

IN THE COURT OF APPEAL, FIJI ISLANDS
APPLICATION FOR LEAVE TO APPEAL
FROM THE HIGH COURT OF FIJI

Criminal Appeal No. AAU0017/2008
[High Court Criminal Appeal No: HAA 57/2007]

BETWEEN:

VERETARIKI VETAUKULA

Appellant

AND:

THE STATE

Respondent

Coram: Hickie JA
Date of Hearing: 16 May 2008
Counsel: Appellant in person
Mr A G Elliott for the Respondent
Date of Decision: 29 May 2008

DECISION

[1] On 22 January 2007, the Appellant pleaded guilty in the Magistrates Court at Nasinu to one count of rape, contrary to sections 149 and 150 of the Penal Code, Cap 17. He was convicted and sentenced to 10 years imprisonment.

[2] The Appellant appealed (by way of letter dated 27 February 2007) against the sentence imposed upon him arguing in essence that the trial magistrate did not give proper weight to his guilty plea.

[3] The Appeal was heard on 26 September 2007 by Justice I. Mataitoga sitting in the High Court at Suva.

[4] On 5 October 2007, Justice Mataitoga allowed the appeal and reduced the Appellant's sentence making the following Orders:

1. *The Appeal against sentence partially succeeds;*
2. *The sentence passed in the court below is vacated;*
3. *The amended sentence of 6 years imprisonment is substituted and it will be effective from the date the current sentence commenced.*

[5] On 29 November 2007, the Appellant appealed by way of handwritten letter making **Application for Leave to Appeal out of time** his sentence (such letter being typed on 14 January 2007 and forwarded on 7 February 2008 by the OIC Minimum Security Prison to the Registrar of the Court of Appeal). That letter of Appeal was received by the Registry of this Court on 12 February 2008 some four months after Justice Mataitoga's judgment and **three months outside the 30 DAYS requirement pursuant to Section 26(1) Court of Appeal Act, Cap.12, 1978 (as amended by the Court of Appeal (Amendment) (No.2) Act 1998, Act No. 38 of 1998)** which states:

"Time for appealing

26.-(1) Where a person convicted desires to appeal under this Part to the Court of Appeal, or to obtain leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of Court within thirty days of the date of conviction or decision. Except in the case of a conviction involving sentence of death, the time, within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Appeal."

[6] The Applicant appeals against the sentence imposed upon him arguing in essence that the trial magistrate did not give proper weight to his guilty plea.

[7] In relation to the actual Notice of Appeal, this is a second appeal pursuant to **Section 22(1) Court of Appeal Act, Cap.12, 1978 (as amended by the Court of Appeal (Amendment) (No.2) Act 1998)** which states:

"22.-(1) Any party to an appeal from a magistrate's court to the High Court may appeal, under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only."

[8] Further, Section 22(1) must be read in conjunction with **Section 22(1A)(b) Court of Appeal Act, Cap.12, 1978 (as amended by the Court of Appeal (Amendment) (No.2) Act 1998, Act No. 38 of 1998)** which states:

"(1A) No appeal under subsection (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground-

(a) that the sentence was an unlawful one or was passed in consequence of an error of law; or

(b) that the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence."

[9] In addition, the notice of appeal can be dismissed pursuant to **Section 35(2) Court of Appeal Act, Cap.12, 1978, as amended by the Court of Appeal (Amendment) Act 1998, (Act No, 13 of 1998):**

"Powers of a single judge of appeal

35 (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."

[10] Thus, Mr Vetaukula must be able to demonstrate:

- (a) That there is good reason why he should be granted leave to appeal out of time; and
- (b) That on the filing of his notice of appeal that the appeal against sentence is a question of law or otherwise the Court may determine that his appeal is vexatious or frivolous or is bound to fail because there is no right of appeal, and thus the Court may dismiss the appeal.

THE NOTICE OF APPEAL

[11] Mr Vetaukula first appeared before me on 23 April 2004 at 9.30am when the Court was handed a letter sent by way of facsimile transmission that morning from Wilisoni Kuruisaqila from the Office of the Director of Public Prosecutions, seeking to have the matter re-listed due to a shortage of staff. Mr Vetaukula advised the Court that he wished to have his application adjourned when the DPP could also appear. The matter was then later re-listed on 7 May 2008 before me. Ms Drew appeared on that date for the DPP and explained that, unfortunately, the matter had not been allocated to any member of their staff. The matter was then adjourned for hearing on 16 May 2008 (with the consent of Mr Vetaukula). On 16 May 2008, the matter proceeded before me with Mr Elliott attending on behalf of the DPP.

