

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No. CAV 0002 of 2018
(On Appeal from Court of Appeal Nos. AAU 0118
of 2013 and AAU 032 of 2011)

BETWEEN : **JOSHUA BENJAMIN ROGERS**
Petitioner

AND : **THE STATE**
Respondent

Coram : Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court
Hon. Mr. Justice Kankani Chitrasiri, Judge of the Supreme Court

Counsel : Ms. M. Fesaitu for the Petitioner
Mr. S. Vodokisolomone for the Respondent

Date of Hearing : 17 April 2018

Date of Judgment : 26 April 2018

JUDGMENT

Chandra, J

1. I am in agreement with the findings and conclusions in the draft judgment of Aluwihare, J.

Aluwihare, J

2. The Petitioner aggrieved by the judgement of the Court of Appeal dated 30th November 2017, filed a notice of appeal against the said judgement on the 20th January 2018.
3. The notice of appeal referred to above is out of time by nine (9) days.
4. The Petitioner through the Legal Aid Commission had filed an affidavit dated 20th March 2018, explaining his failure to file the special leave to appeal application on time.
5. The Petitioner in the said affidavit has taken up the position that he prepared the letter indicating his intention to appeal against the judgement of the Court of Appeal and handed over the letter to the Corrections Department within the stipulated time period of 42 days. The Petitioner however, asserts that the Corrections Department had been remiss in forwarding his letter on time.
6. The learned Counsel for the Respondent contended that this application should be dismissed *in limine* due to the same being out of time and for the reason that there is no merit in the application.
7. Having considered the explanation provided by the Petitioner and the fact that the delay is insignificant, the Court, applying the guidelines laid down in the case of **Kumar v State and Sinu v State**; Criminal Appeal No. CAV001/09 and 001/10, decided to consider this application.

BACKGROUND FACTS

8. The Petitioner was charged along with three other accused with two counts of Robbery with violence. Initially, when the plea of the accused was taken on 8th February 2010, the

Petitioner pleaded not guilty, however, the Petitioner pleaded guilty to both counts on the 27th September 2010.

9. The learned Magistrate accordingly sentenced the Petitioner to a term of 8 years imprisonment. Of this head sentence, the magistrate ordered that 4 years be served concurrently with a pre-existing sentence of 7 years the Petitioner was serving, imposed on him in an unrelated case and the balance 4 years to be served consecutively.
10. The facts were that on the 9th of November 2009, the Petitioner and the co-accused having gained forced entry into a shop and having used violence upon the two female occupants of the shop at the time, made off with items of merchandise and cash to the value of \$11,000.00.

THE GROUNDS OF APPEAL

11. The Petitioner in the instant application has raised two grounds of appeal;
 - (i) That the Court of Appeal failed to consider the reasoning given by the learned Magistrate in imposing a partial consecutive sentence;
 - (ii) That the Court of Appeal failed to consider that the Petitioner suffered injustice as a result of the disparity in sentencing.
12. At this point I wish to refer to the statutory threshold for special leave in criminal cases as set out in Section 7 (2) of the Supreme Court Act of 1988, which states thus:-

“In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-

 - (a) a question of general legal importance is involved.
 - (b) A substantial question of principle affecting the administration of criminal justice is involved or;
 - (c) Substantial and grave injustice may otherwise occur.

13. Under the first ground of appeal, it was contended on behalf of the Petitioner that the magistrate ought to have acted in terms of section 22 (1) of the Sentencing and Penalties Act of 2009 (hereinafter referred to as the Act) and the magistrate was not justified in imposing a sentence that is partially concurrent (with the sentence the Petitioner was serving for an unconnected crime) and the balance consecutive. It was further contended that the reasons stated by the court; the late plea of guilt and the petitioner's previous conviction did not warrant imposition of a partial consecutive sentence.

14. The relevant provision of the Act is reproduced below:

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.

(2) Subsection (1) does not apply to a term of imprisonment imposed

(a) in default of payment of a fine or sum of money;

(b) on a prisoner in respect of a prison offence or as a result of an escape from custody;

(c) on a habitual offender under Part III;

(d) on any person for an offence committed while released on parole; or

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

15. I do not see any ambiguity in Section 22 of the Act and it is clear that subsection (1) of Section 22 of the Act has no application in situations where any one or more of the grounds enumerated in Subsection (2) of that section are present.

