

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

CRIMINAL APPEAL NO. AAU0029 of 2005S
(High Court Criminal Action No. HAA136 of 2004S)

BETWEEN:

AIYAZ ALI

Appellant

AND:

THE STATE

Respondent

Coram:

Smellie, JA
Penlington, JA
Scott, JA

Hearing:

Friday, 18 November 2005, Suva

Counsel:

Appellant in Person
Ms A. Prasad for the Respondent

Date of Judgment: Friday, 25 November 2005, Suva

JUDGMENT OF THE COURT

- [1] The appellant has made an application for a hearing of an appeal by a full bench of this Court. At the end of the hearing Ms Prasad Counsel for the State drew the Court's attention to sections 22 and 35 of the Court of Appeal Act (Cap.12) Ms Prasad's submission was that there was no right in this case for the appellant to pursue his case before a full Court.
- [2] We now trace the course which this case has taken.

- [3] The appellant was charged in the Magistrates Court at Ba with house breaking and larceny. A defended hearing took place in Ba on 7 April 2004. At the hearing the appellant was not represented by Counsel. He conducted his own defence. At the conclusion of the hearing the Magistrate in a detailed judgment convicted the appellant and sentenced him to two years imprisonment such term to be consecutive on the term he was than serving namely seven years for other unrelated offences.
- [4] The appellant then appealed to the High Court against both conviction and sentence. The appeal came before Winter J. In a comprehensive judgment delivered on 14 March 2005 the judge dismissed both the appeals.
- [5] The appellant then appealed to this Court against both conviction and sentence. This, of course, was his second appeal.
- [6] An appeal to this Court after an earlier appeal to the High Court is confined to a question of law only. See section 22(1) of the Court of Appeal Act (Cap.12). And where the appeal is in respect of sentence, there is only a right of appeal if the sentence was an unlawful one or was passed in consequence of an error of law or where the High Court imposed, an immediate custodial sentence for non custodial sentence. See section 22 (1A) Court of Appeal Act (Cap.12). There is no requirement for leave either of the High Court or of this Court.
- [7] The appellant's appeal came before Ward P. sitting as a single Judge of this Court on 16 August 2005. The President acted under section 35 (2) which 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."(emphasis added)

[8] The President determined that there was no right of appeal. Implicit in this finding was that the appellant's second appeal did not raise a question of law as to the conviction and did not come within s.22(1A) as to the sentence and accordingly was bound to fail.

[9] The President did not act under s.35(1) which deals with other powers of a single Judge of this Court. It provides:

"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."***

[10] When the President held that there was no right to appeal the appellant indicated that he intended to apply for a hearing by a full bench of this Court; hence the present application.

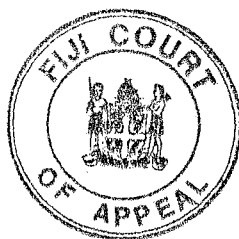
[11] Section 35(3) deals with applications to a full bench of this Court. It provides:

"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."(emphasis added).

- [12] In this case the President acted under section 35(2) and not section 35(1). Accordingly the appellant is not entitled to apply for a full bench. His appeal was at an end when the President held that there was no right of appeal. We therefore uphold Ms Prasad's submission. The present application was misconceived.
- [13] Nonetheless, we record that ahead of Ms Prasad's submission we allowed the appellant to engage the Court for the best part of two hours in advancing to us matters he considered to be issues of law. The four issues which he raised were:
- 1) That he was not given a right to legal representation.
 - 2) That his caution statement to the police was not taken voluntarily.
 - 3) That his constitutional rights in terms of access to a lawyer and to access a telephone at the time of interview were breached;
 - 4) That a sentence of two years imprisonment for this particular offence was harsh and excessive because it was ordered to be served consecutively rather than concurrently with the sentences totalling seven years which he was already serving.
- [14] During the course of his presentation the appellant displayed a considerable knowledge of procedure and points which could be taken. As the hearing proceeded we endeavoured to explain to him that the matters that he raised related exclusively to matters of fact. At the end of the day he failed to persuade us that there was any issue of law which could have been considered by a full bench even if he had a right to open those matters before us. Ward P. was correct in finding that the appellant had no right of appeal.
- [15] As we have stated above the application by the appellant for the hearing by a full bench of this Court was misconceived. The application is accordingly dismissed.

Robert Smellie

Smellie, JA



John Penlington

Penlington, JA

John Scott

Scott, JA

Solicitors:

Appellant in Person

Office of the Director of Public Prosecutions, Suva for the Respondent