

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

CRIMINAL APPEAL NO. AAU 058 OF 2024
[Labasa High Court: HAA 013 of 2023]

BETWEEN : **TAIYAB HUSSEIN** *Appellant*

AND : **THE STATE** *Respondent*

Coram : Qetaki, RJA

Counsel : Mr. Y. Kumar and Mr. J. Reddy for the Appellant
Ms. S. Shameem for the Respondent

Date of Hearing : 12 August, 2025

Date of Ruling : 03 September, 2025

RULING

(A). Background

- [1] The Appellant was charged with one count of criminal trespass contrary to section 387 (1) (c) of the Crimes Act 2009 at the Labasa Magistrate Court, and was found guilty and convicted on 19th December, 2022.
- [2] The Appellant was sentenced on 22nd February, 2023 to 3 month's imprisonment which was suspended for 2 years.
- [3] On 6th March 2023, the Appellant appealed the learned Magistrate's decision to the High Court at Labasa. On 2nd August 2024, the Labasa High Court in its ruling dismissed the Appellant's appeal against conviction and affirmed his conviction. The appeal against sentence was refused, and the sentence stands.

[4] On 29th August, 2024 the Appellant filed a notice and grounds of appeal to this Court against both conviction and sentence.

(B). Grounds of Appeal

[5] The grounds of appeal are as follows:

1. That the learned appellate Judge erred in failing to draw his own inferences on the trespass in particular the evidence of PW3 who had noticed that a drain was dug along the complainant's disputed property and further that the lease was subject to survey and further without offering any evidence that the Appellant had actually trespassed onto the complainant's land.
2. That the learned appellate Judge erred in law in failing to take into consideration the Appellant's contention that he had a lawful right to the subject land which was claimed by PW1, the complainant and had tendered sufficient evidence to that effect without any objection of the Prosecution and was unchallenged.
3. The learned appellate Judge erred in law in failing to sufficiently deal with the grounds of appeal that was articulated before him and did not draw correct inferences before dismissing the appeal and did not expose his path of reasoning or alternatively his reasoning are unintelligible.
4. The learned appellate Judge erred in failing to hold that the conviction of the Appellant is not supported by the matrix of facts presented by the Prosecution and Defence evidence and therefore the conviction could not stand in law. Accordingly, the conviction must be set aside and sentence be quashed.
5. The Appellant reserves the right to add, alter and/or amend the Grounds of Appeal on receipt of the court record.

(C). High Court Ruling (Delivered on 2nd August, 2024 per Justice Usaia Ratuveli, Puisne Judge)

[6] The learned Judge had set out the grounds of appeal and the respective submissions of the Appellant and the Respondent in paragraphs 4 to 31 of the ruling. He carried

out an analysis of the facts, and circumstances of the appeal from paragraphs 32 to 41 of the ruling.

[7] In paragraph 32 of the ruling, the learned Judge referred to paragraph 26 of the learned Magistrate's Judgment (which was referred to by the Appellant in his submissions), as follows:

*"26. PW3 is the crucial witness in this case. He testified that on 19.09.2019 he went to the land in question with police officers and conducted a survey at the place where the digging took place with the assistance of GPS. He confirmed that his findings was that **upon the GPS machine on the lease master, the lease that was given to PW1 and digging was encroached. PW3 confirmed that according to his inspection he had noticed that a drain was dug along the complainant's lease by the accused. PW3 further stated that according to lease master, that piece of land belongs to PW1, however all this agreement for lease subject to survey. He told the Court that the said land has been given to PW1 by the ITLTB for 99 years lease and the file number is 41137 and it can be confirmed from the lease document. However, this piece of evidence remained unchallenged.**"*

[8] The learned Judge held that, the Complainant, PW1 has already given sworn testimony that he had informed the Appellant that he was trespassing. That the Appellant remained on the property despite being informed of the same. The Appellant remained until the Police and ITLTB officers attended the scene.

[9] Having considered the record, in particular the judgment and the exhibits that were placed before the Court at the trial, the learned Judge held that the evidence of the prosecution established the offence beyond reasonable doubt. Also that the defence put up by the Appellant was not accepted by the Court as the same breached the principles of **Brown v Dunn** (1894) AC 67.

[10] The High Court found that, the Magistrate was entitled to arrive at the findings that he made in the Court below. The learned Judge was satisfied that the learned Magistrate did not act upon a wrong principle or that he allowed extraneous or irrelevant matters to guide or affect him.

