IN THE SUPREME COURT OF FIJI
AT SUVA

Criminal Appeal No. CAV0010 of 2013
(Court of Appeal No.AAU0014 of 2011)

BETWEEN: **SIMELI BILI NAISUA**

Petitioner

AND: **THE STATE**

Respondent

CORAM: **The Hon Chief Justice Anthony Gates, President of the Supreme Court**
The Hon Madam Justice Chandra Ekanayake, Justice of the Supreme Court
The Hon Mr Justice Daniel Goundar, Justice of the Supreme Court

COUNSEL: **Petitioner in Person**
Ms P. Madanavosa for Respondent

DATE OF HEARING: **13 November 2013**

DATE OF JUDGMENT: **20 November 2013**

JUDGMENT OF THE COURT

Gates P:

I have read in draft the judgment of Goundar JA and concur in the remarks and observations therein.

Ekanayake JA:

I also agree with the reasons and proposed orders of Goundar JA in this judgment.

Goundar JA:

Introduction

[1] This is an application for an extension of time to seek special leave to appeal against an order of a single justice of the Court of Appeal, dismissing the petitioner's appeal under section 35 (2) of the Court of Appeal Act. The petitioner's main contention is that the learned justice of appeal erred in law by dismissing his appeal solely on the basis that he had no right of appeal.

Procedural and factual background

[2] The petitioner was convicted of rape after a trial in the High Court, and on 8 February 2011, he was sentenced to 15 years' imprisonment. The charge of rape was based on penile penetration of the victim's mouth. The victim was a 3-year old girl. She gave unsworn evidence at trial. The victim's elder sister and her mother gave evidence of complaint made to them by the victim to the effect that the petitioner had penetrated her mouth with his penis. The summing-up of the trial judge lacks direction to the assessors in accordance with ***Peniasi Senikarawa v The State*** Criminal Appeal No. AAU005 of 2004S on the use of recent complaint evidence to assess the credibility of the complainant.

[3] Without the transcript of evidence, it is difficult to ascertain the strength of the prosecution evidence against the petitioner, but from the brief summary of evidence contained in the summing-up, it could be that the conviction was based on the victim's unsworn evidence and the petitioner's confession to police. The direction that the trial judge gave to the assessors on the caution interview was that the petitioner suggested that the statement was not voluntarily made. If the petitioner did make a confession under caution, the summing-up provides no assistance to the assessors on the weight to be attached to a disputed confession.

[4] On 1 March 2011, the Court of Appeal registry received a timely notice of appeal against conviction and sentence by the petitioner. The notice was not in the prescribed

form provided by the Court of Appeal Rules, but since the petitioner was unrepresented, the registry properly accepted the notice. The petitioner was also unrepresented at trial.

Proposed grounds of appeal in the Court of Appeal

[5] The petitioner told this Court that the grounds of appeal that he filed in the Court of Appeal were drafted by him with assistance from an inmate. The substance of his grounds of appeal was that:

(i) The charge is defective.
(ii) The trial judge failed to call the arresting officer to determine the admissibility of confession.
(iii) The evidence of recent complaint was not made voluntarily but was forced out of the complainant.
(iv) Sentence is excessive.

Criminal appeals from the original jurisdiction of the High Court

[6] Criminal appeals against final judgments arising from the High Court's original jurisdiction are governed by section 21 of the Court of Appeal Act. Section 21 (1) states:

> A person convicted on a trial before the High Court may appeal under this Part to the Court of Appeal –
>
> (a) Against his conviction on any ground of appeal which involves a question of law alone;
> (b) With the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and
> (c) With the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

[7] Determination of a leave application is within the powers of a single judge of appeal under section 35 (1) (a) of the Court of Appeal Act. If a single judge refuses leave,

then the applicant retains a further right to seek leave from the Full Court under section 35 (3) of the Court of Appeal Act. This further right is curtailed, if the application is dismissed under section 35 (2) of the Court of Appeal Act by a single judge (***Nioni Tagici v The State*** Crim. Appeal CAV0004.2011 at [8]).

