

**IN THE COURT OF APPEAL, FIJI**  
**On appeal from the High Court of Fiji**

**CRIMINAL APPEAL AAU 107 OF 2014**  
**(High Court HAA 16-19 of 2013)**

**BETWEEN** : **VILIAME ROKINI**  
*Appellant*

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

**Coram** : **Calanchini P**

**Counsel** : **The Appellant in person**  
**Mr. M. Korovou for the Respondent**

**Date of Hearing** : **8 July 2016**

**Date of Ruling** : **28 October 2016**

**RULING**

- [1] This is an appeal against sentence under section 22 of the Court of Appeal Act Cap 12 (the Act). It comes before a single judge of the Court to determine whether the Court has jurisdiction to hear the appeal under section 35 (2) of the Act.

[2] So far as is relevant to this appeal, section 22 provides that:

*“[1] Any party to an appeal from a Magistrates 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 \_ \_ \_ \_*

*[1A] No appeal under sub-section (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground:-*

*(a) 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.”*

[3] Section 22 is a stand alone provision that sets out the appeal procedure for appeals from the High Court in the exercise of its appellate jurisdiction. Pursuant to section 22 (8) certain provisions of the Act apply to such appeals. However leave to appeal is not required under section 22. An appeal under section 22 is subject to the provisions of section 35 of the Act. Section 35 (2) provides:

*“(2) If on the filing of a notice of appeal \_ \_ \_ a judge of this Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal. \_ \_ \_ the Judge may dismiss the appeal.”*

[4] The appellant is appealing against sentence. For there to be a right of appeal to this Court and hence for the Court to have jurisdiction to hear and determine the appeal, the appellant must convince the Court or a judge of the Court [under section 35(2)] that the appeal comes within section 22 (1A) of the Act.

[5] The Appellant was convicted in the Magistrates Court on his plea of guilty to numerous offences and was sentenced to a total sentence of 12 years imprisonment. There were four sets of offences covering four years between 2009 and 2013. In case No. 113 of 2013 the appellant was sentenced to 3 years imprisonment for theft and 3 years imprisonment for burglary to be secured concurrently. In case number 298 of 2010 the

appellant was sentenced to 3 years imprisonment for burglary and 3 years imprisonment for theft to be secured concurrently. In case no. 271 of 2010 the appellant was sentenced to 3 years imprisonment for burglary and 3 years imprisonment for theft to be secured concurrently. In case no. 208 of 2009 the Appellant was sentenced to 7 years imprisonment for robbery with violence. However the concurrent 3 years sentence in case no. 271/2010 was made consecutive to the 3 years sentence in case no. 113/2013 and case no. 398 of 2010 with an effective sentence of 6 years imprisonment for 3 separate burglary and theft convictions. That sentence of 6 years was made consecutive to the 7 years sentence for robbery with violence for a total sentence of 13 years. The sentence was reduced by 1 year for time spent in remand resulting in a sentence of 12 years imprisonment.

[6] The Appellant filed an appeal against sentence in the High Court. The grounds of appeal were (1) error in not giving any weight to his guilty pleas; (2) error in the application of the totality principle and (3) double punishment. In a judgment delivered on 12 December 2013 the High Court allowed the appeal on grounds (1) and (2) but refused ground (3). The learned High Court Judge considered that some reduction in the total sentence to be warranted on the appeal. The sentence was varied by allowing the sentences for the three cases involving burglary and theft to be served concurrently for a total of 3 years. The sentence of 7 years in case no. 208 of 2009 imposed for robbery with violence was reduced to 5 years to be served consecutively to the 3 years sentences for burglary and theft. The total sentence was therefore reduced to 8 years.

[7] It should be noted that the Appellant's right to appeal to the High Court from the Magistrates Court is an appeal as of right under the Magistrates Court Act and the Criminal Procedure Decree 2009. The appeal to this Court is a second tier appeal and the Court of Appeal assumes a role similar to that of a court of error for such appeals. This is the effect of section 22 of the Act.

