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

CRIMINAL APPEAL NO. AAU 0025 of 2019
[In the High Court of Lautoka Case No. HAA 02 of 2018]
[In the Magistrates Court at Nadi Private Prosecution No. 9 of 2016]

BETWEEN : **TIMOTHY JOYCE**
Appellant

AND : **CIVIL AVIATION AUTHORITY OF FIJI**
Respondent

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

Counsel : **Mr. R. Vananalagi and Ms. S. Lata for the Appellant**
: **Mr. R. P. Singh for the Respondent**

Date of Hearing : **12 February 2024**

Date of Judgment : **18 April 2024**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been charged in the Magistrates Court at Nadi with twenty-nine counts of 'Failure to Comply with Safety Aircraft Operation Requirements' contrary to section 70 (1) of the Air Navigation Regulations (ANR) 1981 of 26 February 2016. The Appellant had pleaded not guilty to the charges on 8 April 2016. An amended charge dated 21 July 2016 had been filed by the respondent and the appellant had changed his plea and pleaded guilty to all twenty-nine counts on 04 November 2016.

[2] After the summary of facts had been admitted by the appellant on 30 October 2017, he had been convicted as charged on all 29 charges and sentenced under section

157(3) of ANR 08 December 2017 to pay a fine of $29,000.00 within 3 months with a default sentence of 2900 days of imprisonment.

[3] The appellant had filed a timely petition of appeal against sentence in the High Court and he had tendered amended grounds of appeal on 13 June 2018. Both parties had lodged their respective written submissions as well.

[4] The learned High Court Judge had considered 19 grounds altogether and delivered the judgment on 13 February 2019 allowing the last ground of appeal that the sentence imposed by the Magistrate was harsh and excessive and made the following orders:

1. *Appeal is partially allowed.*
2. *The sentence imposed by the learned Magistrate at Nadi is quashed.*
3. *The appellant is sentenced afresh.*
4. *A fine of $ 750/- for each of the 29 counts is imposed.*
5. *Total fine of $21,750.00 to be paid within 3 months in default 3 months' imprisonment.*
6. *Application for discharge upon non-conviction is dismissed.*

[5] The appellant appealed against the said judgment to the Court of Appeal two days out of time on 15 March 2019 on the following grounds of appeal:

'Ground 1

THAT the Learned Trial Judge erred in law in failing to consider whether the conviction could be sustained by holding that there was no appeal against conviction (paragraph 75) when he was invited by the Appellant to exercise the Court's Revisional powers under Section 260 of the Criminal Procedure Act 2009 to determine whether:

1. *The provision of Section 12D of the Civil Aviation Authority Act of Fiji 1979 requiring a Notice of Infringement was mandatory before mounting a prosecution in Court;*
2. *If mandatory, the Appellant was entitled to be acquitted and the sentences quashed.*

Ground 2

THAT the Learned Judge erred in law in holding that:

1. *The sentence imposed by the Respondent otherwise than by a Court could not be taken into account in setting a tariff (paragraph);*

2. *The Chief Executive Officer's evidence could not be called by the Appellant for the above purposes.'*

[6] Under section 22 of the Court of Appeal Act, a single judge of the Court on 14 June 2021[1] allowed the appeal to go before the full court only on the 01st ground of appeal as it involves a question of law.

[7] The learned High Court Judge at paragraph 18 of his judgment had set out the summary of facts as follows:

> *'The accused is 62 years old and holds a dual Australian and Fijian citizenship. He is a Shareholder, Director and the Accountable Manager of Joyce Aviation (Fiji) Limited, which is a group of aviation companies, namely Sunflower Aviation Limited, Pacific Flying School, Heli Tours (Fiji) Limited and Tandem Skydive (Fiji) Limited. He holds both Australian Air Transport Pilot Licence (ATPL) and Fiji Commercial Pilots Licences (CPL) for Aeroplanes and Helicopters. The companies are managed by the Accused and they operate out of the Sunflower Hanger at London Avenue, Nadi International Airport. The company collectively employs a total of 75 employees which includes the administration staff, the technical personnel and pilots.*
>
> *The accused is actively involved with all the businesses and is usually involved in the flight operations pertaining to both aeroplanes and helicopters, where he is the Chief Pilot.*
>
> *On the 14th of September, 2015, the Accused went to renew his Medical Certificate for his CPL (Helicopter) Licence No. 200928H at the CAAF Head Office. Whilst it was being processed, the Licensing officials noted that his second Licence, the CPL (Aeroplane) Licence No. 200928A had expired about 05 months earlier, on the 06th of April, 2015. This initiated an investigation and evidence indicated that he had flown with an expired Licence on 29 different occasions, i.e. from the 11th of April to the 20th of July, 2015. He was immediately suspended pending a complete investigation, after which he was charged.*
>
> *The evidence indicated that the Accused, Mr Timothy John Joyce had piloted an aircraft with an expired license (CPL [Aeroplane] Licence No. 200928A) on twenty nine (29) different flights between the date his licence had expired – on the 06th of April, 2015 to the date the infringements were*

[1] **Joyce v Civil Aviation Authority of Fiji** [2021] FJCA 116; AAU0025.2019 (14 June 2021)

reported, the 14th of September, 2015, as outlined in detail in the Official Charges he has been charged with, which are the following days:

(1)	*03*	*times*	*on*	*11th April*	*2015*
(2)	*05*	*times*	*on*	*19th April*	*2015*
(3)	*07*	*times*	*on*	*15th June*	*2015*
(4)	*04*	*times*	*on*	*22nd June*	*2015*
(5)	*01*	*time*	*on*	*26th June*	*2015*
(6)	*01*	*time*	*on*	*30th June*	*2015*
(7)	*04*	*times*	*on*	*12th July*	*2015*
(8)	*02*	*times*	*on*	*14th July*	*2015*

The Accused has voluntarily pleaded guilty to all the 29 counts as charged.

01st ground of appeal

[8] The first ground of appeal challenges the conviction and not the sentence. The gist of it is whether the service of an infringement notice in terms of section 12D (1) of Civil Aviation Authority of Fiji Act (CAA Act) is a condition precedent to the institution of criminal proceedings against the appellant in the Magistrates court. In other words, whether the issuance of the infringement notice under section 12D (1) is mandatory prior to resorting to criminal proceedings. If the answer is in the affirmative, then the question is whether the resulting conviction following the prosecution without the service of an infringement notice is liable to be quashed in appeal as agued by the appellant.

[9] It appears from section 12D (3) that the person receiving an infringement notice could pay the fixed penalty and avoid further proceedings for the alleged offence. The Civil Aviation Authority of Fiji (CAAF) may also serve an improvement notice under section 12(C) before serving an infringement notice. However, the CAAF may also issue in the first instance itself an infringement notice under 12D (1) (b) when a person has not complied with any provision of the CAA Act or its regulations. There is, however, no specific provision in the CAA Act which makes an infringement notice a condition precedent to a criminal prosecution in court.