[8] The petitioner's application for leave to appeal was heard by a single judge on 12 October 2012. The petitioner was unrepresented at that hearing. On 2 November 2012, the learned judge dismissed the appeal under section 35 (2). The learned judge approached the application for leave on the basis that the petitioner must satisfy that his proposed grounds of appeal involved a question of law alone. It is apparent from the ruling that the learned judge was persuaded by counsel for the State to take the approach he did. The learned judge said:

> According to the State, the appellant's ground of appeal against conviction does not involve question of law alone, and as such, ask that his appeal against conviction be dismissed. I have carefully looked at the grounds submitted by the appellant, and I must say, I agree with the State. The appellant was correctly charged. It is not the role of the trial judge to call for witnesses in a voir dire. The assessors and the court have properly made their decision on the charge. The grounds submitted by the appellant does not involve questions of law. As to the sentence, the appellant had not shown that the sentence was wrong in law. Pursuant to Section 35(2) of the Court of Appeal Act, Chapter 12, I find the appellant's appeal against conviction is bound to fail because there is no right of appeal, and this application for leave to appeal against sentence is nothing but vexations and frivolous.

[9] Reading of section 21 (1) (a) shows that leave is not required if the proposed grounds of appeal raise 'a question of law alone'. The meaning of the phrase 'a question of law alone' has been considered in the English cases. In ***Robinson*** (1953) Cr App R 95, the English Court of Appeal discussed the meaning of the phrase in relation to section 3 of the English Court of Appeal Act 1907, which mirrors section 21 (1) of the Fiji Court of Appeal Act. In that case, Hallett J at p 99 adopted a strict view that 'an appellant has a right of appeal without leave only if he confines himself to a point of law'. A word of caution was given by Hallett J regarding a point of law that would compel the court to also entertain an appeal on a factual error without leave. Hallett J held that the procedure for leave on grounds of mixed law and fact, or fact alone as provided by section 3 (b) of the English Court of Appeal Act 1907 should not be frustrated by raising a point of law that is of tenuous nature. Adopting Hallett J's

interpretation, 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.

[10] In ***Pagett*** (1983) 76 Cr App R 279, the defendant used a young girl who had been living with him to shield himself from retaliation after firing at police officers who raided his home. The officers returned shots, and as a result, the girl was killed. The defendant was tried for murder of the girl but the jury convicted him of manslaughter. The defendant appealed on the ground that causation had not been established on the evidence. At p 287 of the judgment, the English Court of Appeal concluded that while causation is a question of both fact and law, a question whether a particular act which is a *sine qua non* of an alleged *actus reus* is also a cause of it is a question of law alone. The appeal was dismissed and a further application for leave to appeal to the House of Lords was also refused.

[11] ***In R v Majewski*** [1975] 3 ALL ER 296, the defendant engaged in a brawl in a public house. He was charged and tried on four charges of assault. At trial his defence was that he was adversely affected by alcohol and drugs on the evening of the assault, that he had no recollection of what had happened and that he had no intention of assaulting anyone. The defendant was convicted, and on appeal, the English Court of Appeal accepted that the existence of a defence was a question of law alone. The English Court Appeal at p 297 held that self-induced intoxication was not a defence for basic intent offences such as assault.

[12] In ***Lemon*** [1978] 67 Cr App R 70 at p 71 the English Court of Appeal concluded that determination of *mens rea* for a particular offence is a point of law. In that case, the question was whether subjective intent was an essential ingredient of the offence of blasphemous libel and the Court held it was not. In ***R v Thomson*** [1984] 3 ALL ER 565 the English Court of Appeal held that the issue of the Court's jurisdiction to try an offence was a question of law alone.

