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

CRIMINAL APPEAL NO. AAU0087 of 2016
[High Court Case No. HAA007 of 2016]

BETWEEN : **BENJAMIN PADARATH**

Appellant

AND : **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

Respondent

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

Counsel : **Mr. T. Ravuniwa for the Appellant**
Ms. A. Lomani for the Respondent

Date of Hearing: **29 June 2017**

Date of Ruling: **25 August 2017**

RULING

[1] The appellant seeks bail pending appeal. The respondent opposes the application on the ground that the appeal is bound to fail because there is no right of appeal.

[2] The appellant was charged with giving false information to a public servant contrary to section 201(a) of the Crimes Act 2009. The charge alleged that the appellant on or about 23 January 2011 gave information, which he knew to be false, via text messages to the Director of Immigration Fiji, intending to cause the Director of Immigration to include the name of Paul Freeman on the Fiji Immigration watch list, which the Director of Immigration ought not to do, if the true state of facts respecting which the information was given, were known to him.

[3] The appellant first appeared in the Magistrates' Court on 5 April 2011. After numerous adjournments, on 2 February 2016, the appellant pleaded guilty to the charge. He admitted the facts presented by the prosecution in support of the charge.

[4] According to the facts, the appellant sent text messages from a mobile phone to the Director of Immigration regarding a foreign national by the name Paul Freeman who was due to arrive in Fiji by air. The appellant did not disclose his identity to the Director of Immigration. He told the Director of Immigration that Mr Freeman was suffering from sexually transmitted diseases and was involved in criminal activities including money laundering. The appellant knew that the information he gave to the Director of Immigration regarding Mr Freeman was false. His intention was to cause the Director of Immigration to prevent Mr Freeman from entering Fiji. The Director of Immigration acted on the information provided by the appellant. Upon arrival, Mr Freeman was detained and subjected to medical tests for the purpose of medical and police clearance and entry into Fiji.

[5] On 9 March 2016, the Learned Magistrate sentenced the appellant to 25 months' imprisonment with a non-parole period of 16 months. The appellant appealed against his sentence in the High Court. On 17 June 2016, the High Court dismissed that appeal.

[6] This appeal is against the High Court's judgment dismissing the appellant's appeal against sentence from the Magistrates' Court. The appellant's right of appeal is governed by section 22(1) of the Court of Appeal Act 1949. 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....
>
> (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.

[7] The sentence that is subject of the current appeal was not imposed by the High Court in its appellate jurisdiction. For that reason, the limitations imposed by section 22(1A) does not apply to this case (*Tubuli v State* unreported Cr App No CAV9 of 2006; 25 February 2008, [24]). The appellant's right of appeal is confined to any ground of appeal which involves a question of law only. The question of law must arise from the High Court judgment (*Lalagavesi v State* unreported Cr App No AAU0035 of 2011; 8 March 2012, [14]). If the Court is not satisfied that there is a ground of appeal which involves a question of law arising from the High Court judgment, then there is no jurisdiction to consider the appeal. Section 35(2) of the Court of Appeal Act 1949 gives a single justice power to dismiss an appeal that is bound to fail because there is no right of appeal.

[8] The grounds of appeal are:

1. That the sentence confirmed against the Appellant was harsh and excessive in all circumstances of the case.
2. That the learned judge failed to consider relevant considerations and further, considered irrelevant consideration in the Court's determination of the sentence, the failure of which resulted in a perverse and unreasonable judgment, in all the circumstances of the case.
3. That the learned judge failed to properly consider the appropriate starting point of sentencing for this offence and the reduction which were distinct by law to be afforded to the Appellant, the absence or failure of which made the sentence perverse and unreasonable in all the circumstances of the case.
4. That the learned judge had failed to consider the extraneous issue in sentencing and accepted irrelevant factors as aggravating features in sentencing and accepted irrelevant factors as aggravating features and further failed to consider appropriate issues of mitigation which rendered the sentence manifestly excessive and unreasonable in law.

Ground one - whether the sentence is harsh and excessive?

[9] The maximum penalty prescribed for the offence of giving false information to a public servant is 5 years' imprisonment. The learned magistrate used the two-tiered approach to give reasons for the sentence that he imposed on the appellant. The learned magistrate first identified a tariff by referring to earlier cases on giving false information to a public servant and then using a starting point made adjustments to reflect the mitigating and aggravating factors.

[10] The ground of appeal complains of the sentence being harsh and excessive but the actual complaint relates to the use of similar cases to identify the tariff for the offence of giving false information to a public servant. The learned High Court judge concluded that there was no error in the exercise of the sentencing discretion when the learned magistrate referred to similar cases to identify a range and then imposed a sentence based on the circumstances of the present case. In my judgment, the learned High Court judge is correct in his conclusion. Similar cases were used to identify a range, but the appellant was sentenced on the facts of the present case. There is no question of law alone that arises from this ground of appeal.