[10] On the other hand the respondent argues that acting under section 12D (1) of CAA Act is not mandatory and it could have in its discretion directly instituted criminal

proceedings against the appellant in the Magistrates court. The CAAF has also argued as reflected in the High Court judgment (see paragraph 73, 76 and 78) that in respect of the appellant other regulatory steps under the CAA Act and its regulations had been rendered ineffective and it was justified in having recourse to criminal proceedings without issuing an infringement notice or notices in respect of the 29 breaches.

[11] The learned Magistrate seems to have thought that for the 'integrity of the system' the CAAF must comply with section 12D of CAA Act requiring a notice of infringement to offenders and court should be used as a last resort for the review of fines imposed. The learned High Court judge had not made any observations on these remarks.

[12] However, there are a few other issues that this Court has to resolve before considering the above issue which is at the centre of this appeal.

Does section 247 of the Criminal Procedure Act impose an absolute limit on appeal against conviction in the case of an accused who has pleaded guilty?

[13] The appellant had pleaded guilty in the Magistrates court and he had not challenged the conviction on his plea of guilty directly in the High Court as (according to him) he thought that an appeal against conviction was not permitted by section 247 of the Criminal Procedure Act 2009 due to his guilty plea. Section 247 does not allow an appeal in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence. It has been held in relation to section 290(1) of the Criminal Procedure Code (similar to section 247 of the Criminal Procedure Act 2009) that it is well established that an *appeal* against conviction can be entertained on a plea of guilty if it appears that upon the admitted facts the appellant could not in law have been convicted of the offence charged[2]. The High Court, while disagreeing with this position, circumvented the limitation of appeal placed by section 247 by resorting to its jurisdiction in revision under section 260 of the Criminal Procedure Act in cases of equivocal pleas apparent on the face of the

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[2] **Deo v Reginam** [1976] FJLawRp 1; [1976] 22 FLR 1 (23 January 1976)

record and the challenge to the guilty plea involves questions of legality, jurisdiction and/or procedural impropriety[3] such as compliance with section 174 of the Criminal Procedure Act where *inter alia* it is essential that a Magistrate be satisfied that an accused is admitting facts which amount to all of the legal elements that go to prove the charge in question[4] or where the accused has been convicted and sentenced to charges that he never pleaded to[5]. To me, the latter approach seems more logical as far as the jurisdiction of the High Court is concerned. I will be dealing with this aspect in more detail again later in the judgment in the context of revisionary jurisdiction. However, in the absence of a similar provision such as section 247 restraining the High Court, the Court of Appeal does consider appeals against conviction following a plea of guilty if there is some evidence of equivocation on the record[6].

[14] None of the grounds of appeal (urged in the High Court) seems to be against conviction. However, the appellant appears to have argued under appeal ground 16 that the learned Magistrate should have discharged him without a conviction being recorded in terms of section 43 of the Sentencing and Penalties Act but not gone so far as to contend, as he has done before this court, that the conviction should be set aside for non-compliance with section12D (1) of CAA Act. Needless to say, that these are two different arguments.

[15] Further, it appears that the appellant had not raised any objection to the criminal proceedings against him on the basis of non-compliance with section 12D (1) of CAA Act in the Magistrates court. Nor had he pursued it in the High Court as a ground of appeal. Thus, the appellant appears to have acquiesced in the jurisdiction of the Magistrates court to try him by pleading guilty to all charges in the charge sheet. In other words, the appellant seems to have waived any objection to the jurisdiction of the learned Magistrate.

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[3] **Raisokula v State** [2018] FJHC 148; HAA24.2017 (2 March 2018)
[4] **State v Saukova** [2000] FijiLawRp 1; [2000] 1 FLR 135 (6 July 2000)
[5] **Chaudary v State** [2018] FJHC 628; HAA20.2017 (18 July 2018)
[6] **Nalave –v- The State** [2008] FJCA 56; AAU 4 and 5 of 2006, 24 October 2008; **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019);

[16] The appellant has submitted that he invited the learned High Court judge to exercise revisionary jurisdiction, in particular regarding section 12D of the CAA Act but the learned Judge failed to do so with no reasons given. The High Court judgment does not reflect that the High Court judge had considered the appellant's application to exercise revisionary jurisdiction, if indeed there had been such an application. The only indirect reference to this is at paragraph 75 of the judgment where the High Court judge had stated '*It is clear that an appellate court has no power to quash a conviction which has not been appealed'*.

[17] However, the respondent admitted at the hearing that the appellant's counsel did raise the above issue during the hearing of the appeal in the High Court but only as an afterthought without pleading it as a ground of appeal. Thus, it can be safely assumed that the appellant had brought the question involving section 12D (1) of the CAA Act to the notice of the High Court judge at some stage while the appeal on sentence was being considered but the High Court judge had not considered the same apparently due to his view that he had no power to quash a conviction which had not been appealed.

[18] Therefore, this Court will have to consider whether the High Court should or could have exercised revisionary jurisdiction merely on an invitation by a party while exercising appellate jurisdiction with regard to an appeal from the Magistrates court. Since the matter involving an infringement notice under section 12D (1) of CAA Act may, if answered in favour of the appellant, affect the jurisdiction and therefore the resulting conviction, the Court of Appeal is required to consider whether the High Court should have considered it under revisionary jurisdiction in terms of section 260, 262 of the Criminal Procedure Act read with Article 100 of the Constitution when it was brought to its notice.

[19] On the other hand, assuming that the appellant has taken up the first ground of appeal on the jurisdiction of the Magistrates court for the first time before the Court of Appeal, whether, that ground of appeal should be allowed to be raised for the first time is perhaps the first question this court has to answer.

[20] Secondly, if the Court decides to entertain the first ground of appeal then the next question is whether the appellant is entitled to challenge the jurisdiction of the Magistrates court at the appellate stage based on section 12D(1) of the CAA Act; or whether he is estopped from doing so upon his voluntary plea of guilty; or whether an issue going to the jurisdiction of the original court and by extension to the foundation of the conviction could be taken up at any stage as a matter of law.

[21] If the above questions are answered in favour of the appellant, then the merit of the first ground of appeal could be considered for an authoritative pronouncement as to whether the service of an infringement notice in terms of section 12D (1) of Civil Aviation Authority of Fiji Act is a condition precedent to the institution of criminal proceedings against a person.

Whether the High Court should or could have exercised revisionary jurisdiction merely on an invitation by a party while exercising appellate jurisdiction.