[13] In ***Skipper v R*** [1979] FJCA; Criminal Appeal No 70 of 1978 (29 March 1979), the Court of Appeal accepted the following questions as points of law alone:

Whether bad character or propensity evidence is admissible as evidence of fact relevant to an issue (p 5)?
Whether Indian hemp was a prohibited drug under the Dangerous Drugs Ordinance (p 6)?
Whether the charge in relation to importation of drug heroin should specify the type of heroin (p 8)?
Whether the defendant was convicted on a defective charge (p 9)?
What constitutes double jeopardy for the purpose of sentencing (p 12)?

[14] A summary of these cases show that questions that have been accepted as a point of law alone include causational issue in homicide cases, jurisdiction to try an offence, existence of a particular defence, *mens rea* for a particular offence, construction of a statute and defective charge. The list, however, is not exhaustive. In ***Hinds*** (1962) 46 Cr App R 327 the English Court of Appeal did not define the phrase 'a question of law alone', but suggested that the determination of whether a ground of appeal involves a question of law alone be made on a case by case basis.

[15] Appellate courts have always stressed that grounds of appeal must be particularized as to give sufficient notice of the alleged errors (***Vulaca v State*** - Majority Judgment [2011] FJCA 39; AAU0038.2008). If misdirection is complained of, it must be stated whether the alleged misdirection is one of law or fact, and its nature must also be stated. When a litigant is represented by counsel, it is counsel's duty to present competent grounds of appeal in accordance with the appellate rules. But it would be quite unrealistic to expect an unrepresented litigant like the petitioner to comply with all the appellate rules. In such cases, the rules of drafting are relaxed and the court must approach the applications for leave with care so that the unrepresented litigant's right of appeal is not frustrated.

Test for leave to appeal on mixed law and fact, or fact alone

[16] Like all exercise of judicial discretion, the decision to grant or not to grant leave should be made in a principled manner. A single judge hearing the application for leave may not have the benefit of the full transcript of evidence led at trial, but we are aware of the practice that has been adopted by the trial judges in Fiji to provide a copy each of the summing-up, judgment and sentence to the parties at the conclusion of the case in the High Court. This practice is consistent with the judge's obligation under

section 27 of the High Court Act Cap 13 and section 237 of the Criminal Procedure Decree to commit a judgment to writing in order that it can be read (***The State v John Miller & Ors*** Criminal Appeal No. CAV0008/2009). By making the basic trial documents available, the party who is aggrieved by a judgment or sentence can expeditiously assess the merits of an appeal before lodging one. A single judge considering applications for leave or bail pending appeal can make sound decisions by reference to those documents. It is desirable for a single judge to set out a brief summary of the evidence as contained in the summing-up and judgment when considering a leave application and how the facts complained of are being assessed.

[17] It is clear from the learned judge's ruling in this case that he did not make any individual assessment of whether the grounds of appeal against conviction were of law alone, for which leave was not required, or the grounds were of mixed law and fact, for which leave was required. If the learned judge would have made that assessment, then he would have come to the conclusion that those grounds which raised points of law alone could proceed as a matter of right, and for the grounds that raised points of mixed law and fact, he was required to consider leave. By concluding that the petitioner's appeal against conviction was bound to fail because his grounds did not involve a point of law alone is an error. We are conscious of the fact that counsel for the State appearing before the single judge compounded the error by making submissions to the effect that leave was required for grounds raising points of law alone. We make it plain that leave is not required for grounds raising points of law alone.

[18] If a single judge concludes that the grounds raise questions of mixed law and fact, then he or she should proceed to consider whether leave should be granted. It is settled that the test for leave to appeal against conviction on mixed grounds of law and fact in the Court of Appeal is whether an arguable point is being raised for the Full Court's consideration (***Singh v State*** [2010] FJCA 53; AAU0083.2010; ***Balemaira v State*** [2012] FJCA 31 AAU0098.2010). We must add that it is not appropriate to reach any conclusion on the merits of the proposed grounds when considering leave. That conclusion should be left to the Full Court.

