IN THE FIJI COURT OF APPEAL
AT SUVA

Criminal Appeal No: AAU001/2008
High Court Action No. HAC 106 of 2007

BETWEEN:

SOLOVENI TUBUITAMANA

Appellant

AND

THE STATE

Respondent

Appearances:
Appellant: In Person
Respondent: Ms A. Prasad

Date of Hearing: 23 April 2008
Date of Judgment: 14 May 2008

Coram: Scutt, JA

JUDGMENT

1. BACKGROUND

On 2 November 2007, Mr Soloveni Tabuitamana and Mr Opeti Delana Koro pleaded guilty and were sentenced in respect of the offence of robbery with violence, contrary to section 293(1) of the Penal Code (Cap.17). The offence took place on 24 July 2007 at Nabua, Suva. A third person, not prosecuted and hence an identity unknown to the Court, was together with Mr Tabuitamana and Mr Koro at the commission of the offence, however, that person was not apprehended.

1.1 The Particulars of the Offence indicate that 'personal violence' was used upon one RD, s/o SD, 'immediately before' the robbery. RD was robbed of $4,146.53 in cash and cheques of $835.98, the total value being $4,982.51. The ruling on sentence, delivered by the Magistrate on 1 August 2007, describes the personal violence as involving an 'axe and knife to threaten' RD, and records recovery of some $800 of the total sum.

1.2 In sentencing Mr Tabuitamana and Mr Koro, the Magistrate observed that robbery with violence is a serious offence carrying a sentence of 14 years imprisonment under the Penal Code, and 'courts have given … 6 years to 10 years as tariff': p. 3, Magistrates Court Record

1.3 Commencing, then, from 6 years for both offenders, the Court Record shows that the Magistrate took into account:

- the plea of guilty, plus factors in mitigation – totaling 3 years reduction; and
- weapons used and planning – totaling 1 years increase,

making the overall sentence for Mr Tubuitamana 4 years and similarly for Mr Koro.

1.4 Mr Tubuitamana appealed to the High Court against conviction and sentence, as did Mr Koro. The appeal was heard jointly on 2 November 2007.

1.5 *(a)* ***Conviction:*** The High Court appeal against conviction was dismissed on the ground of the appellants having each pleaded guilty in circumstances where:

- The right to counsel was explained to each accused and each accused waived it;
- Both elected trial in the Magistrates Court;
- Before entering conviction, the summary of facts was outlined to both accused and both admitted the facts as outlined, which were:

SUMMARY OF FACTS

> On the 24th day of July, 2007 between 1500hrs to 1545hrs at Mead Road Nabua, RAJENDRA DEO s/o SURYA DEO (PW1), 28yrs, Sale[s]man of Davuilevu was driving the Punjas & Sons delivery truck registration number DT 547 with his two Delivery boys namely PENI EA VIA (PW[2]), 21yrs of Naduruloulou and MESAKE BUKA, 23 yrs of Dravo, Tailevu when they were threatened with an axe and knife and then were robbed of cash valued $4,146.53 and Cheques of $835.98 to the total value of $4,982.51 by OPETI DELANA KORO (Accused 1), 24yrs, casual worker of Lot 22 Tuirara Sub-Division, Jako, SOLOVENI TUBUITAMNAMA (Accused 2), 26yrs, farmer of WAILEVU Village, Wainibuka and a third accomplice.
>
> On the above date and time, Accused 1 and Accused 2 together with the third accomplice with the plan to rob, were waiting for the delivery truck at the Chinese shop opposite the Shell Service Station, Mead Road Nabua. After a while of waiting, the delivery truck arrived driven by (PW1) and accompanied by the two delivery boys (PW2) and (PW3). After they had stopped near the shops at Mead Road, (PW2) and (PW3) got off to make their delivery while (PW1) remained on the driver's seat with the money bag beside him. The three suspects executed their plan of robbery whereby Accused 1 and their third accomplice grabbed the delivery boys and held them at knife point while Accused 2 entered the truck with an axe, threatened (PW1), grabbed the money bag and they all ran towards the Mead Road main Road. They boarded a taxi registration number LT 4268 and drove up towards Tamavua. They got off at the Mead Road Children's Park, ran through Lovoni Settlement to Lovoni Road and the same taxi picked them up again at Princess Road. They drove down Reservoir Road and at Korovou Prison, Accused 1 and Accused 2 got off while the third suspect went away in the same taxi. Accused 1 was still standing beside the road after getting off when he was arrested by PC 2815 PONIPATE. Accused 1 was searched and cash of $744.07 was found in his trousers pocket. Accused 2 was arrested by PC 3373 EPARAMA at Korovou Town in the Vatukoula Express bus on his way to his village in Wainibuka, Tailevu and cash of $53.06 was found in his

possession together with 1 pair of canvas, 1 pair of socks and 1 pair of knee pads which he admitted that he had brought these items from his share of money from the robbery they did with Accused 1.

