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

CRIMINAL APPEAL NO. AAU 0053 of 2024
[Lautoka High Court Case No. HAA 09 of 2023]

BETWEEN : **JOTISH CHAND**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**

Counsel : **Kumar, Y for the Appellant**
: **Samisoni, E for the Respondent [ODPP]**

Date of Hearing : **13 February, 2025**

Date of Ruling : **4 March, 2025**

RULING

[1] This is a second-tier appeal by the Appellant [Jotish Chand] against his conviction and sentence imposed by the Magistrate's Court of Lautoka, in Criminal Case No. 703 of 2012. At the material time, the Appellant was a Police Constable stationed to the Lautoka Police Station.

[2] The Appellant first appeared in the Magistrate's Court of Lautoka, on 30 November 2012, charged with one count of Conspiracy to Pervert the Course of Justice, contrary to Section 190 (b) of the Crimes Act No. 44 of 2009 (Crimes Act); and one count of

Destroying Evidence, contrary to Section 189 (a) of the Crimes Act [Vide page 35 of the Magistrate's Court Record]. The Appellant pleaded not guilty to the charges.

[3] After many adjournments, the hearing commenced on 24 September 2019, before the Resident Magistrate, Mr. Bandula Gunaratne. Prior to the closure of the case for the prosecution, leave was sought by the prosecution to file an Amended Charge.

[4] On 4 November 2019, Resident Magistrate made a Ruling permitting the Amended Charge to be filed [At pages 88-91 of the Magistrate's Court Record]. As per the Amended Charge filed in the Magistrate's Court of Lautoka, the Appellant was charged with one count of Conspiracy to Pervert the Course of Justice, contrary to Section 190 (b) of the Crimes Act [Vide page 34 of the Magistrate's Court Record]. The Amended Charge read as follows:

CHARGE

Statement of Offence (a)

CONSPIRACY TO PERVERT THE COURSE OF JUSTICE: Contrary to Section 190 (b) of the Crimes Act of 2009.

Particulars of Offence (b)

JOTISH CHAND, between the 15th day of January 2011 and the 7th day of February 2011, **obstructed** the course of justice in the alleged case of CPU (Central Processing Unit) theft reported by **NAZIA FARINA BANO,** by writing an unsigned withdrawal statement of the said **NAZIA FARINA BANO.**

[5] On 26 November 2019, the Appellant took his plea on the Amended Charge and pleaded not guilty. Thereafter, the matter proceeded to trial on the said Amended Charge.

[6] On 11 November 2020, the prosecution closed its case. At this stage, the defence made an application that the Appellant had No Case to Answer.

[7] On 28 February 2022, it is recorded that both the Director of Public Prosecutions (DPP) and the Counsel for the Appellant agreed and consented to accept or adopt the evidence led before the previous Resident Magistrate [Vide page 29 of the Magistrate's Court Record].

[8] Accordingly, by his Ruling dated 11 April 2022, the Resident Magistrate, Mr. Jagath Hemantha held that the Appellant had a Case to Answer and called for his defence [The No Case to Answer Ruling is found at pages 61-69 of the Magistrate's Court Record].

[9] The Appellant exercised his right to remain silent and the matter was fixed for Judgment.

[10] On 13 September 2022, the Appellant was found guilty of the charge and convicted. On 14 February 2023, the Appellant was a sentenced to 5 months imprisonment which term of imprisonment was suspended for a period of 3 years.

Appeal to High Court

[11] Aggrieved by the said Order, on 13 March 2023, the Appellant filed a timely appeal in the High Court. The Petition of Appeal filed is in respect of both his conviction and sentence.

[12] This matter was taken up for hearing in the High Court, on 5 March and 21 March 2024. The Counsel for the Appellant and the State Counsel for the Respondent were heard. Both parties filed written submissions, and referred to case authorities.

[13] The Appellant filed the following grounds of appeal:

(1) That the Trial Magistrate erred in law and in fact in not taking into consideration the laws on "Double Jeopardy" in the instant case where the Appellant was charged for the same offence when the matter was heard before the Fiji Police Force Tribunal who acquitted the Appellant on the

said charge and he was reinstated and as such there has been a substantial miscarriage of justice.

(2) That the Trial Magistrate erred in law and in fact in not adequately directing/misdirecting the previous inconsistent statements/evidence made by the Prosecution witnesses and as such there has been a substantial miscarriage of justice.

(3) That the Trial Magistrate erred in law and in fact in not directing himself to the possible defence evidence presented in Court and as such by his failure there was a substantial miscarriage of justice.

