**IN THE SUPREME COURT OF FIJI**
**AT SUVA**

**CRIMINAL PETITION NO: CAV 027 of 2014**
**[Court of Appeal No: AAU 0063 of 2012]**

**BETWEEN** : **ERONI NABAINIVALU**

***Petitioner***

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

***Respondent***

**Coram** : **The Hon. Chief Justice Anthony Gates,**
**President of the Supreme Court**

**The Hon. Justice Saleem Marsoof,**
**Justice of the Supreme Court**

**The Hon. Justice William Calanchini,**
**Justice of the Supreme Court**

**Counsel** : **Petitioner in person**
**Mr. S. Vodokisolomone for the Respondent**

**Date of Hearing** : **11 August 2015**

**Date of Judgment** : **22 October 2015**

# JUDGMENT

**Hon. Anthony Gates, P**

[1] I have read the judgment of Marsoof JA in draft. I agree with the orders proposed and with the reasons given.

**Hon. Saleem Marsoof, JA**

[2] By his undated letter addressed to the Registrar of this Court which was forwarded by a Deputy Superintendant of Corrections to the said Registrar with a covering letter

dated 21st October 2014 that was received in the Registry on 6th November 2014, the petitioner purported to appeal against the Ruling of the Court of Appeal dated 2nd June 2014 which purported to dismiss under section 35(2) of the Court of Appeal Act (Cap 12), his application for leave to appeal against the sentence imposed on him by the Magistrates' Court of Fiji at Suva on 16th July 2012.

[3] I presume that the petitioner is seeking to invoke the jurisdiction of this Court in terms of Section 98(3)(b) of the Constitution of the Republic of Fiji which confers on the Supreme Court the exclusive jurisdiction, "subject to such requirements as prescribed by law", to hear and determine appeals from all final judgments of the Court of Appeal. As provided in Section 98(4) of the Constitution, no appeal may be brought to the Supreme Court from a final judgment of the Court of Appeal 'unless the Supreme Court grants leave to appeal."

[4] While section 7(2) of the Supreme Court Act No. 14 of 1998, sets out stringent criteria for the grant of special leave to appeal in criminal cases, Rule 6(a) of the Supreme Court Rules of 1998 provides that any application for special leave to appeal against a decision of the Court of Appeal must "be lodged at the Court registry within 42 days of the date of the decision from which special leave to appeal is sought."

[5] I also note that in the undated letter of the petitioner which was received in the Registry on 6th November 2014, he does not specifically pray for the leave of this Court to appeal against the decision of the Court of Appeal, and in any event, his letter was received approximately two months after the expiry of the appealable period prescribed in Rule 6(a) of the Supreme Court Rules.

[6] The Petitioner has not filed any application for enlargement of time, nor has he offered any excuse for his delay in his undated letter received in the Registry on 6th November 2014 or any other communication.

[7] Mr. Vodokisolomone, who appeared for the Respondent, has submitted in his written submissions filed in this Court that the grounds of appeal urged in the aforesaid undated letter of the petitioner exclusively related to the lawfulness of his conviction and that no grounds have been urged therein against the sentence imposed on him.

[8] In these circumstances, Mr. Vodokisolomone has submitted that the petitioner is not, in any event, entitled to seek from this Court special leave to appeal against his conviction since his application for leave to appeal filed in the Court of Appeal was confined to the sentence imposed against him. He has submitted that the grounds of appeal urged before this Court by the petitioner, being exclusively against his conviction and not his sentence, do not arise from the Ruling of the Court of Appeal.

[9] In view of the fact that the petitioner has chosen to appear before this Court in person and did not have the benefit of Counsel, this Court has endeavoured to look into his grievances with sympathy despite the aforesaid technicalities.

*Proceedings before the Magistrates' Court*

[10] The petitioner was charged before the Magistrates' Court of Fiji at Suva for committing aggravated robbery, an offence under Section 311 of the Crimes Decree No. 4 of 2009. The charge sheet and the particulars of offence contained certain errors, and hence need to be reproduced.

[11] The charge and particulars of offence were as follows:-

> *'Statement of Offence*
> AGGRAVATED ROBBERY, contrary to section 311(1)(a)(b) of the Crimes Decree No. 4 of 2009.
>
> *Particulars of Offence*
>
> ERONI NABITU NABAINIVALU and SAILOSI BALEIVANULEVU RALOGO, on the 12th day of April 2012, in the Central Division, being armed with an offensive weapon, stole 1 x Ink Mobile phone valued at $160.00, 1 x E-Machine Laptop valued at $1800.00 and $1575.40 cash, all to the total value of $3535.40, the property of JITENDRA KUMAR."