[8] By letter dated 24 June 2014 the Appellant indicated his intention to appeal the decision of the High Court delivered on 12 December 2013. Pursuant to section 22 (8) of the Act, the Appeal is subject to the time period prescribed by section 26 of the Act. The

Appellant is required to file and serve his notice of appeal within 30 days from the date of the judgment. The appeal should have been filed by 12 January 2014 and is as a result some 5 months out of time. There is no application for an enlargement of time and the issue was not the subject of submissions filed by either the appellant or the respondent. However I am prepared to regard the appellant's letter dated 24 June 2015 the original handwritten version of which is also on the file as an application for an enlargement of time. There is no indication on the file that the appellant had forwarded a notice of appeal prior to the letter dated 24 June 2014. However for reasons that are not presently obvious both the appellant in person and the respondent's counsel informed the court on the first mention date on 18 March 2015 that the appeal was timely.

- [9] In any event section 26 of the Act also permits the Court of Appeal to extend at any time the time within which a notice of appeal may be given. Pursuant to Section 35(1) of the Act the power to the Court to extend time may be exercised by a judge of the Court.
- [10] The Supreme Court in its decision in Rasuku and Another –v- The State (CAV 9 and 13 of 2012; 24 April 2013) considered the principles involved and the criteria to be considered when an appellate court is called upon to determine such an application. In that decision the Supreme Court affirmed that the factors that should be considered were those that were summarized by the Court in its earlier decision in Seru and Kumar –v- The State ([2012] FJSC 17, CAV 1 of 2009; 21 August 2012).
- [11] For the purposes of the present proceedings it is only necessary to consider whether there is a ground of appeal that will probably succeed. It would appear from the material filed by the appellant that the only issue before the Court is the issue concerning the consecutive sentence that the Appellant was ordered to serve in the appeal judgment delivered by the High Court. Although the Appellant also challenges the sentencing decision of the Magistrates Court on the same basis, the issue was not raised in the appeal to the High Court. So far as the appeal to this Court is concerned the ground is stated as:

*“Failure to exercise his discretion properly to pass a concurrent sentence rather than a consecutive sentence.”*

[12] As a result this Court is required to determine (1) whether the ground of appeal raises a question law only and; (2) in view of the delay, whether the ground will probably succeed. As noted the first question must be determined by reference to section 22 (1A) of the Act. Specifically the issue is whether the consecutive sentence was unlawful or was passed in consequence of an error of law. To answer that question it is necessary to refer to section 22 of the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 22(1) states:

*“22 (1) subject to sub-section (2) every term of imprisonment imposed on a person by a Court must, unless otherwise directed by the Court, be served concurrently with any uncompleted sentence or sentences of imprisonment.”*

*Section 22 (2) states:*

*“(2) Sub-section (1) does not apply to a term of imprisonment imposed:-*

*(a)*

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*(b)*

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*(c)*

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*(d)*

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*(e) on a person for an offence committed while released on bail in relation to another offence.”*

[13] It is my view that the effect of section 22 sub-sections (1) and (2) is that sentences should be served concurrently unless (a) the term of imprisonment comes within sub-section (2) in which case the sentences must be consecutive or (b) the Court exercises its discretion and orders otherwise i.e the sentences be served consecutively rather than concurrently.

[14] Although I am prepared to accept that it may be argued that the appeal raises a question of law only, it is apparent from the judgment of the High Court that the appeal has no chance of succeeding. The reason for that conclusion appears in paragraph 11 of the High Court judgment. It would appear that the burglary and theft offences were committed when the appellant was on bail for the robbery with violence offence. It was therefore mandatory that the sentence imposed for the offences that were committed while the Appellant was on bail be consecutive to the sentence imposed for the offence for which he had been granted bail. Furthermore, putting the issue of bail to one side, the

learned Judge has also given cogent reasons in paragraph 17 of his decision for ordering that the sentences be served consecutively.

- [15] In my opinion not only does the appeal not reach the standard required for granting an enlargement of time it is also vexatious and as a result is dismissed under section 35 (2) of the Act.

Orders of the Court:

1. *Enlargement of time refused.*
2. *Appeal against sentence dismissed under section 35(2) of the Court of Appeal Act Cap 12.*



*W. Calanchini*  
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Hon. Mr. Justice W. D. Calanchini  
**PRESIDENT, COURT OF APPEAL**