(4) That the Trial Magistrate erred in law and in fact in not directing himself adequately and/or taking into consideration the ingredients of the offence the Appellant was charged with.

(5) That the Trial Magistrate erred in law and in fact in not directing himself to the possible defence evidence and as such by his failure there was a substantial miscarriage of justice.

Grounds of Appeal against Sentence

(6) That the Appellant's appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.

(7) That the Trial Magistrate erred in law and in fact in not taking relevant (factors into) consideration when sentencing the Appellant.
That the Trial Magistrate erred in law and in fact in not taking into consideration the question of post charge delay and after the Appellant was charged when the incident had happened in 2011 and as such ought to have taken into consideration the above facts in giving the Appellant discount due to delay and as such there has been a substantial miscarriage of justice.

(8) That the Trial Magistrate erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties Act 2009 when he passed the sentence against the Appellant.

[14] As can be observed there are five Grounds of Appeal against conviction; and three Grounds of Appeal against sentence.

[15] After a careful review and consideration of the evidence and applicable in the Magistrate Court, the High Court Judge in his appellate capacity, dismissed the appeal and affirmed the conviction and sentence imposed by Magistrate in the Lautoka Magistrate Court Criminal Case No: 703 of 2012 in a judgement dated 12 June 2024.

Appeal to Court of Appeal

[16] The appellant's appeal seeking enlargement of time to file Notice to Appeal against conviction and sentence. Before I consider the issue of enlargement of time, I want first of all consider the appellant's grounds of appeal pursuant to section 22(1) of the Court of Appeal Act 2009 which provides:

> *"Any party to an appeal from a Magistrates Court to the High Court, may appeal under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on* ***any grounds which involves a question of law only*** *–*
>
> *Provided that no appeal shall lie against the confirmation by the High Court of a verdict of acquittal by a Magistrate Court."*

[17] In **Munendra v State [2023] FJCA 65**, (AAU 023 of 2018) the court explored the scope of section 22 of the Court of Appeal Act thus:

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

substitution for a non-custodial sentence [vide section 22(1)(A) of the Court of Appeal Act].

*[7] Though, leave to appeal is not required under section 22, a single judge could still exercise jurisdiction under section 35(2) in order to determine whether the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal [vide **Kumar v State** [2012] FJCA 65; AAU27.2010 (12 October 2012) and **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)]. In doing so, a single judge is required to consider whether there is in fact a question of law that should go before the full court, for designation of a point of appeal as a question of law by the appellant or his pleader would not necessarily make it a question of law [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014)]. It is therefore a counsel's or an appellant's duty to properly identify a discrete question (or questions) of law in prosecuting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005).*

*[8] What is important is not the label but the substance of the appeal point. This exercise is undertaken by the single judge not for the purpose of considering leave under section 35(1) but as a filtering mechanism to make sure that only true and real questions of law would reach the full court. If an appeal point taken up by the appellant in pith and substance or in essence is not a question of law then the single judge could act under section 35(2) and dismiss the appeal altogether [vide **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020) and **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014)].*

*[9] The phrase 'a question of law alone' is one of pure law to the satisfaction of the court, as opposed to one of law unaccompanied by any other ground of appeal [vide **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)].*

[10] In a second tier appeal under section 22 of the Court of Appeal an appellant cannot seek to re-open and re-argue facts or mixed fact and law of the case or re-agitate findings of pure facts or mixed fact and law. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the court to rectify any error of law or clarify any ambiguity in the law and not to deal with any errors of fact or of mixed fact and law which is the function of the High Court. That is the intention of the legislature and this court must give effect to that legislative intention."

[18] In light of the above guidance from the Court of Appeal, the grounds of appeal are set out below will now be examined:

"The Learned Judge erred in law by not analysing adequately or at all the errors of law committed by the Resident Magistrate as follows:

(a) *The amended charge was itself defective in that the statement of offence alleged conspiracy whereas the particulars specified a substantive offence of obstructing the case of justice by conduct.*

(b) *The document in question was never produced at the trial even though the offence alleged that the Appellant wrote the subject document. The Learned Judge completely overlooked this aspect.*

(c) *The Judge overlooked the fact that the subject document was not in existence at all, thereby weakening the prosecution case at the trial stage.*

(d) *The Judge failed to evaluate the evidence led in the Magistrate's Court namely that the absence of any evidence that the Appellant had proffered the subject document to the complainant for her indorsement.*

