

**IN THE COURT OF APPEAL, FIJI ISLANDS**

**Criminal Appeal AAU0024 of 07  
(High Court Criminal Action HAA47 of  
2006)**

**BETWEEN:**                              **ILIVASI NAVUNICAGI**                              Applicant

**AND**                              **THE STATE**                              Respondent

**Counsel:**              Applicant in person  
                              A Driu for respondent

**Hearing:**              30 March 2007

**Ruling:**                30 March 2007

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**R U L I N G**

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- [1] This is an application for leave to appeal out of time.
- [2] The applicant and his co-accused appeared in the Magistrates' Court on a joint count of shop breaking, entering and larceny, contrary to section 300 of the Penal Code. The offence was committed on 7 March 2006. The accused both pleaded guilty on 9 March 2006 and were sentenced the same day. On 27 March 2006, the applicant appealed to the High Court against his sentence.
- [3] The High Court file shows that the Magistrates' Court record was received by the High Court on 19 April 2006 and the appeal was allocated to Winter J. The minute then has an undated note by the learned judge; "First call 26 May". This was followed by a Notice of Hearing issued on 1 May 2006 together with, on the same date, a production order to the officer in charge of Suva Prison.

[4] According to the applicant's notice of appeal, he escaped from prison on 13 May 2006 not knowing that his appeal had been listed for hearing. On the documents before the Court, that would appear likely to be correct. The documents on the High Court file show that the notice was served on the DPP's office on 3 May 2006 but there is no evidence to say that the applicant's copy was served at all. However, the production order was served on the Suva prison office on 11 May 2006.

[5] The appeal was called on 26 May 2006. The judge's note shows there was no appearance by the appellant and continues:

- "1. Appellant 'escaped'
2. Adj in his absence to 23 June 2006
3. Order production
4. If no appearance Appeal struck out."

[6] The printed minute sheet for 23 June 2006 records (incorrectly) that the appellant appeared "in person" and the judge's manuscript note states; "Adj to 26." No reason is given for the adjournment but it would appear probable that it was for some reason other than the failure of the appellant to appear because, on 22 June 2006, the High Court had already issued a notice of adjourned hearing to 26 June 2006. There is no evidence that was served on either party although the respondent appeared on the adjournment.

[7] On that date the minute again incorrectly records the appellant as being present in person. The respondent was represented and the judge's note records:

- "1. No appearance by the appellant for the second time
2. ORDERS:  
Appeal struck out for abandonment[?] by non appearance (1050)"

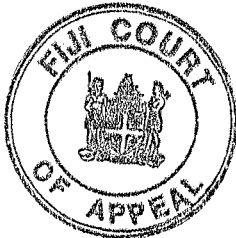
[8] The word abandonment is unclear.

- [9] (I note in passing that the copy of the minute sheet for that day, typed for inclusion in the record for this application, avoids the difficulty in reading the judges writing of that word by recording the order as “Appeal struck out for non-appearance (1050)”. It also corrects the earlier part to state that there was no appearance by the appellant. Both corrections were wrong and should not have occurred. Every transcription for appeal records must accurately record what is in the original, including any errors or incorrect entries.)
- [10] It appears the applicant was back in custody on 14 August 2006 and he tells the Court that he wrote to ask about his appeal soon afterwards. He heard nothing until February 2007 when he wrote to the High Court asking to have his appeal re-listed. It is that notice which was treated as the application to this Court for leave to appeal out of time.
- [11] Whether there was such a notice received by the High Court is not recorded. I accept it might not have been accepted as the appeal had been dismissed but, even if that was the case, it should have been recorded on the High Court file.
- [12] The High Court file shows that the only notification of the result of the appeal issued by the High Court was a memorandum from the officer in charge, High Court Criminal, Suva to the Magistrates’ Court, Nasinu returning the file and advising:
- “On 26<sup>th</sup> June 2006 the above appeal was struck out due to non–appearance of the appellant in court on three call dates”
- [13] That was once again an incorrect statement.
- [14] As has been said, the applicant had only filed a letter to the High Court asking to have his appeal re-listed. However, at the hearing today, he filed his grounds of appeal against sentence. This is a second appeal and, by section 22(1A) of the Court of Appeal Act, the appeal against sentence may only be pursued on the grounds that it was unlawful or passed in consequence of an error of law. The

grounds filed by the appellant raise no such basis of appeal and I refuse leave to appeal on those grounds. However, I give leave to appeal on the question of the propriety of the judge striking out the appeal when he had no evidence that the appellant had been notified of the date of either hearing and made no inquiry whether he was still at large when the appeal was dismissed. Should he succeed on those grounds and the appeal be sent back for hearing, he would then be able to raise the grounds he has submitted today.

[15] I order that:

1. the appellant's letter of grounds of appeal be copied and served on the respondent forthwith;
2. the original Magistrates' Court file be sent to this Court within five days and remain attached to this appeal file.
3. the record shall be prepared within 14 days from today and shall include photocopies of all notices of hearing or adjourned hearing, affidavits of service, correspondence on the High Court file and the judge's minutes of the three hearings.
4. the respondent shall file written submissions within 21 days of receiving the record
5. the appellant shall file any submission in reply if he wishes to do so with 21 days thereafter
5. The case shall be listed in the June sitting of this Court.



A handwritten signature in cursive script, appearing to read "Gordon Ward".

Gordon Ward  
PRESIDENT