Ground two - whether relevant factors were ignored?

[11] This is another ground of appeal that alleges one type of error but a different error is argued in the submissions. The appellant's complaint is that the non-parole period was fixed without him being invited to make submissions.

[12] The non-parole period was fixed pursuant to section 18(1) of the Sentencing and Penalties Act 2009. Under section 18(1), the court must fix a non-parole period where the sentence imposed is more than 2 years. Reasons are not required for fixing a non-parole period (*Rusiate v State* unreported Cr App No AAU0090 of 2012; 5 December 2014, *Naitini v State* unreported Cr App No AAU102 of 2013; 3 December 2015).

[13] The learned High Court judge at paragraph [42] of the judgment said that the appellant was aware of the legal requirement imposed on the court to fix a non-parole period but

the appellant opted not to make submission. His Lordship correctly stated that reasons were not required for fixing a non parole period because the procedure was mandatory where the sentence imposed was more than 2 years and that the sentencing magistrate was justified to impose one given the nature of offending. Although the construction of a statute involves a question of law alone, I am satisfied the question is frivolous because the point of law is settled that the courts are not required to justify fixing of non parole periods under section 18(1) of the Sentencing and Penalties Act 2009. The question whether relevant factors were ignored or irrelevant factors were considered does not involve a question of law only.

Ground three – whether an appropriate starting point was considered?

[14] Like the earlier grounds, this ground alleges one error but a different error was argued in the submissions. The appellant's complaint is that the sentencing magistrate erred in law when he failed to grant him a discount for his guilty plea. The sentencing magistrate considered the appellant's guilty plea and concluded that the appellant did not deserve any credit for the guilty plea. The reasons for this conclusion are at paragraphs [35]-[36] of the sentencing remarks:

> In this case even though the defence submitted that the accused has saved the time and resources of the Court by his guilty plea this was made only on the hearing date when the trial was about to start. The Prosecution was ready for the hearing with their witnesses summoned and only at that time the accused changed his mind. Further his caution statement was already admitted before the hearing which contained some admissions.
>
> The main purpose of giving discount for a guilty plea is to acknowledge the saving a court time and resources. But in this case the accused waited for 05 years to admit his guilt and this was also made only on the last minute when the hearing was about to commence. Therefore I do not think the accused deserves any credit for that.

[15] The appellant's argument that he was entitled for a discount for his guilty plea was rejected by the learned High Court judge. The reasons for that conclusion are found at paragraph [36] of the judgment:

> The decision not to grant any discount to the late guilty plea of the appellant was made by the sentencing Court, based on the binding authority of *Rainima v The State* (supra) where it was clearly stated that "...a plea during trial or after an inculpatory caution interview has been admitted into evidence is not deserving of any discount whatsoever." The submission by the appellant that he ought to have been given a 1/3 discount is clearly misconceived argument in view of this pronouncement by the Court of Appeal.

[16] The weight to be a given to a guilty plea is a matter for the sentencing court (*Khan v State* unreported Cr App No AAU105 of 2011; 2 June 2014 at [9]). In the present case, the sentencing magistrate decided not give any weight to the guilty plea. The discretion was justified and the learned High Court judge found no error in the exercise of the sentencing discretion. The question of what weight should have been given to a late guilty plea does not involve a question of law only.

Ground 4 – whether irrelevant matters considered as aggravating factors?

[17] In sentencing the appellant, the learned magistrate took into consideration that the offending was aggravated due to the following:

> By giving false information you wasted the time and resources of public institutions (Department of Immigration and Ministry of Health) and also deprived the liberty of an innocent person. Therefore your behaviour needs to be strongly denounced and this would be the main purpose of your sentence. Further message needs to be given to the society that people who would engage public officials for their personal agendas in an unlawful manner would be dealt severely by the Court.

[18] It was not in dispute before the sentencing magistrate or the High Court judge that an innocent person (Mr Freeman) was detained and subjected to medical tests by government officials as a result of the appellant's conduct in providing false information about the victim to the Director of Immigration. The relevant institutions acted on the false information. The learned High Court judge concluded that these factors were correctly considered as aggravating factors and that there was no error in the sentencing discretion in that regard. In any event, the question whether certain matters were properly considered as aggravating factors does not involve a question of law alone.

[19] Given my conclusion that the appeal does not involve a question of law only, the appeal is bound to fail because there is no right of appeal. The application for bail must also fail because there is no right of appeal.

[20] **Result**

Bail refused.

Appeal dismissed under section 35(2) of the Court of Appeal Act 1949.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
MIQ Lawyers for the Appellant
Fiji Independent Commission against Corruption for the Respondent