(e) *The Judge misdirected himself on the basic elements of the existence of a conspiracy as had done the Learned Magistrate thereby causing a substantial miscarriage of justice.*

(f) *The Judge failed to analyse the absence of evidence led in the Magistrate's Court that the Police Enquiry Paper did not contain any entries attributed to the Appellant that the complainant wished to withdraw her complaint.*

(g) *The Judge erred in law in failing to recognise that there was no overt act or an omission on the part of the Appellant that would be caught by the offence of conspiracy or the substantive offence of obstruction or perverting the cause of justice.*

(h) *The Judge erred in law and in failing to recognise that the prosecution has not led sufficient evidence to find a case on the amended charge."*

[19] In **Kumar v State [2012] FJCA 65;** (AAU 027 of 2010) – An appeal under section 22, may be reviewed by Justice of Appeal under section 35(1) to establish whether it indeed raises issues of law alone. This review is unnecessary because at the hearing the appellant counsel withdrew 7 of the 8 grounds of appeal against conviction and pursued only one.

[20] At the hearing, Mr Kumar Y [Jiten Reddy Lawyers] Counsel for appellant advised the court, that they are only pursuing ground 1 which relates to claim of defective charge on this appeal.

[21] At the hearing only the ground pertaining to the claim for defective charge was considered.

Defective Charge

[22] The error of law claimed by the appellant, is that the amended charge was itself defective in that the statement of offence alleged conspiracy whereas the particulars specified a substantive offence of obstructing the cause of justice by conduct. In the High Court the learned judge dealt with this submission as follows: **Jotish Chand v State [2024] FJHC 361 (HAA 009/23)**

> *"**[35]** The Appellant has been charged in terms of Section 190 (b) of the Crimes Act for Conspiring to Obstruct the Course of Justice.*
>
> ***[36]*** *I find that the Learned Magistrate has correctly outlined the elements of the offence of Conspiring to Obstruct the Course of Justice in his judgment as follows: [At page 55 of the Magistrate's Court Record].*
>
> *1. The accused*
>
> *2. Conspired to do anything (any act)*
>
> *3. With intent to obstruct, prevent, pervert or defeat the course of justice*
>
> ***[37]*** *Section 190 (b) of the Crimes Act, which is law creating the offence, does not specify a fault element. However, the Learned Magistrate has identified the fault element for the offence as "intention". Although, the Learned Magistrate has not specifically stated so, this would be in terms of the provisions of Section 23 (1) of the Crimes Act which provides: If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.*
>
> ***[38]*** *During the hearing of this matter, the Learned Counsel for the Appellant submitted that the term 'conspired' should be construed in terms of Section 49 of the Crimes Act. His contention was that a conspiracy to commit a criminal offence should always be with another.*
>
> ***[39]*** *Section 49 of the Crimes Act defines the term "Conspiracy", which is commonly regarded as an inchoate crime or incomplete crimes. Inchoate crimes are acts taken toward committing a crime or acts that constitute indirect participation in a crime. Although these acts are not themselves crimes, they are illegal because they are conducted in furtherance of a crime. Other classic examples of inchoate crimes would be Attempts,*

Aiding and Abetting (sometimes referred to as Complicity), Common Purpose (sometimes referred to as Common Intention) and Incitement.

[40] *The above are situations where criminal responsibility maybe extended to persons other than the principal perpetrator of the offence. Part 7 of the Crimes Act (Sections 44-49) is titled Extensions of Criminal Responsibility, and contains provisions governing Attempts (Section 44), Complicity and Common Purpose (Section 45), Offences Committed by Joint Offenders in Prosecution of Common Purpose (Section 46), Innocent Agency (Section 47), Incitement (Section 48), and Conspiracy (Section 49).*

[41] *However, this Court cannot accept the proposition that the term 'conspired', as found in Section 190 (b) should be construed in terms of Section 49 of the Crimes Act. Furthermore, Section 190 (b) of the Crimes Act should be distinguished from Section 190 (a). Section 190 (a) of the Crimes Act clearly provides that a person commits a summary offence* ***if he or she conspires with any other person*** *to knowingly and maliciously accuse any person falsely of any crime. However, Section 190 (b) provides that a person commits a summary offence* ***if he or she conspires*** *to do anything to obstruct, prevent, pervert or defeat the course of justice.*

[42] *From a reading of the above it is manifest that for an offence in terms of Section 190 (a) of the Crimes Act to be committed one person must conspire with another to commit the offence. <u>However, it is my opinion that, an offence in terms of Section 190 (b) of the Crimes Act can be committed by that person alone."</u>*

[23] At the hearing and in the written submissions, the appellant did not provide any new submission to challenge the legal basis of the judge's reasoning, which is set out above. The only issue raised is that the word "conspires" in the particulars of amended charge under section 190 (b) of the Crimes Act 2009, should be construed in terms of section 49 of the Crimes Act. This was rejected by the High Court Judge on the basis that an offence charged under section 190(b) of the Crimes Act 2009 can be committed by a person alone, notwithstanding that the particulars of the offence charged in this case requires the appellant to "**conspires to do anything** to obstruct, prevent, pervert or defeat the course of justice."