[22] Section 260 of the Criminal Procedure Act 2009 is as follows:

> *"Division 2 — Revision by the High Court Power of High Court to call for records*
>
> *260. — (1) The High Court* ***may*** *call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to —*
>
> *(a) the correctness, legality or propriety of any finding, sentence or order recorded or passed; and*
>
> *(b) the regularity of any proceedings of any Magistrates Court.*
>
> *(2) The High Court* ***shall*** *take action under sub-section (1) upon the receipt of a report under the hand of the Chief Justice which requests that such action be taken."*

[23] Section 260(1) and (2) read together appear to suggest that under section 260(1) the High Court (meaning any High Court judge) has discretion ('*may*') to call for records of the Magistrates Court for the purpose of satisfying itself of matters set out under

260(1)(a) and (b). However, any High Court (meaning any judge of the High Court) is bound (‘*shall*’) do so upon the receipt of a report from the Chief Justice. In other words, under section 260(1) the High Court can act on its own motion but when a report is received under section 260(2) from the Chief Justice requesting to do so, the High Court must act under section 260(1). This appears to be the literal and purposive interpretation that could be given to the use of word *‘may’* in section 260(1) and *‘shall’* in section 260(2) used by Parliament.

[24] In a historical context, under the old Criminal Procedure Code the Supreme Court exercised revisionary powers by virtue of section 323 which is identical to section 260(1)(a) and (b) of the Criminal Procedure Act 2009. Section 260 follows the spirit of the supervisory jurisdiction in civil and criminal proceedings given to the High Court by section 6(3) of the Administration of Justice Decree 2009, which was formerly provided by section 120(6) of the 1997 Constitution [**State v Batiratu** [2012] FJHC 864; HAR001.2012 (13 February 2012)]. However, there was no provision in the Criminal Procedure Code similar to section 260(2) of the Criminal Procedure Act empowering the Chief Justice to direct a judge of the High Court to exercise revisionary jurisdiction. Thus, what section 260(2) had done is to introduce another manner in which a High Court judge would exercise revisionary powers namely upon the receipt of a report under the hand of the Chief Justice. By introducing section 260(2) the legislature has not intended to take away the exercise of revisionary powers by the High Court judges *ex mero motu*. There is nothing to indicate in section 260 that the legislature intended that a report of the Chief Justice is a condition precedent or a *sine qua non* to the exercise of power of revision by any other High Court judge under section 260(1). If that be the case, the Parliament could have easily expressed its intention in simple words. To interpret it otherwise would be to impose a fetter on the exercise of revisionary jurisdiction not intended by Parliament as *‘a strong leaning exists against construing a statute so as to oust or restrict the jurisdiction of the superior courts’* and it is a *‘....well-known rule that a statute should not be construed as taking away the jurisdiction of the courts in the absence of clear and unambiguous language to that effect…’* (see **Maxwell on Interpretation of Statutes** Twelfth Edition by P. St. J. Langan page 153). This proposition *‘...now rests on a reluctance to disturb the established state of the law or*

to deny to the subject access to the seat of justice….The fact that jurisdiction is conferred on one authority does not necessarily take away jurisdiction which another already possesses in the same matter[7].

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

[26] There are many instances in the past where the High Court without a formal revision application by a party acted in revision either *ex mero motu* (on its own motion) or otherwise including at the invitation of a party under section 323 read with 325 of the old Criminal Procedure Code[8] and later under section 260 of the Criminal Procedure Act (earlier Decree) 2009[9]**.** Out of a large number of instances under the Criminal

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[7] **Maxwell on Interpretation of Statutes** Twelfth Edition by P. St. J. Langan page 153 & 155

[8] **State v. Ratuvou** [2002] FJHC 140; HAA 60J of 2002S (2 August 2002)- *In appeal against sentence by State HC acting on its own in revision quashed the conviction based on 'defective charges';* **Lal v The State** [2003] FJHC 99; HAR0001J.2003S (9 April 2003) – *on reference to HC for review by the Chief Magistrate*; **Singh v State** [2009] FJHC 128; HAR003.2009 (23 June 2009) – *transferred the case to HC for review by the Magistrate*; **State v Singh** [2009] FJHC 177; HAR005.2009 (27 August 2009) – *HC acted on its own motion.*

[9] **State v Jenkins** [2011] FJHC 797; HAR002.2011 (9 December 2011) – *Forwarded to HC for review by Acting Magistrate*; **State v Batiratu** [2012] FJHC 864; HAR001.2012 (13 February 2012) – ***Case reported in the media and the Chief Justice called for the record and dealt with it;*** **State v Sivonatoto** [2013] FJHC 209; HAR008.2012S (2 May 2013) – *MC record appears to have been called for by the HC*; **State v Latchman** [2015] FJHC 2; HAR003.2014 (2 January 2015) – *HC called for the record for a review of the discharge order;* **State v Vasutoga** [2015] FJHC 289; HAR005.2014 (27 April 2015) – *HC called for the file to review the sentence;* **Devi v The State** - Judgment [2017] FJHC 3; HAA 14 of 2014 (4 January 2017) – *HC exercised revisionary jurisdiction at the invitation of both counsel*; **Nadi Town Council v Narayan** [2017] FJHC 354; HAR001.2016 (15 May 2017*) -* ***matter was referred to another HC judge by the Chief Justice;*** **State v Koroi** [2019] FJHC 483; HAR02.2019 (24 May 2019) – *HC called for the record of proceedings to examine the correctness of the sentence*; **Matoga v State** [2019] FJHC 965; HAA05.2019 (4 October 2019) - *appellant appealed to HC against the sentence and the State as respondent invited the HC to examine whether the convictions on the two counts were correct in law;* **State v Lal** [2020] FJHC 231; HAR002.2020 (16 April 2020) - ***record of the proceedings in MC was called for and dealt with by a High Court judge pursuant to a directive made under the hand of the Chief Justice;*** **Dean v State** [2020] FJHC 419; HAA02.2020 (12 June 2020) – *HC dismissed the appeal against conviction entered on a plea of guilty in view of section 247 of the Criminal Procedure Act 2009 but acted under revisionary jurisdiction under section 260 read with section 262.*

Procedure Act referred to in the footnote there has been only one instance namely ***State v Lal*** where the record of the proceedings before the magistrate court was called for by another High Court judge in order to examine the same in terms of section 260(1) of the Criminal Procedure Act 2009 ("Criminal Procedure Act") pursuant to a directive made under the hand of the Chief Justice in terms of section 260(2) of the Criminal Procedure Act. In another instance *i.e.* ***State v Batiratu*** the Chief Justice himself had called for the record of proceedings and dealt with it under revisionary jurisdiction. In ***Nadi Town Council v Narayan***, the Chief Justice had referred the matter to the High Court and another High Court judge had exercised revisionary jurisdiction in respect of it. In all other instances, the High Court judges had exercised revisionary powers under section 260(1) of the Criminal Procedure Act without any report, directive or reference by the Chief Justice. Therefore, it is abundantly clear that section 260(1) does operate independent of section 260(2). The High Court judges may act in revision on their own under section 260(1) or act under section 260(1) on a report, directive or reference by the Chief Justice under section 260(2) requesting them to do so.