Accused 1 and Accused 2 were interviewed and admitted the offence thus subsequently charged.

1.6 The High Court observed that then, and only then, were the accused convicted as charged.

1.7 The High Court went on to say that in those circumstances 'there is no basis for claiming that the plea was equivocal':

> Ordinarily the inappropriateness of guilty pleas arise[s] where the facts admitted to do not satisfy the elements of the offence charged or where the rights to counsel were not properly explained to the appellants or it was obvious from the records that the appellants were under some duress to enter a guilty plea. None of these was present in this case. The plea was unequivocal and there is no appeal allowed in such circumstances: High Court Ruling, 2 November 2007, at 3

1.8 ***(b)*** ***Sentence:*** As for sentence, the High Court dismissed the appeal on the basis that there was 'nothing wrong in principle' with either the sentence or approach adopted by the Magistrate:

> The sentence was not harsh or excessive given the level of planning and violence involved [in] carrying out the offence. If anything, the sentence may have been lenient: High Court Ruling, 2 November 2007, at 3

1.9 His Lordship reached this conclusion by reference to ***Sakusa Basa*** [2006] FJCA 23 (AAU024/2005) where the tariff for robbery with violence was set at 4 to 7 years, and having regard to the Magistrate's taking into account the guilty plea and aggravating factors.

2. STATUTORY PROVISIONS

Because Mr Tubuitamana appealed from the Magistrates Court to the High Court, his rights in the Court of Appeal come under section 22 of the ***Court of Appeal Act*** (Cap. 12), restricting the scope of any appeal solely to questions of law:

(1) Any party to an appeal from a Magistrate's Court to the High Court may appeal, under ... Part [IV], 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.

(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 inconsequence of an error of law; or

(b) that the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence.

(2) ...

2.1 The powers to be exercised by a single Judge of Appeal are set out in section 35:

(1) A judge of the Court may exercise the following powers of the Court –

(a) to give leave to appeal to the Court;
(b) to extend the time within which notice of appeal or of an application for leave to appeal may be given;
(c) to allow the appellant to be present at any proceedings in cases where he or she is not entitled to be present without leave;
(d) to admit an appellant to bail;
(e) to cancel an appellant's bail on good cause being shown;
(f) to recommend that legal aid be granted to an appellant.

(2) If on the filing of a notice of appeal or of an application for leave to appeal, a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal.

(3) If the judge refuses an application on the part of the appellant to exercise a power under subsection (1) in the appellant's favour the appellant may have the application determined by the Court as duly constituted for the hearing and determining of appeals under this Act.

(4) ...

(5) ...

2.2 Section 26 sets a time limit on appeals:

(1) Where a person convicted desires to appeal under ... Part [IV] to the Court of Appeal, or to obtain leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of Court within thirty days of the date of conviction or decision. Except in the case of a conviction involving sentence of death, the time, within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Appeal.

3. MR TUBUITAMANA'S APPLICATION

This matter is listed before me as an application for leave to appeal out of time. Hence the question before the court is, on its face, whether Mr Tubuitamana should be granted leave to appeal out of time. A part of this question is whether any of the grounds listed by Mr Tubuitamana qualify as a question of law as required under section 22(1). 3.1 This is because, in order to extend the time for appealing, the Court must address the question whether the appeal sought by Mr Tubuitamana has any reasonable prospects of success. For reasons set out below, however, in my opinion Mr Tubuitamana's application should not be treated as an application to appeal out of time. Taking into account the matters set out below, in my opinion it should be regarded as an appeal within time. This means that Mr Tubuitamana is entitled to appeal to the Court of Appeal as of right.

3.2 At the same time, there are difficulties for Mr Tubuitamana in the grounds he puts forward for albeit he has a right to appeal, he is still required to comply with the provisions of section 22, namely that his entitlement extends to a question of law only.

3.3 Because in observing that Mr Tubuitamana has an appeal as of right I do not wish to lead Mr Tubuitamana into a position of wrongly anticipating that he may succeed in his appeal when it appears to me that it may be unlikely he will do so, I have looked carefully at his grounds of appeal and set out matters below in relation to them. Consistent with the approach of this Court where parties are unrepresented, I have looked at all the grounds, whether they are framed as relating to a question of law (as is one ground specifically) or not.