[24] The application of section 23 (1) of the Crimes Act was reference by the High Court judge in his ruling on this matter. But an issue that need further review by the full court is the correct requirement of the offences created by section 190(b) of the Crimes Act 2009. The words "<u>conspires to do anything</u>" would ordinarily mean that there is

another person involved apart from the appellant, otherwise the use of the word "*conspires*" is otiose.

[25] Counsel for the appellant in one of the written submissions filed in court earlier raised the issue of the difference of the particulars of offence and the statement of offence in the charge and whether these give rise to unfair trial. In **Naduva v State [2024] FJSC 48 (CAV 005/23)** the Supreme Court observed as follows:

> *"..To understand what is meant by the indictment and specifically the particulars contained in it, it is important to consider it in the full context of the way in which the trial was conducted. As I have indicated, in the High Court, the case against the petitioner was conducted generally on the basis that the word "vagina" was used in its popular rather than medical sense. It is therefore sensible to treat the word "vagina" in the particulars as having the same meaning. On this basis, there was no variation between the particulars and the evidence.*
>
> *[23] In any event, even if there was a material difference between the particulars and the evidence (which is not my view), I do not see this as affecting the safety of the verdict. As the Court in Cotter also said:*
>
> > *Particulars serve the purpose of ensuring that an accused person is aware of the act and occasion which the prosecution relies upon as being the commission of the offence alleged. It is one of the components of a fair trial that an accused person be informed of precisely what it is that the prosecution alleges he or she has done that constitutes a crime:* **...** .
>
> *In assessing whether particulars have been adequate, the relevant question is whether the accused person has been able to identify the act, omission and circumstances which the prosecution alleged amounted to the offence charged. It is always a question of substance, not technicality. If the particulars are said to be wrong or misleading, the question remains whether they actually caused the accused to misunderstand or fail to appreciate the case brought against him such that he was prejudiced in his defence. A divergence between particulars and the evidence does not necessarily mean that a different offence is alleged, but it may mean that the fairness of the trial is drawn into question. Thus, whether or not the prosecution can properly depart from particulars depends on whether doing so will result in unfairness to the accused."*

[26] In ***Cotter v The State of Western Australia*** [2011] WASCA 202 **-** provides that in assessing whether particulars are adequate, the relevant question is whether the accused person has been able to identify the act, omission and circumstances which

the prosecution alleges amount to the offence charged. This line of inquiry as not pursued.

[27] I am satisfied that the issues of law raise by the appellant is of sufficient public importance to warrant consideration by the Court of Appeal. I will allow the appeal.

Enlargement of Time

[28] In **Rasaku v State [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013),** the Supreme Court stated the following, as factors to be considered by a Court in Fiji when considering an application for enlargement of time:

'[21] In paragraph 4 of his judgment in *Kamalesh Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), Chief Justice Anthony Gates has summarized the factors that will be considered by a court in Fiji for granting enlargement of time as follows:-

(i) The reason for the failure to file within time

(ii) The length of the delay.

(iii) Whether there is a ground of merit justifying the appellate court's consideration.

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the Respondent be unfairly prejudiced?

[29] As regards factors i) and ii) above, the appellant's submission dated 9 September 2024 provided these explanations:

i. That the solicitors who handled his High Court appeal did not consider his request for release of his court paper to enable him to file the appeal on time.

ii. The delay 6 weeks.

[30] I have already discussed above that one of the grounds of appeal raises an important issue of law that merits consideration of the full court. It is likely to succeed.

[31] The respondent is not prejudiced if enlargement of time is granted.

[32] Enlargement of time granted.

[33] The appellant has served his sentence.

ORDERS:

1). Application for Enlargement of time to appeal granted.

2). Leave to appeal is allowed on the narrow issue of law, discussed above.

Hon. Justice Isikeli U. Mataitoga
PRESIDENT, COURT OF APPEAL