[27] In the light of the above discussion, it is also clear that there is no bar, statutory or otherwise, for the High court to act in revision with regard to the *correctness, legality or propriety of any finding* (of guilty) upon a plea of guilty tendered by an accused which *comes to its knowledge* in the course of the hearing an appeal on sentence subject to section 262(1)–(4). Thus, when a party invites a judge of the High Court hearing an appeal on sentence to consider a matter which may fundamentally affect the validity of finding of guilty (on a plea of guilty or after trial), the judge may then act in revision and call for and examine the record of the criminal proceedings before any Magistrates Court for the purpose of satisfying himself as to the *correctness, legality or propriety of that finding* notwithstanding that there is no appeal against conviction.

[28] Justice Keith's observation in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) that the High Court's revisionary power under section 262(1) of the CPA intended to cover cases which had come to the knowledge of the High Court,

does not cover cases where the record of the proceedings in the Magistrates' court had come to the knowledge of the High Court by the transfer of the case under section 190(3) of the CPA to the High Court for sentencing should be understood in that context and it is not intended to exclude revisionary jurisdiction of the High Court in respect of a conviction when considering an appeal on sentence.

What is the effect of section 262(5) of Criminal Procedure Act, 2009 on power of revision of High Court?

[29] Section 262(5) states that where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. There seems to be some tension between section 262 and 262(5). While section 262 read with section 260 permits the High Court to act in revision regarding the correctness, legality or propriety of any finding, sentence or order and the regularity of any proceedings in a Magistrates Court the record of which *otherwise comes to its knowledge*, section 262(5) excludes the exercise of that power in favour of a party who could have appealed that finding, sentence or order but did not.

[30] In my view, as also explained later in the reasoning, section 262(5) does not apply where the Magistrates court lacked jurisdiction to deliver such finding, sentence or order *or* the matter raised seeking the High Court's intervention in revision materially affects any legal condition required by law to constitute the offence charged. If that be the case, the power of revision vested in the High Court by section 262 read with section 260 remains intact. Needless to say that if there is no right of appeal section 262(5) has no application and the remedy of revision will lie. Similarly, since section 247 limits right of appeal upon the plea of guilty, the only way for an accused who has pleaded guilty in the Magistrates court to challenge a conviction appears to be by invoking revisionary jurisdiction of the High Court.

Should the High Court hear parties when acting in revision?

[31] For the sake of completion, it is pertinent to consider the above question at this stage. When the High Court exercises powers of revision no party has any right to be heard

personally or by lawyers, however, the High Court may when exercising such powers, hear any party either personally or by lawyer (see section 263 of the Criminal Procedure Act). The discretion of High Court as to hearing parties under section 263 is subject to section 262(2) which declares that no order under section 262(1) (a) and (b) shall be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by a lawyer in his or her defence.

[32] In my view, section 263 the High Court must be read subject to sections 14(2) and 15 of the Constitution and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) *('….everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'*). In terms of section 14(2) of the Constitution a person charged with an offence has *inter alia* a right to defend herself and to be present when being tried. I see no reason as to why these rights coupled with rights under section 15 of the Constitution on access to courts in so far as they are relevant to appellate proceedings, should not *mutatis mutandis* available to any party to an appeal or to revisionary proceedings particularly when the decision in appeal or revision would adversely affect that party, be it the prosecution or defence. In any event, section 263 should be read (a) so as not to be inconsistent or invalid with the supremacy of the Constitution (section 2 of the Constitution), (b) be interpreted in a way reasonably consistent with the provisions of the Constitution (section 3 of the Constitution) and (c) be construed in accordance with the more restricted interpretation that does not exceed the limits on rights stipulated under Bill of Rights [section 7(3) of the Constitution).

[33] When decisions are taken affecting a person's rights, rules of natural justice should be observed unless excluded by plain words. The principles and procedures to be applied in a given situation should be right, just and fair. There is nothing rigid about natural justice which is only 'fair play in action' in that no one shall be condemned unheard and when an order is to be made depriving a person of his right, interest or legitimate expectation, he should be given an opportunity of replying to it or afforded a fair hearing. To achieve that courts will not only require the statutorily prescribed procedure to be followed but will readily imply that much to be introduced by way of additional procedural safeguards to ensure fairness [see **<u>Annetts v McCann</u>** [(1990)

170 CLR 596, 598], **<u>Wiseman v Borneman</u>** ([1971] AC 297, 308-309, **<u>Lloyd v McMahon</u>** ([1987] 1 AC 625, 702-703) and **<u>Ross on Crime</u>** 07th Edition – Mirko Bagaric, 2016].

[34] Therefore, as a matter of general principle or at least as a best practice, the High Court should always observe the fundamental rule *audi alteram partem* (both sides must be heard before passing any order) in exercising revisionary jurisdiction.

Could new issues be taken up for the first time in appeal?

[35] A party seeking to raise new issues on appeal has a high onus. In order for the new issues to be considered, the appellant must show the Court that *'all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial'* (**<u>Ross v. Ross</u>** (1999) 181 N.S.R. (3d) 22 (C.A.). In other words, if a complete record is not before the appeal court, the court is in no position to assess its merits. Where, of course, the novel issue raised is one of pure law, this burden necessarily eases, as the existence of a complete factual record is not as important (**<u>R. v. Brown</u>** [1993] 2 S.C.R. 918).

[36] One of principles guiding the reticence to admit new issues is a concern for fairness to the parties. As a 2008 decision of the Ontario Court of Appeal, **<u>Ontario Energy Savings LP v. 767269 Ontario Ltd</u>**., makes clear, *'it is unfair to permit a new argument on appeal in relation to which evidence might have been led at trial had it been known the issue would be raised'*. That being said, the decision to consider a new question is entirely within the appeal Court's discretion. Although the threshold is high, there is no doubt that if it is in the interests of justice that the new issue be considered, it will be. This is particularly so where a party may not have had effective counsel at first instance or where there is a good explanation for the omission in the lower court.

[37] Lord Watson in **<u>Connecticut Fire Insurance Co. v. Kavanagh</u>** 1892 A.C. 473 on this topic said as follows:

> *"....When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved*

beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the court of ultimate review is placed in a much less advantageous position than the courts below."

[38] The new ground of appeal allowed by the single judge in this appeal is a pure question of law as jurisdiction of a tribunal is a question of law [**Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)]. Similarly, the prosecution having been instituted by a procedure which was wholly inapplicable is a fundamental error in the institution of proceedings which goes to the jurisdiction (**Director of Public Prosecutions v Prasad** [1974] FJLawRp 7; [1974] 20 FLR 23 (22 February 1974); [1974] 20 FLR 23). Upon facts admitted by both parties, the issue of law before this court could be decided without having to decide any question of fact. The respondent also has had ample opportunity to meet it and both parties have made comprehensive oral and written submissions on it. Therefore, I am inclined to entertain it despite the fact that it is raised for the first time before this court. I am also mindful that the same issue had been taken up, belatedly though and not specifically referring to section 12D of CAA Act, in a somewhat low-key form before the High Court during the hearing of the appeal.

Is the guilty plea a bar for the jurisdictional objection?