[12] The charge did not specify with clarity as to whether the charge was based on section 311(1)(a) or section 311(1) (b) of the Crimes Decree No. 4 of 2009.

[13] There was also an error in the particulars of offence with regard to the date of the robbery the petitioner was charged with. The prosecution sought to rectify the said

error through the "amended summary of facts" dated 2nd July 2012 wherein it is clarified that the robbery in question had taken place at the Bailey Gas Station, Jerusalem Road, Nabua on 12th May 2012, and not on 12th April 2012 as erroneously stated in the particulars of offence, around 5.30 p.m.

[14] According to the prosecution, the petitioner entered the said gas station with his accomplice Sailosi Baleivanulevu Ralogo, armed with a cane knife, and took away the aforesaid mobile phone, laptop and money after threatening the gas station attendant Mr. Jitendra Kumar. It is evident that the mobile phone and laptop were subsequently recovered, but the money could not be found.

[15] The petitioner pleaded guilty to the charge on 22nd May 2012 before the Magistrates' Court exercising extended jurisdiction despite the error regarding the date of the offence and the lack of clarity in regard to the particular limb of Section 311 of the Crimes Decree on which the charge was based.

[16] On 16th July 2012 the Magistrates' Court exercising extended jurisdiction sentenced the petitioner to 6 years and 10 months imprisonment with a non-parole period of 6 years.

*Proceedings before the Court of Appeal*

[17] The petitioner applied to the Court of Appeal on 1st August 2012 for leave to appeal against the sentence imposed by the Magistrates' Court at Suva on 16th July 2012 exercising extended jurisdiction. His sole contention before the Court of Appeal was that his sentence is "harsh and excessive".

[18] Written Submissions in support of his application for leave to appeal against sentence was filed by the petitioner on 25th March 2014, and the Respondent filed its written submissions in response on 16th April 2014.

[19] The petitioner's application for leave to appeal against sentence came up for hearing before a single judge of the Court of Appeal exercising jurisdiction in terms of section 35(1) of the Court of Appeal Act on 30th April 2014, and submissions were heard.

[20] It would appear from the record that on 2nd June 2014, the petitioner sought to reply the Respondent's written submissions dated 16th April 2014. In his aforesaid written submissions, the petitioner has in addition to clarifying his position regarding the sentence, also adverted to what he describes as "serious errors" in the charge sheet and 'particulars of offence' filed in the Magistrates' Court, which if found to be serious, could result in the quashing of the conviction.

[21] The single judge of the Court of Appeal pronounced his Ruling on 2nd June 2014, and dealt with the application of the petitioner for leave to appeal in the following manner:-

> '[2] The appellant's sole contention is that his sentence is *harsh and excessive when compared to sentences imposed in other aggravated robbery cases.* The appellant has made reference to three cases where sentences from 6 months to 4 years imprisonment were imposed.
> [3] I have said on a number of occasions that an appealable error cannot arise by comparing sentences imposed in other cases. Other cases are only relevant in identifying the range of sentence for a particular offence. Otherwise, each case is considered on its own facts.
> [4] In this case, the range for aggravated robbery is well established. The range is 10 to 16 years imprisonment *(**Nawalu v State** Cr. App. No. CAV0012 of 2012).*
> [5] The appellant was sentenced to a term that is on the *lower range of tariff for aggravated robbery.* The learned Magistrate gave detailed reasons for the sentence that he imposed on the appellant. *All relevant matters were properly considered by the learned Magistrate.*
> [6] The ground of appeal is *not arguable* and I am satisfied the appeal cannot possibly succeed and therefore is frivolous.
>
> **Result**
>
> [7] *Leave to appeal against sentence is refused.*
>
> [8] The appeal is *dismissed under section 35(2)* of the Court of Appeal Act." (*Emphasis added*)

[22] It is clear from the foregoing that the single judge of the Court of Appeal had no opportunity of considering for the purpose of his Ruling, the petitioner's reply dated 2nd June 2014 to the written submissions of the Respondent dated 16th April 2014 referred to in paragraph [20] of this judgment.

*Enlargement of Time and Special Leave to Appeal*

[23] Although in his undated letter received in the Registry of this Court on 6th November 2014, the petitioner has not applied for enlargement of time to seek leave to appeal to this Court, he cannot possibly succeed in his appeal without the grant of enlargement of time and special leave to appeal.