Test for leave to appeal against sentence

[19] It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in ***House v The King*** (1936) 55 CLR 499 and adopted in ***Kim Nam Bae v The State*** Criminal Appeal No.AAU0015 at [2]. 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.

[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in ***Chirk King Yam v The State*** Criminal Appeal No.AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case.

Dismissal of appeals

[21] Dismissal of an appeal by a single justice is governed by section 35 (2) of the Court of Appeal Act. Section 35 (2) provides:

> If on the filing of a notice of appeal or of an application for leave to appeal, a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal.

[22] The manner in which the provision is drafted could lead to some confusion as to when the discretion to dismiss may be exercised. Earlier judgments of this Court have confirmed that dismissals can be made under section 35 (2) without hearing the appellant. In ***Raura v The State*** Criminal Appeal No CAV0010 of 2005S, this Court said at [17]-[18] that the power to dismiss without hearing the appellant should be exercised sparingly and only when one of these pre-conditions has been met:

(i) The appeal is frivolous, or
(ii) The appeal is vexatious, or
(iii) The appeal is bound to fail because there is no right of appeal or no right to seek leave to appeal.

[23] In ***Tubuli v The State*** Criminal Appeal CAV0009/06, this Court expounded on the principles in ***Raura*** by adding an obligation to give cogent reasons for summary dismissal of an appeal. The Court said at paragraph [25]:

> As it is clear that an appeal may lie to this Court against a decision of dismissal under S35(2), it not only desirable, but necessary, that the judge exercising that power of the Court of Appeal make clear the basis upon which it is being exercised. If an appeal is being dismissed as vexatious or frivolous then there should be a short statement of the reasons for that characterisation. If an application for leave to appeal out of time is refused, as appears to have been the case here, that should be made clear. If an appeal is dismissed on the basis that it is out of time and leave has not been sought, then that should be made clear, although in such a case an unrepresented petitioner might be invited to seek leave. If the appeal is dismissed because it does not involve "a question of law only" as required by S 22(1) then that should be stated and the basis for it briefly stated.

[24] While the duty to give cogent reasons was added to the principles for dismissal of an appeal under section 35 (2), neither ***Raura*** nor ***Tubuli*** attempted to set out the test for the frivolous or vexatious appeals. In England the test for a frivolous appeal is broadly laid down in terms of whether the ground of appeal is one that could not possibly succeed on argument (***Taylor*** [1979] Crim L R 649).

[25] Canadian cases have distinguished between frivolous and vexatious appeals. Wood JA stated in ***R v Hanna*** (1992) 3 BCAC 57:

> The word "frivolous", has a special meaning in the law. I am of the view that it is, or should be, reserved for those proceedings of which it could properly be said there was absolutely no possibility of success. To put it another way, a frivolous ground of appeal is one the unsuccessful outcome of which is so obvious that it cannot reasonably be said to be arguable.

[26] Similarly, in ***R v Drouin*** [1994] SJ No. 350 (QL) (Sask CA), Tallis JA said:

> A frivolous appeal is an appeal that one can say with confidence cannot possibly succeed.

[27] In ***Pickard v London Police Services Board***, 2010 ONCA 643 Watt JA summarised the test for frivolous or vexatious appeals at paragraph [19] as follow:

> A frivolous appeal is one readily recognisable as devoid of merit, as one having little prospect of success. The reasons may vary. A vexatious appeal is one taken to annoy or embarrass the opposite party, sometimes fuelled by the hope of financial recovery to relieve the respondent's aggravation.

[28] It is clear from these authorities that the standard used for evaluating 'frivolous appeal' appears to be a low standard. If an appellant is able to show that he or she has an arguable ground of appeal, then it cannot be said that the appeal is frivolous to justify dismissal. Vexatious appeals are much easier to detect. They are the ones that are filed to annoy or embarrass the opposite party.

