

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0033 OF 2000S
CRIMINAL APPEAL NO. AAU0023 OF 2002S
(High Court Criminal Case No.HAA0073 of 1999S)

BETWEEN:

TEVITA MALASEBE
JONE COLE SOVUI

Appellants

AND:

THE STATE

Respondent

Coram:

Tompkins JA, Presiding Judge
Davies, JA
Ellis, JA

Hearing:

Wednesday, 6th November 2002, Suva

Counsel:

Appellants in Person
Mr. P. Ridgway for the Respondent

Date of Judgment:

Friday, 15th November, 2002

REASONS FOR JUDGMENT OF THE COURT

Both applicants purported to apply under s.35(3) of the Court of Appeal Act (as amended in 1998) for rehearing of their appeals by a full Court. After hearing the applicants and Mr Ridgway for the Director of Public Prosecutions we dismissed the applications on 6 November 2002 and said we would give reasons in writing later. This we now do.

Section 35 provides inter alia:

“35 (1) A judge of the Court may exercise the following powers of the Court-

- (a) to give leave to appeal to the Court;***
 - (b) to extend the time within which notice of appeal or of an application for leave to appeal may be given;***
 - (c) to allow the appellant to be present at any proceedings in cases where he or she is not entitled to be present without leave;***
 - (d) to admit an appellant to bail;***
 - (e) to cancel an appellant’s bail on good cause being shown;***
 - (f) to recommend that legal aid be granted to an appellant.***
- (2) 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.***
- (3) If the judge refuses an application on the part of the appellant to exercise a power under subsection (1) in the appellant’s favour, the appellant may have the application determined by the Court as duly constituted for the hearing and determining of appeals under this Act.***

Each applicant was convicted in the Magistrate’s Court on two charges of robbery with violence on 22 April 1999 and sentenced to 8 years imprisonment. Each appealed to the High Court. Mr Malasebe’s appeal was dismissed on 30 June 1999 and Mr Sovui’s on the same day by another Judge. In Mr Malasebe’s case the matter reached this Court by way of an appeal against conviction and sentence in September 2000 and in

Mr Sovui's case by an appeal against conviction and sentence received in June 2002.

It follows that in each case leave to appeal out of time would have to be obtained before the appeal would proceed.

However in each case a Judge of this Court sitting above dismissed the appeal under s.35(2) quoted above. In Mr Malasebe's case Eichelbaum JA concluded his decision by saying:

"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."

In Mr Sovui's case Reddy P said:

"In terms of Section 35(2) of the Court of Appeal Act I consider the appeal is vexatious and frivolous and bound to fail because there is no right of appeal, and no right, therefore to seek leave to appeal. Accordingly, I dismiss the appeal."

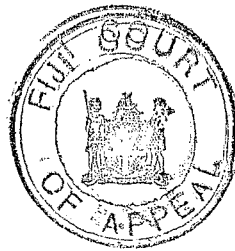
On the approach taken by both Judges it was unnecessary to consider the late filing of the appeals so no decision under s.35(1) was made.

S.35(3) only gives an appellant the right to a rehearing by a full Court where there has been a decision made of an interlocutory nature as set out in s.35(1). As the decision in question was a final determination under s.35(2), this Court has no power to

rehear the appeals. Neither appellant nor Mr Ridgway felt able to offer argument contrary to this view, and we accordingly dismissed the applications.

[Signature]
Tompkins JA, Presiding Judge

[Signature]
Davies, JA



[Signature] JA
Ellis, JA

Solicitors:

Appellants in Person
Office of the Director of Public Prosecutions, Suva for the Respondent