

**IN THE COURT OF APPEAL, FIJI ISLANDS**  
**APPLICATION FROM THE HIGH COURT OF FIJI**  
**IN ITS APPELLATE JURISDICTION IN CRIMINAL CASES**

Criminal Appeal No. AAU0022/2008  
[High Court Criminal Appeal No: HAA120 -121/07]

**BETWEEN:**

**JOELI VULAWALU**

**Appellant**

**AND:**

**THE STATE**

**Respondent**

**Coram:** Hickie, JA

**Date of Hearing:** 15 August 2008

**Counsel:** Mr F. Vosarogo for the Appellant  
Mr A. Rayawa for the Respondent

**Date of Decision:** 11 September 2008

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**DECISION**

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[1] On 3 September 2007, the Appellant pleaded guilty in the Magistrates Court at Suva on File No.984/07 to one count of "Robbery with Violence", contrary to Section 293 (1)(b) of the Penal Code, Cap. 17 and one count of "Unlawful Use of Motor Vehicle", contrary to Section 292 of the Penal Code, Cap. 17. On 7 September 2007, he was convicted and sentenced by Magistrate A. Rokotnaviti to six years imprisonment on the first offence, four months on the second to be served concurrently making a total of six years imprisonment.

[2] On the same date as above, the Appellant also pleaded guilty in the Magistrates Court at Suva on File No.752/07 to one count of "Robbery with Violence", contrary to Section 293 (1)(b) of the Penal Code, Cap. 17 and was also sentenced on 7 September 2007, where he was convicted and sentenced by Magistrate A. Rokotinaviti to four years imprisonment to be served consecutively to the two offences under File No.984/07. This then made a total sentence of 10 years imprisonment for both files. The maximum penalty for the first and third offences is life imprisonment.

[2] The Appellant appealed to the High Court of the Fiji Islands, Criminal Jurisdiction, at Suva arguing two grounds of appeal.

[3] The Appeal was heard and dismissed by Justice I. Mataitoga on 1 February 2008 with written reasons for his decision delivered on 8 February 2008 wherein His Lordship made the following Orders:

***"(i) The appeal against conviction has no merit and is dismissed;***

***(ii) The appeal against sentence succeeds, the sentence is varied from a total of 10 years imprisonment to 7 years imprisonment effective from 7 September 2007."***

[4] The Appellant has now further appealed (by way of a handwritten letter dated 23 January [sic] 2008 as well as a typed letter of 23 February 2008 received by the Registry of the Fiji Court of Appeal on 4 March 2008) petitioning for an Application of Appeal for Leave to Appeal against his conviction arguing eight grounds of appeal. The Application is, therefore, within the 30 day time-limit and does not require leave to extend the time within which the notice of appeal can be filed.

[5] 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, Act No. 38 of 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.**"*

- [6] 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."*

- [7] 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."***

- [8] Thus, Mr Vulwalu must be able to demonstrate 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**

- [9] Mr Vulwalu appeared before me on 8 May 2008 and the matter was adjourned so that he could apply for Legal Aid. The matter was adjourned on 27 May and 20 June

2008 to allow the Applicant to clarify whether the Legal Aid Commission would be appearing on his behalf and, if so, to also clarify the grounds of Appeal.

[10] The Director of Legal Aid filed on 15 August 2008 an *“Amended Notice of Appeal on Question of Law Alone”* as follows:

*“1. THAT the learned Judge erred in law when he failed to properly apply consider the totality principle that was necessary to be applied in all the circumstances of the cases.*

*2. THAT the cumulative sentence of 7 years was harsh and excessive and failed to properly consider whether his role in the offences justified the imposition of such sentences.”*

### **THE HEARING OF THE GROUNDS FOR LEAVE**

[11] The Director of Legal Aid appeared on 15 August 2008 on behalf of the Appellant and Mr Rayawa appeared on behalf of the Office for the Director of Public Prosecutions.

[12] In relation to the First Ground regarding totality, the Director noted that Justice Mataitoga had reduced the sentence from 7 years to 10 years but submitted that there was still an issue of law (albeit thin) and some reduction was appropriate.

[13] In relation to the Second Ground, the Director submitted that the Appellant was still serving 7 years imprisonment and perhaps he should have been sentenced for 6 years on the first offence and 4 years on the second offence to be served concurrently making an overall sentence of 6 years.

### **[DPP’s Submission in Reply**

[14] Counsel for the DPP submitted as follows:

(a) That in relation to Ground 1 there is no error on the totality principle and the reduction of 3 years which Justice Mataitoga gave was substantive enough;

(b) In relation to Ground 2, 7 years is the starting point for a charge of Robbery with Violence towards the lower end.

## DECISION

[15] Leave is refused in relation to Grounds 1 and 2 for the following reasons:

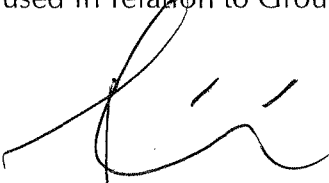
- (a) Mr Vulawalu must be able to demonstrate that the appeal against sentence is a question of law or otherwise the Court may determine that his appeal is vexatious or frivolous or is bound to fail because there is no right of appeal, and thus the Court may dismiss the appeal: **Section 35(2) *Court of Appeal Act***.
- (b) The Court agrees with the submissions of Counsel for the DPP, that is, there is no error on the totality principle and the reduction of 3 years which Justice Mataitoga gave was substantive enough and further, that 7 years is the starting point for a charge of Robbery with Violence towards the lower end.

## ORDERS

[16] This Court makes the following Orders:

1. Leave to appeal is refused in relation to Grounds 1 and 2.



  
The Hon. Thomas V. Hickie  
Judge of Appeal

### Solicitors:

Legal Aid Commission

Office of the Director of Public Prosecutions for Respondent