IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CRIMINAL APPEAL NO. AAU0033 OF 2000S
(High Court Criminal Case No.HAA 73/99)

BETWEEN:

TEVITA MALASEBA

Appellant

AND:

THE STATE

Respondent

APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

1. After a defended hearing at which the applicant represented himself, he was convicted in the Magistrates Court on 22 April 1999 and sentenced to a total of 8 years imprisonment on two counts of robbery under S.293(1)(a) of the Penal Code, briefly described as robbery with violence.

2. The applicant appealed to the High Court. It is evident that in due course he became aware the appeal had been dismissed. No formal record of the outcome is available, saved an unsigned note on the file stating that the "appeal against sentence" was dismissed on 30 June 1999. Assuming that reasons were given orally, no record of such reasons exists. The appeal may have been dismissed summarily under s.313 of the Criminal Procedure Code but if so, the certificate required by that section is not available. Papers may be missing from the file but whatever the explanation, this is unfortunate and such a situation understandably can leave a prisoner with a sense of injustice. I would like the applicant to know that I have carefully read the record of the proceedings in the Magistrates Court, and I am setting out my reasons for the way I have dealt with the appeal

in greater detail than normally.

3. The applicant lodged a document dated 12 September 2000 which reached the Court of Appeal on 22 September 2000. In October 2000 he sent a polite reminder saying he had not yet received a reply. However, so far as the file discloses no action was taken until January 2002. Again, this is unfortunate, and likely to produce the same kind of reaction noted earlier.

4. In dealing with the appeal I will do so on the assumption that (notwithstanding the note on the file) the appeal to the High Court proceeded as one against both conviction and sentence. Certainly the appeal lodged by the applicant covered both aspects. The assumption I make is in the applicant's favour, because unless there had been a previous appeal against conviction, an appeal to this Court against conviction, brought for the first time, would be incompetent on that ground alone.

5. A second appeal against conviction may only be brought on a ground involving solely a question of law, see section 22(1) of the Court of Appeal Act.

6. The first ground stated is that the Magistrate erred in law (and in fact), when he proceeded with the case without the support of any sufficient evidence. As the applicant pointed out there was no eye witness evidence as to his identity, as the robbers were masked. However, the applicant made a written statement, which was before the

Magistrate, admitting the commission of both offences. The Magistrate accepted the prosecution evidence that the statement was not the result of any threats to the accused. The accused did not give evidence. It is not possible to challenge the statement on grounds of inducements at this stage, as the applicant has endeavoured to do.

7. A further ground raised is that although each of the counts alleged that the applicant used personal violence at the time of the robbery, there was no evidence of actual violence. In the case of the robbery relating to Carpenters Fiji Limited this is clearly not correct. The chief prosecution witness gave evidence of violence. Violence does not require proof of injury, as the applicant supposed. In the case of the robbery of the Victoria Parade Service Station the evidence is not as compelling but the principal witness stated the robbers tried to hold him. While the evidence was not strong, in the absence of contradiction there was sufficient evidence to entitle the Magistrate to find as he did.

8. I have to add that the point is in any event completely without merit. It is clear from the evidence there were several persons together committing the robbery and that they were armed with knives, so in each case there was clear proof of an offence under section 293(1)(a) of the Penal Code.

9. The applicant's notice also complained about the sentence as being harsh and excessive. Under section 22 of the Court of Appeal Act, a second appeal against sentence can only be on a question of law alone. The applicant does not raise any

question of law, so in respect of sentence, the proposed appeal is invalid.

10. I have discussed the merits of the applicant's proposed appeal in detail but the immediate question is whether he should be given leave to appeal some 17 months out of time. In that respect he states he was not told he had a right of appeal to the Court of Appeal. As to that I comment that he could have found out in a much shorter time what his rights were. Not only is there that difficulty, but for the reasons I have given, there are no meritorious grounds for any appeal. To the extent that the applicant wishes to appeal his conviction on issues of fact, there is no such right of appeal. To the extent that he has raised a question of law (the absence of evidence of violence) for the reasons I have given this lacks the necessary evidential foundation. The attempt to appeal against sentence is incompetent for the reasons I have given.

11. In terms of section 35(2) of the Court of Appeal Act I consider the appeal is vexatious or frivolous, and bound to fail because there is no right of appeal or no right to seek leave to appeal. Accordingly, acting under that provision, I dismiss the appeal.

Dated at Suva this 24 January 2002.

COURT OF APPEAL

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Thomas Eichelbaum
Justice of Appeal

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