

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

Criminal Appeal No. AAU 0024 of 2008

BETWEEN:

VILIVE NAVUKAILOMALAGI

AND

THE STATE

Applicant in Person

Ms Andie Driu for the State – Respondent.

Date of Judgment: 23 May 2008

JUDGMENT

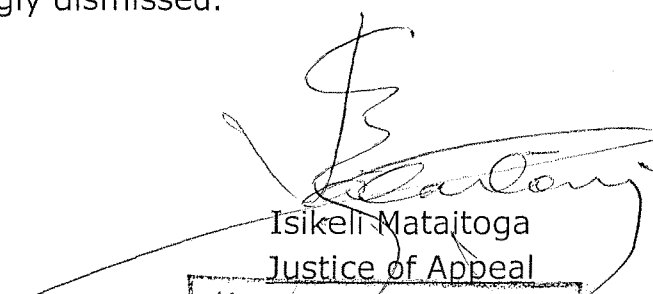
1. VILIVE NAVUKAILOMALAGI, on the 28 November 2006 you pleaded guilty to one count of Robbery with Violence, contrary to section 293(1) of the Penal Code Cap 17 in the Suva Magistrates Court. When the facts were outlined to you on 29 November 2006, you admitted it, following which you were convicted accordingly.
2. On 12 December 2006 you were sentenced to 4 years imprisonment. You were given 28 days to appeal against your sentence to the High Court. You did not appeal within the prescribed period required by section 310(2) of the Criminal Procedure Code Cap 21. Instead on 11 September 2007 you filed a request for leave to appeal out of time.

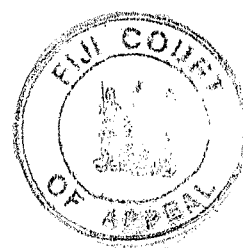
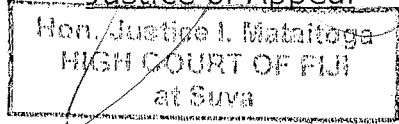
Your request was approximately 10 months out of time. The High Court granted you leave.

3. Your appeal was heard by the High Court on 23 November 2007 and it was dismissed in a written ruling delivered on 29 November 2007.
4. This is your second appeal. You filed your appeal against the High Court judgment on 25 February 2008.
5. The first issue that is noted by this Court is that you leave to appeal is untimely. It is late by approximately 2 months. If your appeal was timely it should have been filed no later than 29 December 2007. Even if we grant the fact that the registry are usually closed for 2 weeks in December 2007, your appeal is still late by a month.
6. But more importantly in this case are the issues you wish to argue on appeal and whether they meet the requirement of the relevant procedural law that must be satisfied before leave may be granted.
7. Section 22(1) of the Court of Appeal Act restricts appeal to this court from a judgment of the High Court sitting in its appellate jurisdiction on issues of law only: ***Ovini Tuitoga v The State [2007] FJCA 44***. In the context of the Leave sought through this application the grounds to be pleaded must go to the error of law in the sentence passed by the learned Magistrate and upheld by the Learned Judge on appeal to the High Court.
8. In considering whether to grant you leave to appeal out of time I considered the following issues:
 - Length of the delay;
 - Good cause for the delay;
 - Issues of law raised [if any];
 - Likelihood of success on appeal;
 - Prejudice that may be caused to the applicant if leave not granted

[see: Milio Nakorolevu v. The State [2007] FJCA 42.]

9. Based on the facts here, I am prepared to waive the first of the two points above. This is so because the delay is short and someone in the position of the applicant with limited knowledge of law and court processes would ordinarily be expected to take some time to find their way around court requirements. There is no prejudice to the respondent as well in conceding those issues.
10. The major obstacle with this application is that there is no right of appeal to a judgment of the High Court sitting in its appellate jurisdiction, to this court against severity of sentence: *section 22(1) Court of Appeal Act Cap 12*. Sentence may be appealed against provide the grounds of appeal go toward the issues of lack of jurisdiction in passing sentence or upholding one or the sentence was passed in error of law.
11. You have filed two sets of written submissions and another was read to the court today at the hearing. In reviewing the grounds of appeal filed in support of this application, there are no issues of law raised with regard to the lawfulness of the sentence.
12. The grounds advanced all go to support the core complain of the applicant, namely, that the sentence of 4 years imprisonment passed by the learned Magistrate was harsh and excessive. The applicant has no right in law to appeal on that basis to this court.
13. I therefore refuse to grant leave to appeal out of time. The application is accordingly dismissed.


Isikeli Maitaitoga
Justice of Appeal



At Suva

23 May 2008