

**IN THE COURT OF APPEAL  
AT SUVA**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. AAU 0054 OF 2011**

**BETWEEN** : **SAMISONI TUINUKUNUKU**  
**APPLICANT**

**AND** : **THE STATE**  
**RESPONDENT**

**COUNSEL** : **Applicant in Person**  
**Ms M. Fong for Respondent**

**Date of Hearing** : **27 June 2013**

**Date of Ruling** : **5 July 2013**

**RULING**

[1] On 23 January 2009, the applicant pleaded guilty to 34 counts of fraud related charges in the Magistrates' Court. Before he could be sentenced, the applicant absconded bail and was at large for nearly one year until 20 January 2010, when he was apprehended on a bench warrant. The applicant appeared before a different magistrate. He maintained his plea of guilty to the charges. On 9 February 2010, he was sentenced to a total term of 5 ½ years imprisonment.

[2] He appealed against his sentence to the High Court. One of his complaints was that his sentence was erroneously increased by the learned magistrate on the ground that he had re-offended while serving a suspended sentence.

[3] The fraud offences were committed between 4 December and 24 December 2008. By the time he was sentenced in February 2010, the applicant was serving a suspended sentence in an unrelated case. The suspended sentence was imposed on 26 October 2009. So when the learned magistrate sentenced the applicant on 9 February 2010, she mistakenly took into account the fact that the applicant had re-offended while serving a suspended sentence as an aggravating factor to increase the sentence.

[4] The applicant takes objection to the following sentencing remarks of the learned magistrate:

“16. In the circumstances of this case, I observe that YOU are not a First offender and further the present offences that YOU are charged with, have been committed whilst YOU were serving a suspended sentence.

17. I, therefore, increase your sentence to three (3) years.

[5] On appeal, the learned High Court judge dealt with the complaint in the following manner:

“The Accused applicant is correct by saying that the Magistrate erred in stating the offence was committed within 3 months from the previous offence. Since it was not considered as an aggravated factor, there is no prejudice caused to the Accused applicant.”

- [6] In her written submission to the High Court, counsel for the State conceded that the applicant was not serving a suspended sentence when he committed the fraud offences in 2008. In 2008, he was a first time offender, and although he had other pending cases before the courts, he should have been given discount for previous good character.
- [7] The applicant may have re-offended while on bail but it was fairly conceded by counsel in the High Court and by Ms Fong in this court that the finding the applicant re-offended while serving a suspended sentence was erroneous.
- [8] Appeals from the High Court in its appellate jurisdictions are governed by section 22 (1) of Court of Appeal Act. Section 22 (1) states:
- “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 (*Amended by 38 of 1998*).”
- [9] Section 22 does not require leave to appeal to this Court. The only condition is that the ground of appeal has to be question of law alone.
- [10] Whether or not the applicant had re-offended while serving a suspended sentence is a question of mixed law and fact. But the issue is not that. The issue is whether a sentence can be enhanced on a mistaken fact. This issue raises a question of law alone. The applicant may proceed with his appeal on this ground.

[11] The appeal may be listed before the Full Court for hearing in the September session.

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**DANIEL GOUNDAR**

**JUDGE**

**Solicitors:**

Applicant in Person  
Office of the Director of Public Prosecutions for Respondent.