[24] The Petitioner has sought to invoke the jurisdiction of this Court on 21st October 2014, which is the date of the covering letter of the Deputy Superintendant of Corrections with which the petitioner's undated letter that was received in the Registry of this Court on 6th November 2014 was forwarded, 141 days after the pronouncement of impugned Ruling of the Court of Appeal dated 2nd June 2014. The petitioner has not offered any explanation for this inordinate delay in invoking the jurisdiction of this Court.

[25] This Court has in decisions such as *The State v Ramesh Patel* Criminal Appeal No.AAU0002 of 2002S (15 November 2002); *Enele Cama v The State,* [2012] FJSC 4; CAV0003.09 (1 May 2012), *Kamalesh Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), *Rasaku v The State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), *Volivale v The State* [2015] FJSC 1; CAV0004.2014 (23 April 2015), *Tiritiri v. The State* [2014] FJSC 15 CAV9.2014 (14th November 2014) and *Donu v The State* [2015] FJSC 19; CAV0014.2014 (20 August 2015) considered the factors that will be relevant when considering any application for enlargement of time. The relevant considerations may be summarised as follows:-

(i) The reason adduced by the petitioner for his or her failure to file within time;

(ii) The length of the delay;

(iii) Whether there is a ground of merit justifying the appellate court's consideration;

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed; and

(v) If time is enlarged, will the Respondent be unfairly prejudiced?

[26] The above factors may not be necessarily exhaustive, but they are certainly convenient yardsticks 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 court.

[27] Although the petitioner has not adduced any reasons in his undated letter received in the Registry of this Court on 6th November 2014 for his failure to lodge his appeal within time, at the hearing before this Court he stated that he was at the time in Maximum Security in connection with a previous conviction, but did not provide any further particulars in this regard.

[28] The next matter for consideration is the length of the delay, which in this case is 141 days after the pronouncement of the Ruling sought to be appealed against. The Fiji Supreme Court has consistently held that a short period of delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons.

[29] Explaining the approach of our courts, in *Kamalesh Kumar v State; Sinu v State, supra,* Chief Justice Anthony Gates in paragraph [9] of his judgment quoted the following dictum from *The Queen v Brown* (1963) SASR 190 at 191-

> "The practice is that, if any reasonable explanation is forthcoming, and if the delay is, relatively, slight, say for a few days or even a week or two, the Court will readily extend the time, provided that *there is a question which justifies serious consideration*."
> (*Emphasis added*)

[30] As a Full Court of New South Wales Court of Appeal observed in *R v Sunderland* (1927) 28 S.R. (NSW) 26, in cases of substantial delay, "very exceptional

circumstances would have to be established before the court would be justified in granting an extension".

[31] In my opinion a delay of 141 days is substantial and would not justify the enlargement of time in the absence of a question which justifies serious consideration.

[32] This necessitates an examination of the three grounds of appeal urged by the petitioner in his undated letter received in the Registry of this Court on 6th November 2014 in support of what he has described as his "sentence and conviction appeal". All three grounds set out in the said undated letter related to the petitioner's conviction. They were as follows:-

(a) that he was not legally represented nor legally minded to understand what he was pleading guilty to in the Magistrate's Court;

(b) that the date of the offence set out in the "particulars of offence" was 12th April 2012 whereas the "amended summary of facts" tendered to court gave the date as 12th May 2012; and

(c) that the respondent has openly admitted in paragraphs 16 to 21 of the written submissions filed on behalf of the respondent that there are irregularities in the section of the law that the petitioner was charged with.

[33] However, Mr.Vodokisolomone, who appears for the respondent has submitted that none of the aforesaid grounds arise from the impugned Ruling of the Court of Appeal as the petitioner had not sought leave to appeal from the Court of Appeal against his conviction. The petitioner's application dated 1st August 2012 for leave to appeal to the Court of Appeal and the impugned Ruling of that court related only to the sentence.

[34] As this Court was constrained to observe in paragraph [8] of its judgment in *Tagici v The State* [2014] FJSC 8; CAV0004.2011 (15 April 2014), this Court will not usually

be inclined to consider on appeal any ground of appeal that "was not a part of the appeal in the Court of Appeal".

[35] Of course, as already noted in paragraph [20] of this judgment, after the petitioner's application for leave to appeal had been heard by the single judge of the Court of Appeal on 2nd June 2014, which was the very same day the single judge of that court pronounced his Rule, the petitioner sought to reply the Respondent's written submissions dated 16th April 2014. In his aforesaid written submissions, the petitioner had for the first time adverted to what he described as "serious errors" in the charge sheet and "particulars of offence" filed in the Magistrates' Court, which have been outlined in detail in paragraph [33] of this judgment. That was too late for the single judge of the Court of Appeal to consider.