[11] The learned Judge found that the learned Magistrate had considered all of the relevant facts and he did take into account all of the relevant facts before him at the trial. The sentence arrived at by the Court falls within the tariff and that the Court was entitled to fully suspend the sentence. Finally, the learned Judge found that the whole appeal must fail. Ground 1 to 5 are not made out and the appeal against sentence is also dismissed.

(D). The Law

[12] Section 21(1) (b) of the Court of Appeal Act requires that appeals on errors of law and fact require the leave of the Court.

[13] For a timely appeal the test for leave to appeal against conviction and sentence is “*reasonable prospect of success*”: **Caucu v State** [2018] FJCA171;AAU0029.2016 (4 October 2018), **Navuki v State** [2018] FJCA 172;AAU0038.2016 (4 October 2018); and **Sadrugu v State** [2019] FJCA 87;AAU0057.2015 (6 June 2019). On sentence, appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:

- (i) Acted upon a wrong principle;
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;
- (iii) Mistook the facts;
- (iv) Failed to take into account some relevant consideration.

See **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No. AAU 0015.

(E). Appellant’s Case

[14] **Ground 1**: That Order 113 Rule 4(2) (a) and (b) relied upon. Also **Arjesh Sami v Alena Qiqi**, Civil action No. HBC 156 of 2022. An agreement for a lease is subject to survey. It is crucial to ensure whether a survey had occurred or not, or whether the TLTB officer can give evidence regarding the area or boundary which belongs to the respondent. See **Native Land Trust Board v Lal** [2012] FJSC 11; CBV0009.2011 where the action was a claim for damages for breach of contract, statute, and trespass

and loss of production opportunity. Shanti Lal claimed he was lessee of approximately 13 acres of itaukei land. It was checked with D.S.Prasad who stated that the whole 13 acres is native land. In this matter, the learned Judge failed to consider there was no evidence given by a surveyor. If boundaries are disputed, then an inspection report with the report of the surveyor must be adduced as an evidence. The GPS machine on the lease number, which was used to confirm the boundary which was not tendered in court, is ambiguous in nature in its entirety. When it comes to right to land, a lease agreement is subject to survey and a report has to be tendered in court as evidence.

[15] **Ground 2:** The term evidential burden in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist according to section 59(7) of the Crimes Act 2009. See **Abourizk v State** [2022] FJSC 9; CAV0013.2019 (28 April 2022). In this matter, the dispute is on ownership of land and the evidence given relate to ownership of land. The Applicant discharged his evidential burden in relation to the evidence – he claimed the land belonged to him. The Appellant claimed he had lawful right to the said land in dispute.

[16] **Ground 3:** The learned Judge did not draw correct inferences that the proceedings were about interest in land. On paragraph 4 of Ruling, it is clearly stated that, the Appellant submits that the trial Magistrate erred in law and in fact in convicting the Appellant for trespass when;-

- (a) It was disputed that the complainant did not have any interest in the land claimed by him.
- (b) It was probed that the complainant could not have any interest in the land which was claimed by him.
- (c) That the land in fact belonged to the Appellant.

[17] Paragraphs 6 and 11 of the learned Magistrate’s judgment support the argument that the nature of the proceedings is on ownership to land.

- [18] The Appellant submits that the learned Magistrate failed to make inferences on the proceedings before him, given section 16(1) (d) of the Magistrate’s Court Act, and that the Court has the jurisdiction to deal with trespass to land.
- [19] In criminal trespass the element of “*unlawful persistent in coming or remaining upon such property*” is an element of the offence that has to be proven. The Appellant disputes the learned Magistrate’s finding/observations in paragraphs 15 to 28 of the judgment. Even if the Appellant judge did consider the records, the judgment and the exhibits, he failed to consider the elements of the offence the accused had been convicted of.
- [20] **Ground 4:** The Appellant submits that the matrix of facts support the accused had trespassed into the land of the complainant. The evidence of both the prosecution and defence were in relation to the ownership of the piece of land. The accused did not enter the property of the Complainant. In relation to paragraph 37 of judgment, the learned Judge had failed to consider that the overall exhibits and the records were about the ownership of the land as stated in paragraph 14 of the High Court judgment. The Appellant referred to the case **Inspired Destinations (Inc) Ltd v Graham** [2022] FJSC 50 CBV0003.2020 (28 October 2022), which outlined the nature of a license. The matrix of facts presented by the prosecution and defence evidence support the fact that the accused had trespassed onto the land of the Complainant which falls under the tort of trespass. This view is supported by what constitute trespass under section 387(1) of the Crimes Act 2009. There is also the need to consider the difference between the terms “*property*” and “*land*”.
- [21] The Appellant submits that in consideration of section 109 of Property Law Act 1971, the case of **Mehmood Khan v Pauliasi Ratu** FJCA ABU 110 of 2019 (paragraphs 22 to 24) and the legal meaning of trespass to land as defined in Halsbury’s Law of England (4th Edition, Vol 45) and paragraph 1384, and Street on Torts (16th Edition at Chapter 12) with Clerk & Lindsell on Torts (15th Edition 1982) at page 631, the learned judge erred in failing to hold that the conviction of the appellant is not supported by the matrix of facts presented by the prosecution and defence and therefore the conviction could not stand in law.

