IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 8(A) OF 1992
(High Court Criminal No. 16 of 1991)

BETWEEN:

SIVINIA KOROI — APPELLANT

-and

THE STATE — RESPONDENT

Appellant in person
Mr. I. Wikramanayake the Respondent

Date of hearing : 6th May, 1994
Date of delivery of judgment : 3rd June, 1994

JUDGMENT

This is an application to the full Court for leave to extend the time to apply for leave to appeal following refusal by the single judge.

By section 26(1) of the Court of Appeal Act, Cap 12, notice of intention to apply for leave to appeal should be given within thirty days of the date of conviction. If an application to apply out of time is refused by the single judge, the appellant is entitled under section 35 to have the application determined by the Court. The President of the Court has certified pursuant to section 6(2) it is impracticable to summon a Court of three judges to consider this application and appeal.

The applicant and another man pleaded not guilty to a joint charge of robbery with violence on 30 March 1991 and they were both convicted. Conviction and sentence were on 3rd October 1991 but it was not until 9th September the following year that application was made to apply for leave to appeal. The applicant's letter of that date stated grounds of appeal relating

only to sentence but was headed "Conviction and Sentence Appeal".

On 23rd October 1992 the single judge directed that a copy of the record be supplied to the applicant and he be given an opportunity to file clearer grounds. More detailed grounds were submitted on 26 January 1993 and make clear an intention to appeal against both conviction and sentence.

On 26th February 1993 the single judge refused leave.

There followed an application dated 13 December 1993 to have the matter considered by the full Court and, on 1st February 1994, the single judge advised the applicant to send in his reasons why the appeal should be allowed. That was done by letter dated 10 January 1994 (presumably intended to be February) which sets out further grounds of appeal.

All the various grounds submitted are either matters of fact or mixed fact and law and so leave is required.

It has been stated many times that when an extension of time is being sought, the Court will only grant the application if substantial grounds are given for the delay. It is also clear that the longer the delay, the heavier will be the burden to demonstrate good reason for the delay; R v Rhodes (1910) 5 Cr App R. 35, R v Lesser (1939) 27 Cr App R 69. The Court will also consider the likelihood of the appeal succeeding. In R v Marsh and Ors (1935) 25 Cr App R 49, Avory J stated that the rule and practice of the Court of Criminal Appeal was

> *"not to grant any considerable extension of time unless we are satisfied upon the application that there are such merits that the appeal would probably succeed."*

In his letter of 9 September 1992, the applicant explained the delay was the result of failure by his lawyer to [illegible]

sufficient interest in the appeal and to advise on appeal. He suggested that he only received a "verbal" (presumably "oral") notice from his legal adviser on 28 July 1992.

By that time, of course, almost ten months had passed since the conviction but he still delayed a further six weeks before putting in his application. With those facts before him, the single judge refused leave.

The request to have the application considered and determined by the Court was not written for a further nine and a half months. It was on Form 13 which should be sent by the Registrar under Court of Appeal Rule 41(2) whenever the single judge refuses leave.

Despite the inaccurate heading to Form 13, this is not an appeal from the single judge. Our function is not to consider the merits of his decision but to determine the application and, therefore, we must consider the total delay both before and after the refusal by the single judge.

At the hearing of the application, the Court was told that the initial delay between conviction on 3 October 1991 and 9th September 1992 was because counsel at the trial told the applicant he had put in a notice of appeal. Safe in that knowledge, the applicant had simply waited to hear when the appeal would be heard. He insisted that, following the decision of the single judge and receipt of Form 13, he had applied promptly.

The original appeal file shows there were no grounds filed but it did contain a memorandum dated 11 August 1992 from a senior prison officer referring to the fact he also believed counsel had filed grounds of appeal. Further perusal of the file showed that the duty under Rule 41 2, to send a copy of Form 13 had been overlooked by the Registry officials until the President of this Court had noticed the omission on 2 September

1993.

We therefore adjourned to obtain further information which now shows the following facts :

1. Counsel for the applicant at the trial agrees he told both the applicant and the prison authorities that he would only lodge the appeal if legal aid continued. We accept that such advice tendered immediately after conviction and sentence may have been improperly understood by the applicant and led him to believe an appeal had been commenced.

2. The information in the prison officer's memorandum was confirmed by one of the clerical officers in the prison as having been told to him by counsel's clerk. We have no evidence such information was passed to the prisoner but it is probable, if he made any enquiries about his appeal, he would have been told an appeal had been lodged.

Thus, there is good reason shown for the delay in the application to the single judge. The judge, of course, knew nothing of the matters that have influenced our decision when he refused leave.