[39] An unconditional guilty plea generally *'waives all defects which are neither jurisdictional nor a deprivation of due process of law.'*- **United States v. Schweitzer**, 68 M.J. 133, 136 (C.A.A.F. 2009) (quoting **United States v. Rehorn**, 9 C.M.A. 487, 488-89, 26 C.M.R. 267, 268-69 (1958); **United States v. Bradley**, 68 M.J. 279, 281 (C.A.A.F. 2010); **United States v. Mooney**, 77 M.J. 252).

[40] Consent cannot give jurisdiction[10] and therefore any statutory objection which goes to the jurisdiction does not admit of waiver (**Maxwell on Interpretation of Statutes** Twelfth Edition by P. St. J. Langan at page 332). In **Cox** (1968) 52 Cr.App.R.106,

[10] **Heyting v. Dupoint** [1963] 1 W.L.R. 1192, per Plowman J., citing., **Re Aylmar, ex p. Bischoffsheim** (1888) 20 Q.B.D. 258, per Lord Esher M.R.; **London Corporation v. Cox** (1867) L.R. 2 H.L. 239, per Willes J.

CA, the conviction was quashed because of lack of jurisdiction, despite the fact that no objection had been taken at trial and the defendant had pleaded guilty. See **Board of Trade v Owen** [1957] A.C. 602, HL, and **Davis** (D.W.M.) (1983) 76 Cr. App. R. 120, CA, where a conviction was quashed following a plea of guilty, it being held that it made no difference that the parties had purported to confer jurisdiction by agreement. Jurisdiction could not be conferred by consent (**ARCHBOLD CRIMINAL PLEADING EVIDENCE & PRACTICE 2020** SWEET & MAXWELL 7-95 at page 1371).

[41] Hence my statement earlier that section 262(5) of the Criminal Procedure Act 2009 does not apply *inter alia* where there has been lack of jurisdiction or the matter raised seeking the court's intervention in revision materially affects any legal condition required by law to constitute the offence charged. Therefore, I conclude that the appellant's voluntary guilty plea in the Magistrates' court is not a bar for him to raise a jurisdictional objection based on section 12D of CAA Act on the validity of the guilty finding recorded in the Magistrates court at the High Court hearing into his appeal against his sentence despite not appealing against his conviction.

Has there been lack of jurisdiction or non-compliance with section 12D of CAA Act materially affected any legal condition required by law to constitute the offence charged?

[42] Sections 12C and 12D of CAA Act are as follows:

> ***12C (1)*** *If an authorised person is of the opinion that a person, operator or aerodrome operator–*
>
> *(a) is contravening this Act and its regulations; or*
>
> *(b) has contravened this Act and its regulations in circumstances that make it likely that the contravention will continue or be repeated, the authorised person* ***may*** *issue to that person, operator or aerodrome operator an improvement notice requiring the person, operator or aerodrome operator to remedy the contravention or the matters or the activities giving rise to the contravention.*
>
> ***(2)*** *An improvement notice shall –*
>
> *(a) state that the authorised person is of the opinion that the person or operator –*

(i) is contravening this Act and its regulations; or

(ii) has contravened this Act and its regulations in circumstances that make it likely that the contravention will continue or be repeated;

(b) state the reasons for that opinion;

(c) specify the provision of this Act and its regulations in respect of which that opinion is held; and

(d) specify the day before which the person is required to remedy the contravention or the matters or activities giving rise to the contravention.

(3) *If a person fails to comply with any improvement notice issued to the person, the authorised person may issue an infringement notice to such person.*

[s 12C insrt Promulgation 6 of 2008 s4, effective 1 October 2008]

12D (1) *An authorised person* **may** *serve an infringement notice on a person if it appears to the authorised person that the person has not complied with –*

(a) the improvement notice; or
(b) any provision of this Act and its regulations.

(2) *An infringement notice is a notice to the effect that, if the person served does not wish to have the matter dealt with by a court, the person may pay, within the time and to the person specified in the notice, the prescribed fixed penalty.*

(3) *If the person to whom the infringement notice pays the full amount of the prescribed fixed penalty for the alleged offence, the person is not liable to any further proceedings for the alleged offence.*

(4) *Payment under this section is not to be regarded as an admission of liability for the purpose of, nor should it in any way affect or prejudice, any civil claim, action or proceedings arising out of the same occurrence.*

(5) *The amount of a penalty prescribed under this section for an offence shall not exceed the prescribed fixed penalty.*

[s 12D insrt Promulgation 6 of 2008 s4, effective 1 October 2008]

[43] The appellant argues that the issuance of the infringement notice under section 12D is mandatory prior to resorting to criminal proceedings. It is further contended that the appellant had been deprived of his opportunity to elect between going to court and having the matter dealt with at the CAA level by paying the prescribed fine and the

appellant has explained it by stating that assuming that the CAA had issued an infringement notice by following the 'proper procedure' and the appellant had elected to pay the prescribed fine, there would have been no charges, no prosecution, no criminal proceedings, no offence and no conviction entered against the appellant which is what, according to him, section 12D, which, he claims, is penalty oriented, contemplates.

[44] The appellant has cited **Batikalou v State** [2015] FJCA 2; AAU31.2011 (2 January 2015) and **Tuisolia v Director of Public Prosecutions** [2010] FJHC 254; HAM125.2010; HAC019.2010 (19 July 2010) in support of his contention. ***Batikalou*** dealt with an accused's right of election under section 4 (1) (b) of the Criminal Procedure Act in respect of an indictable offence triable summarily (as defined in section 2 (a) and (b) of the Criminal Procedure Act 2009). Section 4(1)(b) of the Criminal Procedure Act, 2009 states that *'any indictable offence triable summarily under the Crimes Act 2009* ***shall*** *be tried by the High Court or a Magistrates Court****,*** *at the election of the accused person'*. The Court of Appeal adopted the strict view and held the compliance with section 4 (1) (b) mandatory and non-compliance leads to a nullity of proceedings in the lower court. However, in **Kumar v State** [2023] FJCA 189; AAU009.2019 (28 September 2023) the Court of Appeal revisited the application of section 4 (1) (b) of the Criminal Procedure Act and departed from the strict view taken at paragraph [30] of ***Batikalou.*** In any event, the Court of Appeal in both cases had to consider the effect of non-compliance with section 4 (1) (b) in the light of the fact that the legislature has used the word 'shall' in section 4(1)(b) indicating a *prima facie* intention that it is imperative as opposed to being mere directory.

[45] On the other hand, section 12C and 12D have the word 'may' indicating a *prima facie* legislative intention of them conferring a discretion on the CAA. I shall discuss the legal effect of the use of the words 'shall' and 'may' in a statute in more detail later. Secondly, section 4 (1) (b) of the Criminal Procedure Act deals with a right conferred on an 'accused person' whereas sections 12C and 12D deal with a 'person'. In other words, when section 4 (1) (b) becomes applicable, a person has already become an accused and the right of election is accrued to him as an accused whereas at section

12C and 12D stages there is no accused but only a person who has contravened the CAA Act or its regulations and may receive an improvement notice and failing to comply with the improvement notice and he may receive an infringement notice. This explains why by and large the appellate courts including ***Batikalou*** have taken a strict view of section 4 (1) (b) in order to safeguard the rights of an accused.

