

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court of Fiji]**

**CRIMINAL APPEAL NO: AAU0015 of 2015**  
**[High Court Case No: HAA20 of 2014]**

**BETWEEN** : **SAMUELA MACEDRU** *Appellant*

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

**Before** : **Hon. Mr. Justice Daniel Goundar**

**Counsel** : **Appellant in person**  
**Ms P. Madanavosa for the Respondent**

**Date of Hearing** : **22 November 2016**

**Date of Ruling** : **30 November 2016**

**RULING**

[1] This is an untimely appeal against a judgment of the High Court in its appellate jurisdiction under section 22(1) of the Court of Appeal Act, Cap.12. The appellant seeks an enlargement of time to appeal. Section 35(1) of the Court of Appeal Act, Cap 12 gives a single judge power to grant an enlargement of time to appeal. The factors to be considered are:

- (i) The reason for the failure to file within time.
- (ii) The length of the delay.
- (iii) Whether there is a ground of merit justifying the appellate courts consideration?
- (iv) Where there has been substantial delay, nonetheless is there a ground that will probably succeed?
- (v) If time is enlarged, will the respondent be unfairly prejudiced? (*Kumar v State* unreported Cr App No CAV0001 of 2009; 21 August 2012).

- [2] The High Court's judgment was delivered on 12 December 2014. The statutory time period within which an appeal must be filed is 30 days from the date of the impugned decision. The appellant's notice of appeal was filed on 2 February 2015, that is, thirty four days late. The appellant informed the Court that he gave a timely notice but the Department of Corrections did not forward the notice to the registry. However, counsel for the State points out that the appellant's notice is dated 2 February 2015, meaning the appeal was out of time when the appellant gave his notice to the Department of Corrections. I am not convinced that the appellant has provided good reasons for the delay.
- [3] The real question is whether there is a ground of merit justifying consideration by the Full Court. In that regard, I am bound to consider whether the appellant has a right of appeal under section 22 of Court of Appeal Act, Cap 12. Section 22 restricts the right of appeal to a question of law only. Leave is not required. Provided there is a question of law only that is not frivolous or vexatious for the Full Court's consideration, the appeal may proceed as of right.
- [4] In the notice of appeal filed on 2 February 2015, the appellant raised three complaints. The first two complaints are that the learned High Court judge did not properly analyse the identification of the appellant based on dock identification and the evidence of alibi. The third complaint is that the charge is defective, which he withdrew at the hearing. Thereafter, the appellant filed several additional grounds of appeal. The additional complaints in summary are:
- (i) the learned trial magistrate did not caution himself on the specific weaknesses in the complainant's identification evidence using the Turnbull guidelines.
  - (ii) the learned magistrate did not caution himself against the prejudicial evidence led by PC Tora that the appellant was a known offender.
  - (iii) the learned High Court judge failed to consider that the learned trial magistrate did not advise the appellant the need to give alibi notice.
  - (iv) the learned High Court judge and the learned trial magistrate did not consider that the investigating officer did not suspend the appellant's caution interview to verify his alibi.

- (v) the learned trial magistrate misdirected himself when he stated that there was admission in the appellant's interview.
- [5] The appellant was charged with one count of robbery with violence contrary to section 293(i)(b) of the Penal Code, Cap. 17. He was convicted after trial in the Magistrates' Court and sentenced to 5 years and 5 months imprisonment with a minimum term of 4 years. He appealed against conviction only to the High Court. Two grounds were advanced in the High Court:
- (i) That the identification was unreliable.
  - (ii) The Magistrate erred in not accepting his alibi.
- [6] The facts were that on 3 October 2009, the victim (an adult male of Indian decent) was waiting outside a shop in Milverton Road for transport to take him to his work at about 8.15pm, when two men approached him and asked him for money. The victim said he had none at which one of the men held him from behind with a hand over his mouth and searched his back pocket. He struggled but the other man in front of him punched him on the face and holding his collar banged him on the wall of the shop. This violence continued for about 15 to 20 minutes until the victim was bleeding. The attackers took his phone and about \$40 cash. The victim said he knew one of the men because he lived nearby and he saw him often. He knew his name to be 'Samu' because he had heard people call him that and he would see him going to and from the shop over the years. He identified the accused in Court as this 'Samu'. A police officer had come to the scene and the victim told the officer about the robbery and his identification by recognizance of 'Samu'.
- [7] At trial, the appellant challenged the victim's identification of him, saying that the dock identification after nearly 5 years was unreliable and the learned magistrate should have warned himself of the need for caution before relying on it.
- [8] In his judgment, the learned trial magistrate dealt with the identification issue as follows:

There was no I.D. parade conducted by the Police and the complainant identified the accused in Court. It has been held that dock identification is not safe to rely on when the identity of an accused is the main issue in a case. But in this case according to the complainant the accused was not a stranger and has seen him before the incident that day. According to him, the accused was from his area and was known as "Samu". Therefore even without an ID parade I would think this Court can consider the evidence of the prosecution witnesses. But as the accused is denying that he was involved in this incident I would have to consider if the complainant has properly identified the accused on that day.

- [9] On appeal, the learned High Court judge did not find an error in the learned trial magistrate's judgment. In his judgment, the learned High Court judge said at [10]:

In this particular case the Magistrate has dealt with the identification most appropriately. There was an underlying long acquaintance with the accused, he allowed the dock identification but being wary of its value, warned himself of the dangers and so went to examine the identification using the **Turnbull** guidelines. He could have done no more.

- [10] Similarly, the learned High Court judge did not find any error in the learned trial magistrate's judgment to reject the appellant's alibi. The learned High Court judge said at [12]:

The accused had never given notice of his alibi to the Court as required by s.125(2) of the Criminal Procedure Decree 2009. There had been suggestion of alibi in his caution interview of an alibi but that was not produced in evidence. So the accused's alibi given as part of his sworn testimony in Court was the first time it was raised. He called no witness to support it. In those circumstances it is perfectly understandable that the learned Magistrate would not give any credence to his alibi.

[11] At the hearing, the appellant tendered further written submissions in support of his grounds of appeal. Many of his arguments are evidentiary issues that were not raised in the High Court. For instance, the complaint that the learned trial magistrate did not warn himself regarding the prejudicial evidence led by PC Tora that the appellant was a known offender was not raised as ground of appeal in the High Court. In any event, there is no merit in this ground because the trial magistrate did not refer to the alleged prejudicial evidence in his judgment.

[12] All the grounds of appeal advanced by the appellant raise questions of mixed law and fact. There is no question of law alone for the Full Court to consider. In my judgment, the appeal is bound to fail because the appellant has no right of appeal. I would grant an enlargement of time but dismiss the appeal under section 35(2) of the Court of Appeal Act, Cap. 12.

[13] **Result**

Appeal dismissed under section 35(2) of the Court of Appeal Act, Cap. 12.



A handwritten signature in black ink, appearing to read "Daniel Goundar", with a long horizontal line extending to the right.

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Hon. Mr. Justice Daniel Goundar  
**JUSTICE OF APPEAL**

**Solicitors:**

Appellant in person  
Office of the Director of Public Prosecutions for the State