

IN THE COURT OF APPEAL, FIJI ISLANDS

CRIMINAL APPEAL NO. AAU 0004 OF 2004S
(High Court Criminal Case No. HAA 007 of 2003S)

Between:

BIU IRIVI

Appellant

and

THE STATE

Respondent

DECISION

In January 2004 the Appellant filed a petition of appeal against a sentence of imprisonment which was imposed upon him by the Suva Magistrates' Court in January 2002 and which was confirmed by the High Court on appeal in May 2003.


On 18 March 2004 Gallen J.A. determined that the appeal was bound to fail since it did not raise any question of law and accordingly did not come within the provisions of Section 22 (1A) (a) of the Court of Appeal Act (Cap 12). In these circumstances leave to appeal was refused.

The Appellant, invoking Section 35 (3) of the Act, now seeks to have his appeal against sentence determined by the full Court.

Under Section 22 (1A) no appeal lies at all in respect of a sentence confirmed by the High Court unless the sentence was unlawful or was passed in consequence of an error of law. On the other hand where an appellant shows that an error of law occurred or that the sentence was unlawful then he has an unconditional right of appeal. In my respectful opinion the question of leave does not arise.

Although Gallen J.A's ruling concludes by refusing "leave" to appeal I am satisfied that in fact he was exercising the power conferred on him by Section 35 (2) of the Act and was not refusing to exercise the power conferred on him by Section 35(1) (a). In the circumstances Section 35 (3) does not apply.

The application is misconceived. It is dismissed.


M.D. Scott
Justice of Appeal

10 June 2004