JA

[45] I have read and agree with the reasoning and outcome of the judgment of his Honour Qetaki J.

Order of Court:

1. *Appeal is dismissed.*
2. *High Court order for speedy retrial is set aside.*
3. *Retrial to be held within six (6) months from 27th September 2024.*

Hon. Mr Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL