

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEALS AAU 0071 OF 2015
AAU 0085 OF 2015
(High Court HAA 8 of 2014
HAA 9 of 2014)
(Magistrates Court No.1008 of 2007 at Suva)

BETWEEN : AISEA LEDUA
OPETAIA VULI

Appellants

AND : THE STATE

Respondent

Coram : Calanchini P

Counsel : Mr S Waqainabete for the Appellant Ledua
The Appellant Vuli in person
Mr M Korovou for the Respondent

Date of Hearing : 25 May 2018

Date of Ruling : 25 June 2018

RULING

[1] The first appellant (Ledua) was charged with two counts of robbery with violence contrary to section 293(1)(b) of the Penal Code Cap 17 (now repealed). The second appellant (Vuli) was charged with 2 counts of robbery with violence contrary to section

293(1)(b) of the Penal Code and one count of resisting arrest contrary to section 247(a) of the Penal Code (now repealed). There were two other co-offenders who were charged with the same offences. Following a trial in the Magistrates Court at Suva both appellants were found guilty and convicted on both robbery with violence counts. On 25 August 2011 the appellants were each sentenced to 8 years 5 months imprisonment on each count to be served concurrently with a non-parole term of 6 years imprisonment with effect from 25 August 2011.

- [2] Both appellants subsequently filed appeals against conviction in the High Court. The appellant Ledua filed his appeal out of time by over 1 year and 8 months. The appellant Vuli filed his appeal within time. It was necessary for Ledua to seek an enlargement of time from the High Court. In a judgment delivered on 8 June 2015 the High Court Judge refused Ledua leave to appeal out of time and Vuli's appeal was dismissed.
- [3] Both appellants subsequently filed timely notices of appeal against conviction in the Court of Appeal. As second tier appeals the Court's jurisdiction to hear the appeals is restricted to grounds of appeal which involve questions of law only pursuant to section 22 of the Act. Leave is not required and the purpose of the proceedings before a judge of the Court is to determine whether (i) there is a right of appeal, i.e. do the appeals involve questions of law only and (ii) are the appeals vexatious or frivolous. Section 35(2) of the Act gives power to a judge of the Court to dismiss the appeal if a determination is made that there is no right of appeal (i.e. no jurisdiction) or that the appeals are vexatious or frivolous.
- [4] In an amended notice of appeal against conviction filed on 9 October 2017 Ledua relied on three grounds of appeal:

"1. *The learned Magistrate erred in law when he failed to give a special warning to himself in his judgment about the unreliability of the dock identification without laying prior foundation through a photo identification or the identification parade unless with your appellant's objection.*

2. *The learned Magistrate erred in law and in fact when he used the caution interview statement of the appellant to corroborate the prosecution's case.*
3. *The learned Magistrate erred in law and in fact when he admitted the confession contained in the caution interview statement despite of the act that it was obtained through an oppressive circumstances."*

[5] It is convenient to consider Ledua's grounds of appeal first before moving on to consider Vuli's notice of appeal. It must be recalled that the appeal to this Court is in respect of the decision of the High Court. There is no direct appeal in this case from the Magistrates Court to the Court of Appeal. It follows that the only ground of appeal, regardless of the number of ways in which it may be phrased, is whether the decision of the learned High Court Judge refusing an enlargement of time to enable Ledua to pursue his appeal against conviction was wrong in law. Put another way, the issue is whether the learned High Court Judge has applied the correct test for determining the application for an enlargement of time rather than whether he has applied the test correctly. In my opinion the first question involves question of law only and the second involves a question of mixed law and fact.

[6] The power to extend time for an appeal from the Magistrates Court to the High Court is found in section 248(2) of the Criminal Procedure Act 2009 which provides:

"The Magistrates Court or the High Court may at any time, for good cause, enlarge the period of limitation prescribed by this section."

[7] It should be noted that section 248(3) provides that without prejudice to its generality, "good cause" is deemed to include certain specified matters therein stated, none of which apply to the present application. However the section is not exhaustive and in my judgment the matters listed in sub section (3) are not the only matters that should be considered by the court hearing the application. The learned High Court Judge has acknowledged that "good cause" would include appeal grounds that have merit. However, the question of good cause should also be considered in the context of the

factors that should be considered for an enlargement of time application which were discussed by the Supreme Court in Kumar and Sinu –v- The State [2012] FJSC 17; CAV 1 of 2009, 21 August 2012. Those factors are (i) the length of the delay, (ii) the reason for the failure to file within time, (iii) whether there is a ground of merit justifying the appellate court’s consideration or, where there has been substantial delay, nonetheless is there a ground that will probably succeed and (iv) if time is enlarged, will the respondent be unfairly prejudiced. In a subsequent decision the Supreme Court in Rasaku –v- The State [2013] FJSC 4; CAV 9 of 2013, 24 April 2013 observed that:

“These factors may not be necessarily exhaustive, but they are certainly convenient yard sticks to assess the merit of an application for enlargement of time. Ultimately it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of the court.”

[8] In my judgment the issue that comes up for determination in the Court of Appeal is whether the Court below has applied the correct test for determining the application for an enlargement of time sought by Ledua in to prosecute his appeal. This constitutes a ground of appeal involving a question of law only and as a result the Court of Appeal has jurisdiction. Furthermore the issue is not frivolous or vexatious.

[9] As for Vuli, his grounds of appeal against conviction are set out in a document filed on 27 July 20106 as:

1. *That the trial judge failed to caution himself due to the reliability of inconsistency in the complainants sworn statements and sworn evidence before accepting their twisted identification evidence.*
2. *That the trial judge erred in law when he admitted the confession evidence which ought not to have been admitted.*
3. *That the trial judge erred in law when he shifted the burden of proof to the disadvantaged defendant throughout the trial.*
4. *That the trial judge erred in law by:*
 - (a) *Failing to declare Josua Vunisa (PW3) as an accomplice; before accepting his evidence.*

(b) Failing to warn himself on the danger of convicting the accused without corroboration on accomplice evidence.

5. *The High Court of Appeal judge erred in law by misdirecting that "There was therefore no need for an accomplice warning."*
6. *That the trial judge was bias when he proceeded with the trial without considering the rist of injustice that the accused is likely to face without the guidance of disclosures.*
7. *That the learned Magistrate erred in law when he failed to warn himself as to the dangers of convicting on identification evidence when its reliability is disputed.*
8. *That the trial judge erred in law when he gave inadequate direction about the Turnbull guideline.*
9. *That the High Court of appeal judge erred in law by overlooking the inadequate direction made by the trial judge concerning the 3 parts of the Turnbull test.*
10. *Did the learned trial judge erred in law in not giving the appellant the statutory option laid down by law to choose the court to stand trial in as in Section 4(1)(10) of the Criminal Procedures Decree?*
11. *Flagrant incompetence of appeal counsel.*
12. *Did the learned trial judge erred in law in not dismissing the case, or in not giving cogent reasons for not dismissing the case in respect to the non-appearance of complainant of hearing as demanded by Section 166(2)(a)(b) of the Criminal Procedure Decree?"*

[10] However, once against it must be recalled that this is an appeal from the High Court exercising its appellate jurisdiction. It is not an appeal from the Magistrates Court. The grounds that will be considered will be those that were considered by the High Court in order to determine whether any of the grounds now before this Court involve questions of law only arising from the decision of the High Court. The grounds of appeal that were relied upon by Vuli in the appeal in the High Court were:

"....i) THE Appellant was not legally represented.

ii) THE Appellant was prejudiced when he was not provided any disclosures for the voire dire trial.

iii) THE Learned Trial Magistrate erred in law and in fact when he misdirected himself that the Appellant failed to raise reasonable doubt on prosecution evidence in the voire dire trial, when the burden of proof is on prosecution.

iv) THE Learned Trial Magistrate erred in law and in fact by not robustly considering the evidence of the appellant in the voire dire.

v) THE Learned Trial Magistrate erred in law and in fact in failing to adequately apply the Turnbull warning on the identification evidence.

vi) THE Learned Trial Magistrate erred in law and in fact when he failed to direct his mind to the possibility of mistaken identification.

vii) THE Learned Trial Magistrate erred in law and in fact in regards to accomplice evidence by;

a) Failing to warn himself on accomplice evidence

b) Failing to declare Josua Vunisa (prosecution witness no.3) as an accomplice and relying on his evidence without any corroborating evidence.

viii) THE Learned Trial Magistrate erred in law and in fact by failing to consider that the burden of proof is on prosecution to disprove the alibi evidence relied upon by the Appellant and not the Appellant to prove it...."

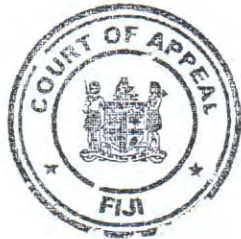
[11] In relation to grounds one and two to the extent that they involve questions of law only, they are vexatious and are dismissed under section 35(2) of the Act.

[12] Grounds 3 and 4 raise issues concerning the admissibility of the caution interview and the admissions against interest contained therein. The admission into evidence of a caution interview is a question of law for the judge. A challenge to the admission into evidence of a document as an exception to the hearsay rule that would otherwise be excluded involves a question of law only. The grounds are not vexatious. There was medical evidence that should have been considered. Grounds 5 and 6 relating to identification involve questions of mixed law and fact: **R v Hinds** (1962) 46 Cr. App. R 327. The

issues raised by 7 and 8 may raise issues involving errors of law only and should be considered by the Court.

Order:

1. *The notice of appeal filed by Ledua may proceed to the Full Court on the question whether the High Court applied the correct test for determining an application for an enlargement of time to appeal.*
2. *The notice of appeal filed by Vuli against the decision of the High Court may proceed on grounds involving questions of law only.*



W. Calanchini

Hon Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL