

**IN THE COURT OF APPEAL**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO: AAU0104 OF 2011**  
**(H Ct Case NO. HAC 096/09S)**

**BETWEEN** : **TADEO QARASAUMAKI** *Applicant*

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

**BEFORE** : **Mr. Justice Daniel Goundar**

**COUNSEL** : **Ms N. Nawasaitoga for Applicant**  
**Ms J. Prasad for Respondent**

**Date of Hearing** : **21 November 2013**

**Date of Ruling** : **28 November 2013**

**RULING**

[1] This is an application for an extension of time to seek leave to appeal against conviction on grounds of mixed law and fact pursuant to section 21(1)(b) of the Court of Appeal Act. Leave to appeal out of time is a discretionary matter. A single justice of appeal may exercise that discretion under section 35 (1) of the Court of Appeal Act.

[2] The discretion to grant an extension of time is governed by considerations such as:

- (i) the reasons for delay,
- (ii) the length of delay,
- (iii) whether the grounds are arguable before the Full Court,

- (iv) prejudice to the opposite party, and
- (v) the overall injustice if the appeal is not heard (*Kumar v State; Sinu v State* CAV 0001.2009; *Rasaku v State* CAV 009, 0013.2009).

[3] The third consideration is also the test for leave to appeal on a ground of mixed law and fact (*Simeli Naisau v State* CAV 0010/13).

[4] Following a trial, the applicant was convicted of one count each of robbery with violence and receiving stolen property in the High Court at Suva. On 23 May 2011, he was sentenced to a total term of 10 years' imprisonment for both offences. He filed his Notice of Appeal on 7 October 2011 in person. The Notice is late by 3 ½ months and the reason for the delay is that the applicant was unaware of the statutory 30-day appeal period. The delay is significant and the applicant's ignorance of the law and its procedures is not a good excuse (*Rasaku's* case at [31]).

[5] Turning to the merits of the appeal, the applicant advances two grounds of appeal against conviction:

(i) The learned trial judge erred in law when he did not give the *Turnbull* directions to the assessors since the identification was an issue thereby causing a substantial miscarriage of justice.

(ii) The appellant was prejudiced because he was unrepresented thereby causing a substantial miscarriage of justice.

[6] The *Turnbull* directions on identification are applicable in a case against an accused that is wholly or substantially based on one or more identifications of the accused which the defence alleges to be mistaken (*R v Turnbull* [1977] 63 Cr. App R. 132). In the present, the applicant's conviction was not based on a witness's account of identification but on his confession to the police, which the trial judge ruled admissible in a *voir dire*. Clearly, the *Turnbull* directions were not applicable in this case. The first ground is not arguable.

- [7] The second ground complains of lack of legal representation at trial. According to the court record, the applicant knew of his right to counsel. Judge's notes dated 27 November 2009 indicate that the applicant informed the trial judge of his status:

I wish to apply for legal aid; if legal aid is refused, I will defend myself.

- [8] Subsequently, legal aid was refused and the trial commenced on 10 March 2011. By this time, the case has been pending in the system for nearly three years. Perusal of the judge's notes show that on more than one occasion the applicant had informed the trial judge that he was going to represent himself after his application for legal aid was refused.

- [9] During a pre-trial hearing, the prosecutor informed the trial judge that the only incriminating evidence against the applicant was his confession made under caution. The trial judge obtained the objections to the confession from the applicant and held a *voir dire* to determine its admissibility. After assessing all the evidence, the trial judge ruled the confession admissible. There is no suggestion that the applicant was handicapped due to lack of legal representation to carry out an effective cross-examination at the *voir dire* or the trial proper, or to adequately present his defence.

- [10] It is well settled law that the right to counsel is not an absolute right and the absence of counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted (*Kean v State*, Cr. App. No. AAU0018/08). When lack of legal representation is raised as a ground of appeal, the question for the appellate court is whether the trial miscarried as a result of the accused being unrepresented (*Ledua v State*, Cr. App. No. CAV 004/07).

- [11] Counsel for the applicant submits that the applicant was prejudiced due to the seriousness of the offence and his lack of legal knowledge. With respect, lack of

legal knowledge and seriousness of the charge are not sufficient basis to conclude that the applicant's trial miscarried. There is nothing to suggest that the applicant was not accorded his fundamental trial rights. He was indeed convicted after due process and there cannot be an arguable point that he was prejudiced due to lack of legal representation.

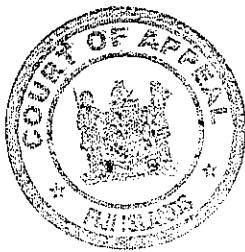
- [12] I am satisfied that the proposed grounds of appeal are not arguable before the Full Court. I am further satisfied that the grounds of appeal have no prospect of success. The grounds are frivolous within the meaning of that term as defined by the Supreme Court in *Naisua's* case.

### **Result**

- [13] Application for an extension of time to appeal is refused.

Application for leave to appeal on grounds of mixed law and fact is refused.

Appeal dismissed under section 35(2) of the Court of Appeal as being frivolous.



*Daniel Goundar*

**DANIEL GOUNDAR**  
**JUDGE**

### **Solicitors:**

Office of the Legal Aid Commission for Applicant

Office of the Director of Public Prosecutions for Respondent.