[46] In ***Tuisolia*** the applicants submitted that in terms of section 65(1) of the Food Safety Act 2003 the charges against them were misconceived, premature and brought in order to embarrass them on the basis that in terms of section 65(1), the body corporate had to be convicted first before charges were laid against them as directors of the company, Bottomline Investments Limited. According to section 65(1) of the Food Safety Act, if a body corporate is convicted of an offence under the Act, the managing director or similar officer of the body corporate may also be charged with the same offence as if the act of the body corporate was a personal act of such director or officer. The High Court in appeal held that section 65(1) of the Food Safety Act is a condition precedent in that the prosecution should get a conviction against the body corporate before charging the managing director or a similar officer. Needless to say that there is no similar express condition precedent to the institution of proceedings under section 70 (1) of the Air Navigation Regulations (ANR). In my view, an improvement notice and then an infringement notice under section 12C and 12D respectively cannot be regarded as conditions precedent to the institution of proceedings under section 70 (1) of the Air Navigation Regulations (ANR).

[47] Therefore, ***Batikalou*** and ***Tuisolia*** are not binding or persuasive authorities as far as the operation and application of section 70 (1) of the Air Navigation Regulations (ANR) are concerned. They should be distinguished from the facts of the appellant's case. Similarly, the statement in ***Tuisolia*** that for disobedience of lawful orders or notices, a person can be charged under section 144 of the Penal Code only if there is no other penalty or mode of proceeding prescribed in respect of such disobedience and as specific provision for penalty is provided under section 141 of the Public Health Act, the complainants cannot be charged for disobedience of lawful orders in terms of section 144 of the Penal Code, are not applicable to the appellant's case in as much as there is no alternative provision to section 70 (1) read with section 157(3) of

the Air Navigation Regulations (ANR) in any other statute. An improvement notice and an infringement notice under sections 12C and 12D respectively cannot be regarded as alternative penalties to section 70 (1) of the Air Navigation Regulations (ANR) read with section 157(3) of ANR. Section 70 (1) of the Air Navigation Regulations (ANR) read with section 157(3) of ANR are on 'safety of aircraft operations' whereas Part 2 under which sections 12C and 12D are found is on 'administrative' matters. The argument that the regime under section 12C and 12D is penalty oriented and the regime under section 70 (1) of the Air Navigation Regulations (ANR) read with section 157(3) of ANR are penal in nature makes no difference, for that difference is there for a good and rational purpose namely the gravity of the evil which they seek to prevent. Sections 12C and 12D on the one hand and section 70(1) of ANR read with section 157(3) of ANR are standalone provisions. The former is not a forerunner to the latter.

[48] The appellant also argues that under section 12D of the CAA Act there is no discretion given to the CAAF to choose between issuing an infringement notice under section 12D and instituting criminal proceedings under section 70 (1) of the Air Navigation Regulations (ANR) read with section 157(3) of ANR. Allowing the CAAF to do so in the absence of specific or express provision would be *ultra vires* and in breach of the statutory provisions. He also contends that Air Navigation Regulations cannot override the CAA Act.

[49] This involves the interpretation of the word 'may' found in section 12C and 12D of the CAA Act. Where the act or thing required by the Statute is a condition precedent to the jurisdiction of a tribunal, compliance cannot be dispensed with and, if it be impossible, the jurisdiction fails. It would not be competent to a court to dispense with what the legislature has made the indispensable foundation of its jurisdiction (**Maxwell on The Interpretation of Statutes** 12th Edition at page 328). In ordinary usage "may" is permissive and "must" is imperative, and in accordance with such usage, the word "may" in a statute will not generally be held to be mandatory (**Nicholl v. Allen** (1862) 31 L.J.Q.B.283; **Cooper v. Hall** [1968] 1 WL.R. 360).

[50] Thus, the question is when a statute requires that something shall be done within a certain time, or done in a particular manner of form, without expressly declaring what shall be the consequences of non-compliance, is the requirement to be regarded as imperative (or mandatory) or merely as directory (or permissive)? An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially [see **<u>Woodward v Sarsons</u>** (1875) L.R. 10 C.P. 733 per Lord Coleridge C.J. at pa.746]. *'No universal rule'* said Lord Campbell L.C., *'can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed'* [see **<u>Liverpool Borough Bank v. Turner</u>** (1860) 2 De G.F. & J. 502, at pp. 507, 508].

[51] Lord Penzance in **<u>Howard v Bodington</u>** (1877) 2 PD 203, at p. 211 said:

> *'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.'*

[52] **Sutherland, *Statutory Construction*, third edn, vol III, p 77** states:

> *"The difference between mandatory and directory statutes is one of effect only. The question generally arises in a case involving a determination of rights as affected by the violation of, or omission to adhere to, statutory directions. This determination involves a decision of whether or not the violation or omission is such as to render invalid Acts or proceedings pursuant to the statute, or rights, powers, privileges or immunities claimed thereunder. If the violation or omission is invalidating, the statute is mandatory; if not, it is directory."*

[53] **Craies, *Statute Law*, fifth edn, p.60** puts the matter thus:

> *"When a statute is passed for the purpose of enabling something to be done and prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called imperative or absolute, but those which are not essential, and may be disregarded without invalidating the thing to be done, are called directory."*

[54] There is ample authority that the mere use of the word 'must' or 'shall' in a statute does not necessarily denote a mandatory requirement. Regard must be had to the context, subject matter and object of the statutory provision in question in determining whether the same is mandatory or directory. Similarly, it is well-settled that the use of the word 'may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word 'may' as a matter of pure conventional courtesy and yet intend a mandatory force (see **N S Bindra's Interpretation of Statutes** 12th Edition at pp. 444, 446).

[55] **Sunflower Aviation Ltd v Civil Aviation Authority of the Fiji Islands** [2015] FJHC 260; HBC250.2008 (20 April 2015) has some pertinent remakes as follows on the core functions of the CAA.