3. The nine and a half months delay following the refusal of leave by the single judge is partially explained by the failure of the Court to send Form 13. Our enquiries take it further. The same day that the President noticed the oversight, a form was sent and received at the prison. Prison records show that it was then not passed to the prisoner until 13 December 1993. No explanation is given for that delay but the applicant completed and signed the form and handed it back on the same day. It was passed to the Court two days later.

Clearly, since leave was refused, the delay has been caused by factors entirely beyond the applicant's control

Before leaving this part of the case, we must express the hope that procedures in the Court registry are improved to ensure such a failure does not occur again. Similarly we ask that the prison authorities are reminded that all court documents addressed to a prisoner must be delivered to the prisoner without any delay.

In all the circumstances, we find the applicant has demonstrated good cause for the delay and grant both leave to apply out of time and leave to appeal.

Although it was suggested to the appellant that if he would prefer to be represented by counsel we would grant legal aid, he asked to have the appeal heard immediately relying on his written grounds.

These are found in his letters dated 26 January 1993 and 10 January 1994. The matters raised are confused and repetitive. We do not set them out here but they can be condensed to the following:

1. The appellant points out that, in the English translation of his interview under caution, the answer to Question 43; **"After you have used violence on the driver what were your intentions after that?"** is not recorded whereas there was an answer in the original Fijian. He suggests that is the result of a "deceitful plan" to prevent the assessors seeing it.

A check of the copy of the translation exhibited at the trial shows the answer has been added in manuscript and would therefore have been before the assessors.

He also suggests the translation of the word "nona" to "you" is an attempt to implicate him in the violence. We do not consider there is any merit in this point. The matter for the assessors to decide was the relevance and meaning of the appellant's answers. There can be no inference of guilt drawn

from a question unless it is accepted by the accused in his answer. In this case the suggestion the appellant had used violence was not accepted by him.

2. The appellant suggests there is no evidence to corroborate his alleged confession. Such confession does not need corroboration in law but, in any event, there is substantial corroboration in the evidence of four witnesses; Naila Wati, Semiti Duri, Balou Vituku and Richard Wise. How much weight, if any, should be placed on that evidence or the confession itself is a matter for the assessors.

3. The appellant raises a number of additional points involving the effect of particular parts of the evidence and, in some of those cases, the judge's directions on them.

We do not set them out here. They were all matters for the assessors to consider and evaluate. They had the evidence before them and came to a conclusion on it. It is no function of the appellate court, which did not see or hear the witnesses, to substitute its view of the facts for that of the assessors who did unless there has been a misdirection.

The two specific grounds of complaint about the summing up relate to the learned judge's direction on joint enterprise and the admissibility against one accused of evidence of the actions of the other .

We have scrutinised the summing up of Scott J with care It is concise, accurate and clear and we can find no reason for criticism

The appeal against conviction is dismissed

The appellant also appeals against the sentence of 4 years imprisonment.

His co-accused was sentenced to 10 years. He had a very bad record including convictions for robbery with violence in 1984 and 1987 for which he was sentenced to 4 years and 5 years respectively. The sentence in 1987 was passed a few months after his release from prison for the earlier robbery and the present offence was committed less than 6 months after his release from the second term.

The learned judge said of him:

"This is your third conviction for robbery with violence in identical circumstances. You have learned nothing from the sentence of imprisonment imposed on you before. You are a danger to the public."

When sentencing the appellant the judge stated he was satisfied on all the evidence his role was "somewhat lesser" and that his criminal record was "slightly less bad" than his co-accused. As a result, the sentence imposed on him is substantially reduced from that of his co-accused. It is clear the difference was not only based on the smaller degree of involvement and the lesser criminal record but on the particular circumstances of the other accused.

Our reading of the case endorses the judge's comment on the appellant's involvement but we consider his criminal record is substantially less than his co-accused.

In 1980 he was convicted of robbery with violence and sentenced to 3 years imprisonment. Since his release in early 1982 from that sentence and an additional month for club breaking he has not been back to prison. His subsequent court appearances are in 1984 for three offences of damage and criminal trespass and one in 1989 for damage. We feel he should have been given more credit for his change in attitude prior to the present offence.

Bearing that in mind and considering sentences in other cases of robbery with violence, we consider it is proper to allow the appeal against sentence and reduce it to one of 4 years imprisonment.

We therefore order

1. Time to apply for leave to appeal extended to this time

2. Leave to appeal against conviction and sentence granted

3. Appeal against conviction dismissed.

4. Appeal against sentence allowed. Sentence of six years imprisonment quashed and a sentence of four years substituted therefor.

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Mr Justice Gordon Ward
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