3.4 Mr Tubuitamana may therefore consider the matters I raise in deciding upon proceeding before the Full Court of the Court of Appeal when his appeal is ultimately listed for hearing.

4. LEAVE TO APPEAL OUT OF TIME OR APPEAL AS OF RIGHT

As noted, the High Court ruling against Mr Tubuitamana's appeal against conviction and sentence was made on 2 November 2007. Under section 26 of the Court of Appeal Act the time limit on appeals from the High Court to the Court of Appeal in criminal matters is 30 days. Hence to be within time, his application should have been received by the Court of Appeal on or before 2 December 2007.

4.1 Mr Tubuitamana's letter addressed to the President of the Fiji Court of Appeal is headed: 'Re: Application for leave to Appeal out of time'. However, it bears the date '13 November 2007'. The typed version of the letter bears no date; however, the handwritten document generated by Mr Tubuitamana clearly does. This means that if that is the correct date of Mr Tubuitamana's letter or petition of appeal, an issue is raised as to what this Court should do in respect of time and applications made by prisoners.

4.2 There is no reason to assume that the date 13 November 2007 is not the date upon which Mr Tubuitamana wrote his letter or petition. Working upon the basis that at the most, for a person not in prison delivery to the Court would take five to seven days – whether delivered by hand or through the post (and in my view it would generally take far less than this), Mr Tubuitamana's letter or petition would have been received by the Court by 20 November 2008 – still well within time.

4.3 The question then is whether the correct approach to accept it as being within time, for any delay in its receipt by the Court of Appeal would appear to be out of Mr Tubuitamana's control.

4.4 That is, Mr Tubuitamana is an incarcerated person. He is dependent upon prison authorities for transmission of his mail into the postal system or otherwise for delivery to the Court of Appeal.

4.5 A Memorandum being a cover note to Mr Tubuitamana's letter and headed from 'The Officer in Charge, Minimum Security Prison' to the President of Fiji Court of Appeal is dated 7 December 2007. It is stamped as received by the Fiji Court of Appeal on 18 December 2007. If the latter date, being the date of receipt of Mr Tubuitamana's letter, is taken as the appropriate date, then Mr Tubuitamana is obliged to seek leave to appeal out of time. Similarly as to the 7 December 2007 date: as at that date, Mr Tubuitamana's application was out of time and its transmission by prison authorities so as to be received by the Court of Appeal immediately after that date would not have assisted him to be within time.

4.6 On the other hand, there is no explanation as to the delay between 13 November 2007 (the date Mr Tubuitamana's letter discloses its having been written) and 7 December 2007. Mr Tubuitamana may have retained the letter, delaying passing it on to the prison authorities. However, this may seem surprising in that Mr Tubuitamana is seeking a reduction in sentence and it would therefore be in his interests to ensure that any such request would be transmitted through the system in a timely manner. Timeliness would therefore seem likely to govern that part of which he had control: namely, writing and passing on of his application.

4.7 Assuming that delay may be more likely to have occurred after the missive left Mr Tubuitamana's hands (albeit he did take some 11 days after his appeal was dismissed in the High Court to compose his letter or petition), should Mr Tubuitamana be penalised by having the additional hurdle of seeking leave out of time because of bureaucracy or staffing matters impinging upon or impeding more rapid transmission of his letter through the system?

4.8 This arguably raises an issue of (un)equal treatment under the Constitution. Section 38 of the Constitution says every person has the right to equality before the law. This is amplified as follows:

> (1) ...
> (2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:
> (a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or
> (b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others;
> or on any other ground prohibited by this Constitution.
>
> (3) Accordingly, neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any person on a prohibited ground.
> (4) Every person has the right of access, without discrimination on a prohibited ground, to shops, hotels, lodging houses, public restaurants, places of public entertainment, public transport services, taxis and public places.
> (5) The proprietor of a place or service referred to in subsection (4) must facilitate reasonable access for disabled persons to the extent prescribed by law ...

4.9 The time provision in section 26 of the Court of Appeal Act does not 'directly' discriminate against Mr Tubuitamana or any other incarcerated person: it does not explicitly refer to persons in prison setting a time limit for them alone. It applies to all convicted persons whether serving a term of imprisonment or not. However, it appears to 'indirectly' discriminate against incarcerated persons.

4.10 Indirect discrimination would or could apply as follows. Section 26 is neutral on its face: it does not identify any particular group or characteristic; rather the 30 day time limit applies to 'all comers' wishing to appeal. However, it impacts differentially or disparately against persons who are incarcerated, because (as noted) they do not have the same freedom as persons outside prison in obtaining writing materials, obtaining stamps, gaining access to mailing boxes, or gaining access to roadways, taxis, buses or other vehicles to travel in person to the Registry of the Court of Appeal to deliver an appeal document or an application, or being able to call upon another person of their choice to undertake the delivery for them. Persons in prison are, unlike

persons outside prison, dependent upon others to carry out their wish to have a document (in this case, an application or appeal notice) transmitted to the relevant authority.