> *'[5]. CAAF is the authority established under the Fiji Islands Civil Aviation Authority Act 1979 to regulate civil aviation in the Fiji Islands. Its core functions include the issuing of licenses to airport operators and developing, promoting and enforcing good aviation safety standards.*
>
> *[15]. Fiji became a fully-fledged member of the International Civil Aviation Organisation (**"ICAO"**) in 1973. The ICAO was formed by the Convention in Chicago in 1944. Article 44 of the Chicago Convention stipulates that the overall objective of ICAO is to:*
>
> > *...ensure the safe and orderly growth international civil aviation throughout the world.'*

[56] The respondent has summited that public interest in aviation safety is intended to override in some instances interests of individual document holders (being persons who may hold certain type of licences or positions within an entity certified by the regulator to hold such a position) – **Air Nelson Limited v Neil CC** 15/08 [2008] NZEmpC 102 (28 October 2008). In **Director of Civil Aviation v Air National Corporate Limited** [2011] NZCA 3 (7 February 2011) the Court of Appeal of New Zealand quashed the order made by the High Court staying the appellant's decision to suspend the respondent's air operator certificate pending the determination of judicial review proceedings stating:

> *'[35] .... Court should be slow to interfere with the Director's assessment of the need for action in the interests of safety on the*

unreasonableness/irrationality ground given his expertise and responsibilities under the Act…'

[57] The long title to the CAA Act vests CAAF with functions relating to civil aviation, in particular the safety of civil aviation and maters connected thereto. According to section 14(2) of the CAA Act, almost all these functions include or deal with many a facets of aviation safety. The prosecution of any offence committed under the CAA Act or its regulations is one among many functions of the CAAF under section 14(3)(h) relating to aviation safety mentioned in section 14(3) of the CAA Act. Under section 14(3)(i) the CAAF can do 'any other thing deemed necessary' for the enforcement of aviation safety. On the other hand, issuance of improvement and infringement notices and collect infringement fines have been listed under section 17(1)(g) only as one among many powers of the CAA under section 17(1). Issuance of improvement and infringement notices is also just one among many powers and functions of an authorised person under section 12(2)(h).

[58] Thus, it is absolutely clear that the core and overriding function of the CAAF is the safety of civil aviation operations in Fiji. This must not be compromised under any circumstances and individual rights of license or permit holders should be subservient to this inalienable duty. Therefore, not only is it not unreasonable but also absolutely necessary that strict compliance is demanded from such persons who cannot claim as of right that they should receive improvement and infringement notices before being charged in the criminal court. If one were to say that improvement and infringement notices under sections 12C and 12D respectively must always precede filing of criminal charges it would allow repeated offenders of such contravention of the CAA Act or its regulations to get away every time only with a fixed penalty, for if he pays the fixed penalty he cannot be made liable for any further proceedings irrespective of how many times he commits the same transgression.

[59] Considering the key provisions of the CAA Act and its regulations, in my view, the word "may" in section 12C and 12D in the CAA Act should be interpreted as merely directory or permissive as opposed to being mandatory or imperative. As discussed above, this conclusion is justified when the purposive approach (also called the Golden Rule) to interpretation [see Lord Blackburn's classic exposition in **River**

Wear Commissioners v Adamson (1876-77) 2 App Cas 743 at 764-5] is employed as proposed by the appellant which looks at the purpose of the Act. Therefore, I conclude that the issuance of improvement and infringement notices under sections 12C and 12D respectively is not a condition precedent to the institution of criminal proceedings and the Magistrates court did not suffer from any lack of jurisdiction to entertain and enter conviction against the appellant.

[60] This means the CAAF has the discretion, considering the urgency and gravity of the contravention of the CAA Act or its regulations to decide either to have recourse to improvement and infringement notices under sections 12C and 12D or to institute criminal proceedings. If this discretion is exercised unfairly, arbitrarily or without a proper basis the aggrieved party has the right to challenge it by way of judicial review or constitutional redress, as the case may be, on any ground available in law. If the word "may" in section 12C and 12D in the CAA Act is to be interpreted as 'must' or 'shall' it would negate the core objective of the CAA Act which is to ensure, regulate and enforce the safety of civil aviation operations in Fiji the failure of which could lead to dangerous and catastrophic consequences.

[61] Further, there is no provision in the CAA Act or in Air Navigation Regulations 1981 which even remotely suggest that "may" in sections 12C and 12D should be read as "must" or "shall" in order to give effect to the legislative intention. Even on a plain reading and literal construction of sections 12C and 12D as suggested by the appellant, the unavoidable conclusion that one can draw is that the Parliament has used the word "may" in order to vest a clear discretion in the CAAF whether to adopt the route of issuing improvement and infringement notices or not. I do not think that there exists any of the grounds mentioned by Lord Simon in **Stock v Frank Jones (Tipton) Ltd** [1978] ICR 347; [1978] 1 All ER 948, to depart from this literal interpretation with regard to sections 12C and 12D.

[62] The appellant also argues that by introducing sections 12C and 12D in 2008 the legislature wanted to avoid litigation, save taxpayer money allocated to CAAF and cost of the offender and lessen the burden on the criminal justice system and make it available for other important matters and reduce risk of conviction for aviation

document holders, and therefore the only way matters could be taken to court was by first exhausting the procedure of issuing improvement and infringement notices. This argument appears somewhat based in what is known as mischief rule or the rule in ***Heydon's case*** (1584) 3 Co Rep 7a, 7b which, formally, of narrower application, in that its approach is located in the context of identifiable common law status which existed prior to the Act. Moreover, great care must be taken when relying upon this rule in arguments in that it operates subject to certain limitations. Firstly, judges do not have to travel beyond the bounds of the Act to discover the mischief it sought to remedy; secondly 'mischief' itself can be difficult to define, for all Acts came about for some reason, be it social, economic, political, or because of some technical legal defect; thirdly, as was noted by Lord Bingham in **R v Secretary of State, ex parte Spath Holme** [2001] 1 All ER 195 (HL), an Act may have more than one mischief and the interrelationship between these may affect the question of interpretation.

[63] Therefore, while some matters mentioned by the appellant may have been reasons for promulgating sections 12C and 12D, one cannot by any means say that they were the only reasons or for that matter the dominant reasons. In any event, even if that is the case, it cannot necessarily lead to an irresistible conclusion that criminal proceedings is conditional upon issuing improvement and infringement notices or the CAAF has to exhaust section 12C and 12D before resorting to criminal action.

[64] It may be expected that if the breach is in relation to a minor matter set out in the CAA Act or many of the regulations made thereunder, the CAAF may have recourse to issuing improvement and infringement notices under sections 12C and 12D respectively. However, in the case of a contravention regarding more serious matters such as safety of aircraft operations the CAAF may opt to institute criminal proceedings in the first instance itself. This discretion should be left to the CAAF to enable it to fulfil its obligations and achieve the purpose of the CAA Act intended by the legislature.

Is contravention of section 70(1) of ANR 1981, an offence?

[65] In the course of its deliberations, upon a careful reading of the CAA Act and its regulations this court encountered a fundamental issue relating to the jurisdiction of

the Magistrates' court which neither party to the case nor the two courts below have been alive to. It is the crucial question whether the contravention of section 70(1) of ANR 1981 *ipso facto* an offence and if not whether the Magistrates court had jurisdiction at all to entertain and deal with the criminal proceedings instituted against the appellant.