[22] **Ground 5:** The Appellant reserves his right to amend grounds of appeal on receipt of the court record for further evidence to be adduced upon questions of fact: see Rule 22(2) Court of Appeal Rules.

(F). Respondent's Case

[23] In the Magistrate's Court, the prosecution argued that there was evidence tendered at the trial showing that the land in question belonged to the complainant. That ITLTB lease No. 4/9/ 41137 belonged to the complainant.

[24] An ITLTB officer was called as a witness for the prosecution whose evidence proved that the land in question belonged to the complainant's lease and not the appellant. That there was no error by the learned Magistrate in accepting that evidence and the finding that the appellant was guilty of the offence.

[25] The learned Judge took into account the judgment of the learned Magistrate. In paragraph 32 of the learned Judge's ruling, he quoted from paragraph 26 of the judgment in the Magistrate's Court. He concluded that it was open on the evidence for the learned Magistrate to find the appellant guilty - see paragraph 37 of High Court ruling.

[26] **Ground 1:** The Respondent submits that it is trite law that on appeal, the function of the appellate court is not to be another trial court and make its own assessment on the evidence. If that happens the appeal court effectively usurps the function of the trial court. The appellate court simply assesses whether on the totality of the evidence, it was open for the learned Magistrate to find the appellant guilty. The learned Judge did that. It is evident from paragraph 39 of the ruling that he found on the evidence that the learned Magistrate was entitled to arrive at his decision.

[27] The Respondent submits, on a preliminary view of the ground, that the ground was not argued before the appellate Judge before the High Court, on appeal. It is therefore unfair for the Appellant to argue it now before this Court. On that basis alone, this ground should be dismissed as it lacks merit.

[28] **Ground 2:** The Respondent submits that this ground is alleging an error of fact and not an error of law. It is misleading. Again, the function of the appellate court is not

to conduct another trial, but to assess and review the totality of the evidence, on whether the learned Magistrate is justified in convicting the Appellant.

[29] In paragraph 32 of the ruling, the learned Judge accepted the learned Magistrate's ruling. The learned Judge agreed with the learned Magistrate, that from the evidence, the land which was subject of dispute belongs to the complainant and not the Appellant. That was evident from PW3's evidence. This ground lacks merit.

[30] **Ground 3:** The Respondent submits that it is clear from the ruling (pages 2 to 5) in the High Court that the Court had taken into account the grounds of appeal and the position of the Appellant. However, the learned appellate Judge found that the grounds of appeal are not made out because there was evidence which justified the conviction and the learned Magistrate's decision. The question on the appeal was whether the totality of the evidence supported the conviction, and the learned Judge found that there was. This ground must be dismissed.

[31] **Ground 4:** This ground questions whether the matrix of facts, or the totality of the evidence supports the conviction. The exhibits produced by the Appellant at the trial was accepted by the Magistrate. It did not mean that the Magistrate accepted the exhibits as the truth. All the evidence will be balanced with the prosecution evidence. The Appellant does not have to prove anything. It is the prosecution that must prove its case beyond reasonable doubt. The prosecution case was accepted. Despite the Appellant submitting its own exhibits, it seems the learned Magistrate did not accept them because it had breached certain evidential rules such as **Browne v Dunn** (supra)

[32] The Respondent submits that the learned appellate Judge at the High Court basically arrived at the same decision as the learned Magistrate and found that the totality of the evidence supported the conviction. It did so after considering the judgment and the court records as evidenced from paragraph 39 of the ruling. This ground lacks merit and must be dismissed. In **Sahib v State** [1992] FJCA 24, the Court of Appeal states:

“Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the

written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.”

Conclusion

[33] The Respondent submits that the grounds of appeal against conviction and sentence lack merit and leave to appeal against conviction and sentence be refused.