[12] Even though Mr Vetaukula indicated to the Court that he had a good command of English, it was found necessary to have the Court Officer who was in attendance to interpret because of language and/or hearing difficulties experienced by the Court and so that Mr Vetaukula's responses could be clarified and confirmed.

[13] Mr Elliott on behalf of the DPP conceded that the handwritten letter of 29 November 2007 was only three weeks out of time and was not going to press the issue particularly that the typed letter was received by the Registry of this Court on 12 February 2008 some four months after Justice Mataitoga's judgment and three months outside the 30 DAYS requirement.

THE HEARING OF THE GROUNDS FOR LEAVE

[14] The hearing then proceeded by way of the Court reading out to Mr Vetaukula his two grounds of appeal and asking Mr Vetaukula whether he wished to say anything in support of each particular ground.

[15] **The First Ground reads:**

"Sir, the reason for my late appeal is that I am not well educated and nor so well versed with the legal system. After seeking advice from some fellow inmates then I changed my mind for appeal on the sentence which was imposed by the Suva high court."

[16] Mr Vetaukula did not want to add anything further to this Ground.

[17] **The Second Ground reads:**

"This is the first time for me to serve a long custodial sentence, I beg your honourable office if I could be given a chance to do so."

[18] Mr Vetaukula noted that it was his first time serving such a sentence and he was finding prison life very hard. He was hoping that the term of imprisonment could be reduced "because I am getting old".

New Grounds

[19] Mr Vetaukula then tendered two documents which between him and the DPP, the Court was able to ascertain that he was not changing his plea of guilty, he had been assisted by another person in prison with these two documents and that he reduced them to the following general propositions:

- (a) That the sentence of six years was harsh and excessive;
- (b) That since he has been in Prison he has changed because it is a difficult life in prison;
- (c) That the sentence should be in line with other similar sentences for such an offence.

[20] Mr Elliott for the DPP submitted:

(a) That section 22 *Court of Appeal Act* governs this appeal and referred the Court to ***Prem Chand v. Reginam*** (1976) 22 FLR 100 which was dealt with under the old section 21. He submitted that the sentence was lawful.

(b) That he referred the Court to the Ruling on Leave to Appeal of Pathik J in ***Tomasi Vuniyacawa –v- The State*** [Criminal Appeal No. AAU0074/07] and Court of Appeal Judgment ***Rajendra Chaudhary –v- The State*** [Criminal Appeal No. AAU0006/99S].

(c) That the sentence is not manifestly excessive and if it does not meet the test of an error of law then leave should not be allowed.

DECISION

[21] **That Leave is refused for the reason that it has not been shown *that the sentence was an unlawful one or was passed in consequence of an error of law.***

[22] The Court notes that it spent sometime during the leave hearing explaining to the Appellant the significant reduction he had been granted on Appeal by Justice Mataitoga particularly for his plea of guilty. At the same time, the Court noted that the offence was one which involved a breach of trust because the victim was the Appellant's niece and that he used a weapon (a cane knife) to subdue and threaten her.

[23] The Court has noted, however, Mr Vetaukula's genuine statement as to his "finding prison life very hard" and that he is "getting old". It has also noted Justice Mataitoga's remarks in sentencing from the Magistrate that "the Appellant was seeking spiritual guidance because he wants to be free from his misdeeds". It is hoped that this can be maintained during his term of imprisonment and, with remissions for good behavior, Mr Vetaukula will eventually return to his community, seek the forgiveness of his niece and relatives, and recommence a productive life.

[24] The Court wishes to acknowledge the assistance given by Mr Elliott of the DPP who displayed the utmost fairness in his presentation.

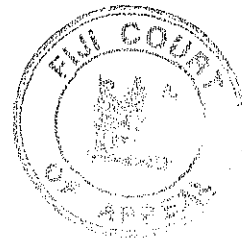
ORDERS

[25] This Court makes the following Orders:

1. That Leave is granted to seek Leave to Appeal out of time.
2. That Leave to Appeal is refused.



The Hon. Thomas V. Hickie
Judge of Appeal



Solicitors:

Appellant in Person

Office of the Director of Public Prosecutions for Respondent