[36] In any event, I have carefully examined the aforesaid grounds of appeal, and in particular, ground (a) which is to the effect that the petitioner was not legally represented nor legally minded to understand what he was pleading guilty to in the Magistrate's Court. However, it is clear from the record of the Magistrates' Court for 21st May 2012 that this ground is altogether untenable because when the petitioner was first produced before the Magistrate with his co-accused, the right to counsel was explained to both accused by the Magistrate, and while the petitioner waived his right to counsel, his co-accused indicated that he will seek the assistance of a private lawyer. It is noteworthy that in paragraph [2] of his sentencing order the Magistrate has addressed the petitioner as follows:-

> "You pleaded guilty for this offence on your free will on the 22nd day May 2012. *Having satisfied that you fully comprehended the effect of your plea of guilty and made it on your free will and voluntarily without any condition. I now convict you* for the offence of 'Aggravated Robbery', which is punishable under Section 311 (1) (b) of the Crimes Decree No 44 of 2009.

[37] The next ground (b) urged by the petitioner to appeal against his conviction, which is that that the date of the offence set out in the "particulars of offence" was 12th April 2012 whereas the "amended summary of facts" tendered to court gave the date as 12th May 2012; is equally untenable. While admittedly the date of the offence in the

particulars of offence was erroneous, the error had been rectified by the amended summary of facts, which too had been admitted by the petitioner who had voluntarily pleaded guilty to the charge. It is expressly provided in section 182(3)(a) of the Criminal Procedure Decree No. 43 of 2009 that any "variance between the charge and the evidence produced in support of it with respect to (a) the date or time at which the alleged offence was committed is not material and the charge need not be amended for such variation".

[38] Ground (c) relied upon by the petitioner is that the respondent has openly admitted in paragraphs 16 to 21 of the written submissions filed on behalf of the respondent that there are irregularities in the section of the law that the petitioner was charged with. As already noted, the charge referred to the offence as one "contrary to section 311(1)(a)(b) of the Crimes Decree No 9 of 2009", and it is evident from the particulars of offence as well as the amended summary of facts that the petitioner could have been charged under either section 311(1)(a) or section 311(1)(b) of the Crimes Decree as the petitioner was accompanied by another person when he committed the offence and was also armed with a weapon, namely, a cane knife. Thus ground (c) too is wholly without merit.

[39] It is noteworthy that although the impugned Ruling of the Court of Appeal dated 2nd June 2014 dealt exclusively with the sentence imposed on the petitioner, the petitioner's undated letter received in the Registry of this Court on 6th November 2014 did not include a single ground of appeal against sentence.

[40] However, the petitioner in paragraph 2 of his written submissions dated 7th July 2015 adverts to the fact that upon his plea of guilty for aggravated robbery, he was sentenced to 6 years and 10 months imprisonment, and complaints in paragraph 9 of the said written submissions that the single judge of the Court of Appeal dismissed his appeal on the ground of disparity of sentence as not being arguable. He further submits in paragraphs 10 and 11 of his written submissions that uniformity of sentence is a well established sentencing principle and that the precedent he raised in

the Court of Appeal should have been considered by the appellate court to bring about uniformity in similar cases.

[41] As the single judge of the Court of Appeal quite rightly observed in paragraph 3 of his impugned Ruling, "an appealable error cannot arise by comparing sentences imposed in other cases." Comparative decisions are only relevant in identifying the range of sentence for a particular offence, but each case must be decided on its own facts.

[42] The petitioner was convicted for the offence of aggravated robbery contrary to section 311 (a) of the Crimes Decree for which and the maximum penalty set by the said Decree is 20 years imprisonment. Consistently with sections 4(1) and 4(2) of the Sentencing and Penalties Decree of 2009, the Magistrate in his sentencing judgement dated 16th July 2012 took into consideration the then prevailing tariff for aggravated robbery and commenced his computation of sentence with a head sentence of 10 years of imprisonment.

[43] No complaint is made by the petitioner before this Court with regard to the selection of the head sentence. It is noteworthy that at paragraph [29] of its judgment in *Nawalu v The State* (2013) FJSC 11; CAV0012.2012 (28th August 2013), this Court cited with approval the following contemporaneous observation of Calanchini P in *Samuel Donald Singh v State* Crim. AAU15 and 16 of 2011 Calanchini P in the Court of Appeal said:

> "..there is ample authority in this Jurisdiction for concluding that the appropriate tariff for robbery with violence is now 10 to 16 years imprisonment. In selecting 10 years as a starting point the learned trial judge has started as the lower end of the range."