(G). Analysis

[34] In the High Court, the Appellant had argued that the learned Magistrate failed to take into account the Appellant's exhibits. The documents proved that the complainant did not have any leasehold interest. That the disputed land belonged to the Appellant That he cannot be guilty of criminal trespass in his own property. On the other hand, the Prosecution argued that there was evidence tendered in the trial showing that the land in question belonged to the complainant. That ITLTB Lease No. 4/9/41137 belonged to the complainant. There was an ITLTB officer who was called as a witness for the prosecution whose evidence proved that the land in question belonged to the complainant's lease and not that of the Appellant. The learned Magistrate accepted that evidence. Was the learned Magistrate mistaken?

[36] On appeal the learned Judge considered the judgment of the learned Magistrate, and concluded that it was open on the evidence for the learned Magistrate to convict the Appellant. His Lordship quoted paragraph 26 of the judgment on the effect of PW3's evidence. Was the learned Judge mistaken in accepting the findings and decision of the learned Magistrate?

[34] **Ground 1:** The Appellant argues that the learned Judge was mistaken in failing to draw his own inferences on the trespass, in particular the evidence of PW3. PW3 is an officer of the ITLTB, who had noticed that a drain was dug along the complainant's

disputed property. The witness also stated that the lease was subject to survey. It is alleged that the officer did not offer any evidence that the Appellant had actually trespassed on the complainant's land. The Appellant's submissions are in paragraph [14] above.

[35] A summary of the learned trial Judge's ruling is set out in paragraphs [6] to [11] above. The learned Judge had clearly accepted that the learned Magistrate was entitled to make the decision he made, meaning that there were sufficient evidence supporting the conclusion that the Appellant had trespassed and that he was guilty as charged. The evidence of PW3 was clear, that the GPS survey confirmed that there was an encroachment into the complainant's land by the Appellant who had dug on the boarder. The use of GPS is sufficient under the circumstances to establish the evidence of trespass. This is not an argument about the ownership of the "whole" of the lease. The digging was on an area that could readily be inspected and surveyed by an officer of the ITLTB and with the assistance of GPS, and was the case. The Appellant was notified much earlier of his illegal encroachment and did not act to remedy the same. The Appellant had insisted all along, even in this appeal, that he is the lawful owner of that piece of land. The facts as established by credible and reliable evidence indicate the contrary. This ground has no prospect of success. It has no merit.

[36] **Ground 2:** The Appellant argues that the learned Judge was mistaken in law in not upholding his lawful right to the subject land. For the Appellant's submissions on this ground - see paragraph [15] above, and the Respondent's arguments in paragraphs [28] and [29] above. The exhibits were allegedly tendered in evidence without any objection by the Prosecution. However, that fact does not mean that it is accepted as evidence in Court. Exhibits on their own are of not much use to the Court, except when introduced formally, and properly explained in evidence and the witness introducing the exhibits is subjected to cross-examination to test their credibility and reliability. Exhibits need to be tested by examination and cross-examination, unless they are tendered by consent for a particular purpose or end. This ground has no prospect of success. It does not have merit.

[37] **Ground 3:** The Appellant argues that the learned Judge was mistaken in law in failing to sufficiently deal with the grounds of appeal articulated before him. He did not draw

correct inferences before dismissing the appeal and he did not provide his reasons. The Appellant's submissions are in paragraphs [16] to [19] above. In response, the Respondent's submissions are in paragraph [30] above. The learned Judge has accepted the position taken by the learned Magistrate in paragraph 26 of his judgment - see paragraph 32 of ruling. The learned Judge's "Analysis" of the evidence given the circumstances and the decision of the learned Magistrate are set out in paragraphs 32 to 41 of the ruling. It is apparent that the learned Judge has given a lot of thought to the judgment of the Magistrate, and on whether the conclusions arrived at in convicting the Appellant were supported by the totality of the evidence adduced at the trial. The Appellant had not shown and demonstrated where the learned Judge had gone wrong and the reasons. This ground has no prospect of success.

[38] **Ground 4:** The Appellant argues that the learned Judge was mistaken in failing to hold that the Appellant's conviction is not supported by the matrix of facts presented by the Prosecution and Defence evidence- therefore the conviction could not stand in law. The Appellant's submissions are set out in paragraphs [20] and [21] above, and the Respondent's submissions are contained in paragraphs [31] and [32] above. The totality of the evidence adduced at the trial supports the conviction of the Appellant as charged. The ground has no prospect of success.

Order of Court

1. *Application for leave to appeal against conviction is not allowed.*
2. *Application for leave to appeal against sentence is not allowed.*

 
Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Solicitors

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