[66] What is a crime? The simple, technical answer is that a crime is behaviour which offends against the Crimes Act or any other statute proving for a criminal offence. In the first place, no act is to be deemed criminal unless it is clearly made so by the words of the statute concerned (**Maxwell on The Interpretation of Statutes** 12th Edition at page 240). Thus a mere declaration that "all lotteries are unlawful" does not create any offence on which a prosecution can be based (**Sales-Matic, Ltd. v. Hinchcliffe** [1959] 1 W.L.R.1005). Similarly, an exemption clause, setting out conditions on which acts which are made punishable under other provisions of the statute may be done, does not *per se* operate to make non-observance of the conditions criminal (**R. v. Staincross Justices, ex p. Teasdale** [1961] 1 Q.B. 170). An act or omission may, however, constitute an offence without any particular penalty being specified in the statute concerned (**Rathbone v. Bundock** [1962] 2 Q.B. 260).

[67] "Offence" means any crime, felony, misdemeanour or contravention or other breach of, or failure to comply with, any written law, for which a penalty is provided and "written law" means all Acts (including the Interpretation Act) and all subsidiary legislation [section 2(1) of Interpretation Act]. However, section 2 (2) of the Crimes Act 2009 states that the only offences against the laws of Fiji are those offences created by, or under the authority, of the Crimes Act and any other Act or Regulations.

[68] The question is whether section 70(1) and/or section 157(1) of ANR or both read together creates an offence.

> *"70.- (1) No person shall pilot an aircraft or act as a flight crew member of an aircraft unless in possession of a licence, rating or permit issued or rendered valid by the Authority or document or authorisation acceptable to the Authority."*

[69] The penal provision in section 157(3) of ANR is as follows:

> *"Any person who contravenes the provisions of any regulation specified hereunder shall be liable to a fine not exceeding $1000 or imprisonment for a term not exceeding 6 months or to both such fine and imprisonment."*

[70] Regulation 70(1) is one of the regulations mentioned under section 157(3) of ANR.

[71] Thus, it is clear that neither regulation 70(1) nor 157(3) creates any offence. Piloting an aircraft without a license is prohibited by regulation 70(1) and a person doing so is made liable to a fine not exceeding $1000 or imprisonment for a term not exceeding 6 months or to both by regulation 157(3). However, neither regulation declares the contravention of regulation 70(1) as an offence.

[72] On the contrary, regulation 157(4) declares that a person who contravenes any provision of the regulations, not being a provision specified in sub regulation (3) commits an offence and is liable on conviction to a fine of $2000 and to imprisonment for 12 months. Neither regulation 70(1) nor 157(3) contains a similar statement creating an offence. Merely setting out a prohibition and corresponding penal sanction is not sufficient to create an offence. Regulation 151(8) is another example where a prohibited act is declared an offence before setting out the penal sanction. Turning to CAA Act itself, sections 8(2), 12B (d), 17A (4) & (5), 17B (3) and 17C provide more examples where declaration of offences are found before penal sanctions are prescribed.

[73] The provisions in the Criminal Procedure Act 2009 reinforces the fact that the Magistrates court has jurisdiction to entertain and deal only with *offences*. Interpretation of "summary offence" under section 2[11], section 4(1)(c)[12], section 5(1)[13] & (2)[14], section 8 and section 9 make this very clear. As per section 56 of the

[11] "summary *offence*" means any offence stated in the Crimes Act 2009 or any other law prescribing offences to be a summary offence….

[12] any summary *offence* shall be tried by a Magistrates Court.

[13] Any *offence* under any law other than the Crimes Decree 2009 shall be tried by the court that is vested by that law with jurisdiction to hear the matter.

[14] When no court is prescribed in any law creating an *offence* and such *offence* is not stated to be an indictable offence or summary offence, it may be tried in the Magistrates Court …….

Criminal Procedure Act, institution of criminal proceedings is possible only in respect of *offences* by way of a formal charge and every charge shall contain a statement of the specific *offence* (section 58 of the CPA). Each statement of the offence in the charge shall describe the *offence* with reference to the section of the law creating the *offence* (section 61 of the CPA). Summons also should state the *offence* (section 76 of the CPA). In the case of a conviction or acquittal the judgment shall specify the *offence* (section 142 of the CPA). Thus, an accused could be convicted upon his own plea on a charge that contains an *offence* (section 174 of the CPA). These are just some examples that go to show unmistakably that the existence of an *offence* is at the very foundation of criminal liability without which there cannot be a conviction.

[74] All 29 charges against the appellant signed by the prosecuting officer of the CAAF and the Magistrate filed purportedly under sections 3, 8, 9 and 58 of the Criminal Procedure Act do not refer to any offences but only contraventions under section 70(1) of the ANR but no reference is made to even to section 157(1) of the ANR. Sentence order dated 09 December 2017 shows that the Magistrate had convicted the appellant on his own plea for 29 charges under section 70(1) of the ANR for 'Failure to Comply with Safety of Aircraft Operation Requirements" and relied on section 157(1) of the ANR for the sentence considering it as the penalty provision. Neither the CAA Act nor ANR 1981 has made 'Failure to Comply with Safety of Aircraft Operation Requirements" an offence. No such offence has been declared in the CAA Act or ANR 1981. It is hoped that the CAAF will take steps to remedy this glaring lacuna in section 157(3) of ANR as a matter of urgency.

[75] From early times the well known rule of interpretation has been that statues imposing criminal or other penalties should be construed narrowly and strictly in favour of the person proceeded against. The principle applied in construing a penal Act is that if, in construing the relevant provisions, "there appears any reasonable doubt or ambiguity," it will be resolved in favour of the person who would be liable to the penalty. [**London & Country Commercial Properties Investments, Ltd. v. Att.-Gen.** [1953] 1 W.L.R 312, *per* Upjohn J. at p.319.]. The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of

an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction (**Maxwell on The Interpretation of Statutes** 12th Edition at page 239 & 240).

[76] Therefore, this Court has no option but to declare the criminal proceedings against the appellant a nullity, for the Magistrates court had no jurisdiction to entertain and deal with the same.

Qetaki, JA

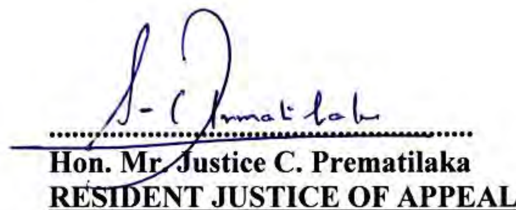
[77] I had read and considered the judgment of Prematilaka, RJA in draft. I agree with the judgement, the reasons, and the orders.

Winter, JA

[78] I am in complete agreement with the judgment of Prematilaka, RJA.

Orders of Court are:

1. Conviction of the appellant is set aside.
2. Sentence imposed on the appellant is set aside.



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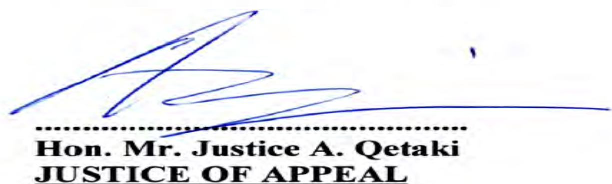
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL



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Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

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Hon. Mr. Justice G. Winter
JUSTICE OF APPEAL

Solicitors:

AK Lawyers for the Appellant
Patel & Sharma Lawyers for the Respondent