[44] The Magistrate took into consideration the following aggravating factors set out in paragraph 6 of his sentencing order, which were that (i) the petitioner was armed with a cane knife, (ii) this was a shop/office invasion, (iii) there was a vulnerable man inside the shop who was performing his duties at the time of the invasion, (iv) property worth of $ 3535..40 was taken away by the petitioner and his accomplice, (v)

the robbery was pre meditated, (vi) fear was instilled on the victim who suffered trauma at the time of the robbery, (vii) the act of offence could have the effect of endangering innocent public and their freedom of life, and (viii) the accused completely disregarded the law and order and utilized the vulnerability and the insecurity of the victim to carry out this criminal act.

[45] Mitigating factors taken into consideration by the Magistrate in paragraph [14] of his sentencing judgment were that (i) the petitioner was 38 years of age at the time of sentencing, (ii) married with three children, (iii) asked for forgiveness, and (iv) pleaded guilty at the first available opportunity, and (v) the stolen items were recovered.

[46] Having so set out the aggravating and mitigating factors, in paragraph [15] of his sentencing judgment, the Magistrate arrived at the quantum of sentence of 6 years and 10 months imprisonment imposed on the petitioner adopting the following process of reasoning:-

> 'In view of aforementioned aggravating factors I increase 6 years [to the head sentence of 10 years] to reach the period of 16 years. I reduce 5 years for your early guilty plea and 4 years for your other mitigating factors. Now your sentence reaches to 7 years of imprisonment period. I further reduce 2 months for the time you spent in remand custody prior to this sentencing pursuant to section 24 of the Sentencing and Penalties Decree. Your sentencing now reaches to 6 years and 10 months imprisonment period."

[47] It is clear that the petitioner's complaint of disparity of sentence is altogether unfounded, and the position he took up before the Court of Appeal that his sentence was 'harsh and excessive' untenable.

[48] I do not find in the grounds urged by the petitioner against his conviction and sentence any ground of merit justifying consideration by this Court or any ground of appeal that will probably succeed. If enlargement of time is granted, that can only prejudice the respondent to this case and the public at large.

[49] In these circumstances, I am of the opinion that in the light of the considerations set out in paragraph [24] of this judgment, no enlargement of time can be allowed to the petitioner.

[50] Even if the petitioner is granted an enlargement of time to pursue this application, it is clear on the analysis of the grounds of appeal urged by him that he will inevitably fail to satisfy the stringent threshold criteria set out in section 7(2) of the Supreme Court Act of 1998 for the grant of special leave to appeal to this Court, as his appeal does not involve any question of general legal importance or any substantial question of principle affecting the administration of criminal justice, nor has he been able to show that any substantial and grave justice could occur if special leave to appeal is refused.

[51] I therefore hold that the petitioner's application to this Court should be dismissed.

**Hon. William Calanchini, JA**

[52] I would refuse the application by the Petitioner for an enlargement of time to apply for special leave to appeal sentence for the reasons stated by Marsoof JA.

[53] However, in the event that the application had been made in time, I would have granted the petition for special leave on the basis that a substantial and grave injustice might occur if special leave to appeal to this Court had not been granted. In my judgment, if the Petitioner's appeal which was properly before the Court of Appeal were to be curtailed by a wrong application of the law, that is by the wrong application of section 35(2) of the Court of Appeal Act, then a substantial and grave injustice may occur. The requirement for granting special leave under section 7(2) of the Supreme Court Act 1998 is satisfied. (See: **Naisua -v- The State**, CAV 10 2013; 20 November 2013).

[54] Finally, even if special leave had been granted, I would dismiss the appeal. I would have concluded that this was a case where there was no error on the part of the justice of appeal when he found that the appeal against sentence was frivolous and vexatious and that it should be dismissed under section 35(2) of the Court of Appeal Act.

*Orders of Court*

[55] For all the foregoing reasons, this Court makes order as follows:

(1) Enlargement of time is refused;

(2) Special leave to appeal is refused; and

(3) The "sentence and conviction appeal" contained in the undated letter addressed by the petitioner to the Registrar of this Court that was received in the Registry of this Court on 6th November 2014 is dismissed.

**Hon. Anthony Gates, P**
**PRESIDENT OF THE SUPREME COURT**

**Hon. Saleem Marsoof, JA**
**JUSTICE OF THE SUPREME COURT**

**Hon. William Calanchini, JA**
**JUSTICE OF THE SUPREME COURT**

**Solicitors:**

Petitioner in person
Office of the Director of Public Prosecutions for the Respondent