16. The gravamen of the Petitioner's complaint is that the magistrate ought not to have considered his late guilty plea as a ground not to act under Section 22 (1) of the Act. It was further contended on behalf of the Petitioner that the Court of Appeal fell into the same error.
17. In considering the legality of the sentence, it would be relevant to consider paragraph (e) of subsection 2 of Section 22 of the Act. Subsection (1) of section 22 of the Act, would not be applicable to a term of imprisonment imposed on any person for an offence committed, while he was on bail, in respect of another offence.
18. It was admitted on behalf of the Petitioner, that he committed the offences related to the present case, whilst he was on bail in another case. The other case also happened to be a case of Robbery with violence for which he was serving a 7 year term of imprisonment at the time, the learned magistrate imposed the impugned sentence.
19. Under the circumstances aforesaid, the learned magistrate need not have looked beyond Section 22 (2) (e) of the Act in deciding not to act under subsection (1) of Section 22 of the Act and I do not see any illegality in the order of the magistrate even though the learned magistrate had made no specific reference to the applicable section.
20. It is well settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a provision of a statute which confers no power has been quoted as an authority for a particular act, and there was in force another provision which conferred that power.
21. In the case of **Vulawalu v State** (2011) FJSC; CAV0006 2010 the Supreme Court held that;

“There can be no challenge to the correctness of the magistrate in ordering consecutive sentences for the two robberies. They were

wholly different incidents of Robbery with violence and in such circumstances the terms of imprisonment should be made consecutive to each other”.

22. Considering the above, I do not see any merit in the 1st ground of appeal and as such special leave to appeal on the said ground is refused.
23. As the second ground of appeal, it was the contention of the learned counsel for the Petitioner that the sentence imposed on him was disproportionate in that the co-accused who were convicted after trial were visited with lighter sentences.
24. Relying on the decision in the case of **Bote v The State** (2005) FJCA 58 Criminal Appeal No. AAU 0011 of 2005 where the court held that “*The parity principle applies where the sentences imposed on co-offenders are so disproportionate as to leave the offender with the larger sentence with a justifiable sense of grievance*”, the learned counsel argued that the sentence imposed on the Petitioner is excessive.
25. When the parity of sentence is raised as a ground of appeal, what this Court would consider is, whether something had gone wrong with the administration of justice, with the full knowledge of the facts and circumstances relating to the disparity and the court would have regard to the disparity as a ground of appeal only in instances where the disparity is unjustifiable and gross.
26. The three co-accused who were charged along with the Petitioner had been imposed the following sentences after trial:
 - (i) Isei Korodrau – term of 5 years imprisonment
 - (ii) Osea Vakacereivalu - term of 5 years imprisonment
 - (iii) Joseph Nonu - term of 9 years imprisonment.

27. It was contended on behalf of the State that that the court took into consideration the significant amount of time the co-accused had been in custody awaiting trial and the fact that the accused Isei Korodrau was a first time offender.
28. At the hearing of the appeal before the Court of Appeal it had been brought to the attention of the court that co-accused Korodrau's circumstances of offending had been less serious than the Petitioner's circumstances and that any of the grounds enumerated in subsection (2) of Section 22 of the Act would have no application to Korodrau.
29. Having considered the facts and circumstances aforesaid the Court of Appeal had drawn the conclusion that the disparity in sentence complained of is not "something that had gone wrong with the administration of justice".
30. In the circumstances aforesaid this court see no valid ground to grant special leave to appeal with regard to the second ground of appeal as well.

CONCLUSIONS

31. The Court of Appeal had dealt with the two grounds of appeal raised on behalf of the Petitioner in this application and I am in agreement with their Lordships reasoning and conclusions.

Chitrasiri, J

32. I have read the judgment of Justice Aluwihare in draft, and I agree with his findings and the reasons given therein.

Orders of the Court:

1. *Special leave to appeal for enlargement of time granted.*
2. *Special leave to appeal against the sentence refused.*
3. *Application dismissed.*

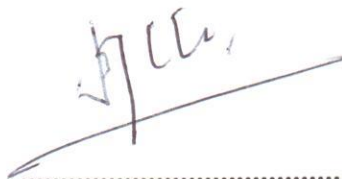




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Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court



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Judge of the Supreme Court



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