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

CRIMINAL APPEAL NO. AAU0018/2004S
(High Court Cr. Appeal No.HAA0046/03L)

BETWEEN:

LASARUSA RAKULA

Appellant

AND:

THE STATE

Respondent

Coram: Ward, President
Barker, JA
Tompkins, JA

Hearing: Wednesday 17th November, 2004

Counsel: Appellant in person
Mr. P. Ridgeway for respondent

Date of Judgment: Friday, 26th November 2004

JUDGMENT OF THE COURT

Following a trial in the Magistrates' Court in Lautoka, the appellant and two others were convicted of unlawful use of a motor vehicle and two counts of robbery with violence. All the offences related to the preparation for and execution of a bank robbery in which masks and weapons were used. Each of the accused was sentenced to 6 months, 4 years concurrent and 3 years consecutive giving a total sentence of 7 years imprisonment.

The evidence against this appellant was that he was positively identified, albeit in a dock identification, as one of the persons who took the vehicle used in the

robbery by force from the owner very shortly before the robbery and that, following the robbery, he gave $200 each to his common-law wife and an acquaintance, although he was unemployed at the time. No caution interview or statement was produced at the trial and the appellant elected not to give evidence.

He appealed to the High Court against conviction and sentence. In a short reasoned judgment, the learned judge dismissed the appeals against conviction. He then dealt with the sentence in the following terms:

> ***"The sentence imposed by the learned trial magistrate is set aside as in lieu thereof sentence the accused as follows:-***
>
> ***On count 1 Unlawfully use of motor vehicle a term of imprisonment for 6 months.***
> ***On count 2 Robbery with violence a term of imprisonment for 5 years.***
> ***On count 3 Robbery with violence a term of imprisonment for 5 years.***
> ***I order that the terms are to be served concurrently and I further order that all the sentences are backdated to the 19th of May 2003."***

He gave no reasons for the decision. There should always be clear reasons given for allowing any appeal either against conviction or sentence. In the present case, although the total sentence the appellant will serve is reduced by 2 years, the learned judge increased the sentences on both robbery charges. Clear reasons are especially important when sentences are increased.

The appellant now appeals to this Court against his conviction and has filed lengthy grounds of appeal all of which relate to matters of fact or of fact and law. It has been pointed out many times that the powers of this Court on an appeal from the High Court sitting in its appellate jurisdiction are limited by the terms of section 22(1) and (1A) of the Court of Appeal Act:

> "22 (1) 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;

Provided that no appeal shall lie against the confirmation by the High Court of a verdict of acquittal by a magistrate's court.

(1A) No appeal under subsection (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground-

(a) that 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."

The grounds of appeal did not involve a question of law only and the appeal must be dismissed. However, as the appellant was unrepresented, we allowed him to address the court and we would refer to three matters raised by him.

1. His principal ground was a complaint that he had not been adequately represented by his lawyer at the trial. His case, he stated, was not put properly, he had an alibi but the lawyer failed to call evidence to support it and he was badly advised to remain mute.

An appellate court will only interfere with a conviction on the ground that counsel has not conducted the case properly if it is satisfied that the manner in which it was conducted in court amounted to flagrant incompetence or in any other way it was such that there had been a miscarriage of justice. It will not regard the fact that counsel has taken a course of conduct which later appeared to have been mistaken or unwise as a sufficient ground of appeal; Ensor v R [1989] 89 CrAppR139.

In order to consider these matters, the court would normally require evidence and application should be made to call such evidence. No such application was made. We have looked at the record and it is clear that counsel put the appellant's case properly and there are reasons which could reasonably account for his advice to the appellant not to give evidence. We also note that the manner in which the case was conducted was not raised as a ground of appeal to the High Court and, indeed, the appellant had instructed the same counsel. We do not consider there is any substance in this ground.

2. The appellant initially sought leave to call fresh evidence. The evidence was that of the witnesses who, he tells the Court, would have supported his alibi and, therefore, also relates to the manner in which his counsel conducted the trial. This application should also have been accompanied by the evidence it was proposed to call.

The Court will only allow fresh evidence to be called if it is fresh in the sense that it was not known at the time of the trial and could not reasonably have been known. Although we have not seen the evidence, the appellant advised the Court that he had told his counsel of it at the time. It clearly does not fall into the category of fresh evidence and the application to call evidence is refused.

3. The appellant asserted that he had been assaulted by the police before he was interviewed. He advises this Court that, at the first hearing, he had to be helped into the court. A medical report was ordered by the court but has been lost. We are unable, on the material before us, to determine the truth of this allegation. However, no evidence was led by the prosecution of any interview or statement by the appellant and so the relevance of the assault to the issues in the trial is not apparent.

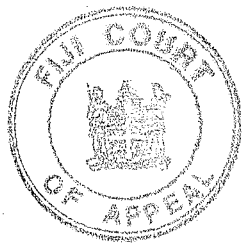
This is an appeal from the decision of the judge sitting in his appellate jurisdiction in the High Court. It follows that any ground which was not raised in the appeal cannot be considered in this Court. We have listened to the appellant's

arguments but none of the grounds raised gives him a right to appeal and the appeal is dismissed.

Order

Appeal against conviction dismissed.

Ward, President



Barker, JA

Tompkins, JA

Solicitors:

Appellant in person
Office of the Director of Public Prosecutions, Suva for the Respondent