[29] The third pre-condition for dismissal is that the appeal is bound to fail because there is no right of appeal. Cases that may fall in this category are interlocutory criminal appeals (s 3 (3) of the Court of Appeal Act) or appeals based on issues of mixed law and fact from the appellate jurisdiction of the High Court (s 22 of the Court of Appeal Act). If a single judge concludes that this pre-condition has been met, then it is necessary that the ruling state the reasons why there is no right of appeal

[30] It is also clear that the three pre-conditions set out in section 35 (2) are not additional considerations for leave applications. The pre-conditions are complimentary considerations. A dismissal can still occur in cases where there is a point of law raised, but the point of law has no prospect of success and is frivolous (***Sousau v The State*** Criminal Appeal No. AAU0020A of 2003S).

[31] The purpose of leave and section 35 (2) is to provide for a filtering process so that the criminal appeals can be disposed in a timely and efficient manner. Section 35 (2) should not be invoked to curtail a right of appeal. As was put by a single judge in ***Chand v State*** [2008] FJCA 53; AAU0035.2007 at [15]-[16]:

> The right of appeal as prescribed by Parliament must be a meaningful right. A meaningful right of appeal is achieved by a procedure that avoids clogging appeal rolls with frivolous and unmeritorious appeals. This is particularly so in our jurisdiction, where majority of appeals are filed by prisoners without any legal assistance. I am not suggesting that all appeals filed by the prisoners are frivolous, but experience has shown that some appeals are frivolous and unmeritorious, thus, clogging appeal rolls and denying resources to appeals that are meritorious.
>
> The leave procedure allows the Court to filter meritorious appeals from unmeritorious appeals so that meritorious appeals are allocated resources to achieve a full and meaningful hearing by a higher court. Leave procedure, in my view, is not intended to limit the constitutional right of appeal. To succeed in an application for leave to appeal, all that is required of the appellant is, to demonstrate arguable grounds of appeal.

[32] In the present case, the petitioner's appeal was properly brought before the Court of Appeal. But his right to appeal was curtailed by a wrong application of the law. In terms of section 7(2) of the Supreme Court Act 1998, a substantial and grave injustice may occur if the petitioner is not granted special leave to appeal to this Court. He has a right of appeal against section 35 (2) dismissal to this Court (***Tubuli's*** case) but his hurdle is that his petition for special leave is out of time by six months. His reason for the delay is that he was unaware of the period of limitation in filing an appeal to this Court. In any event, his handwritten petition has an endnote stating:

> This is the second time I am sending this letter. Register (sic) told me that they never received the first letter.

[33] Counsel for the State did not rebut the above claim of the petitioner. As far as prejudice to the State is concerned, we find it not to be significant, especially in light of the fact that we have concluded that counsel for the State appearing in the Court of Appeal is the co-author of the error that was made by the single judge of the appeal in dismissing the petitioner's appeal. While the discretion to enlarge time is exercised by considering 'the reasons for the failure to file within time, the length of delay, whether there is a ground of merit justifying the appellate court's consideration and prejudice to the opposing party' (***Kumar v State; Sinu v State*** [2012] FJSC 17 CAV0001.2009), the ultimate objective of that discretion is 'to avoid or redress any grave injustice that might result from the strict application of the rules of court' (***Rasaku v State*** [2013] FJSC 4; CAV009, 0013.2009). Since we have concluded that a case for special leave has been made out, we are satisfied that an enlargement of time should be allowed as a

measure of redress for the substantial and grave injustice that may occur if the petitioner's appeal is not heard.

Result

[34] We grant the petitioner's applications for an enlargement of time and special leave, and set aside the dismissal of his appeal by the single judge of appeal. We remit the matter of leave to be heard afresh by another single justice of appeal. The registrar will issue a fresh notice of hearing upon direction from the President of the Court of Appeal.

Hon. Chief Justice Anthony Gates
President of the Supreme Court

Hon. Madam. Justice Chandra Ekanayake
Justice of the Supreme Court

Hon. Mr. Justice Daniel Goundar
Justice of the Supreme Court

Solicitors:

Petitioner in Person
Office of the Director of the Public Prosecutions for the Respondent