4.11 Further, restrictions on letter-writing exist for prisoners who have been convicted and are serving a sentence.[1] Hence, the Prisoner's Letter Form (PN 914)(PLF) outlines Regulations relating to letter writing. The PLF says the 'privilege to write and receive letters is given to prisoners for the purpose of enabling them to keep in touch with their relatives and friends':

> All letters are read by the Prison Authorities. They must be legibly written. Any which is of an objectionable nature either to or from a prisoner will be suppressed.
>
> Every prisoner shall be allowed the privilege of writing one letter on admission and thereafter as follows –
>
> > Prisoners in the First and Second States – one letter every fortnight
> > Prisoners in the Third Stage – one letter every 10 days
> > Prisoners in the Special Stage – one letter every week
> > Civil prisoners – one letter in every week
> > Unconvicted Criminal Prisoners – write whenever they desire to do so
>
> Matters of special importance to the prisoners may be communicated at any time by letter to the Officer-in-Charge who will inform the prisoners there of expedient.
>
> ...

4.12 This outline of Prison Regulations appears on the PLF which was used by Mr Tubuitamana for the purpose of his appeal to this Court. Hence, as this is the explanation of letter writing rights or privileges held by convicted prisoners, insofar as Mr Tubuitamana and persons in Mr Tubuitamana's position are concerned, the notion that they are restricted in correspondence would apply.

4.13 The need for vigilance by prison authorities in respect of communications between prisoners and the outside world may be readily understood: for example, instances have arisen in other jurisdictions of prisoners using communications systems (including correspondence and telephone) to threaten, intimidate or otherwise harass and distress victims/survivors of their crimes or families of victims/survivors or victims who have not survived. This does not, of course, apply to all prisoners. Nonetheless, it happens and needs to be guarded against. Prison authorities have responsibilities in this regard that need affirmation. Correspondence can also be used for transmission of prohibited substances such as drugs. This, too, applies to some and certainly not all persons in prison. It too requires oversight. Prison authorities' responsibilities in this regard should be affirmed, too.

4.14 At the same time, letters, applications or petitions of appeal do not fall into the category of 'ordinary' correspondence.

4.15 The final sentence quoted in the extract of information appearing on the PLF (relating to 'matters of special importance to the prisoner') is unclear. It may mean that in matters of special

[1] 'Unconvicted criminal prisoners' (as described in prison material relating to correspondence rights or privileges) are entitled to 'write whenever they desire to do so': Prisoner's Letter Form, PN 914.

importance, the Officer-in-Charge will inform prisoners of the way their correspondence may be expedited vis-à-vis such matters. However, this is speculation and a convicted prisoner reading that sentence may not understand that an appeal is a 'matter of special importance' to be dealt with expeditiously by the prison authorities. Whatever the case in that regard, because the Bill of Rights in the Constitution is 'rights' legislation it must be interpreted favourably or benevolently toward rights and the scope or application of rights. Hence, restrictions or implied restrictions, or restrictions understood by convicted prisoners to apply, should not operate to make the rights of appeal of persons serving a prison term unequal to those of persons who are not incarcerated.

4.16 The right to equality should not be dependent on discretion. Redress of the discrimination arguably inherent in section 26 by reason of the Constitutional provision of equality should not be dependent upon the exercise of judicial discretion. That is, the rights of prisoners to be treated equally with those who are not incarcerated and seek access to the courts should not rely upon the discretion of the Court of Appeal to extend time under section 35 insofar as any of the delay rests directly with the fact of the prisoner's being incarcerated. The discretion to be exercised by the Court of Appeal in extending time under section 35 should itself be governed by the equality principle of section 38.

4.17 Section 38 of the Constitution explicitly recognises the difficulties faced by persons with a disability in relation to access to public places, etc. Notably, courts are not specifically mentioned in section 38(4). However, courts would obviously be included in 'public places'. Arguably, people in prison can be classified within the meaning of the law as 'persons with (or under) a disability'. This was in the past a common way of describing prisoners. Furthermore, extending access is not limited to methods or means such as ramps, moving footpaths, elevators and so forth. 'Disability' is not limited to physical disability requiring reliance upon a wheelchair for mobility. 'Access' includes hearing loops, enlarged fonts or Braille so that persons with a hearing or sight disability can gain access. It includes means by which people can access information, and means by which they can transmit information, including applications or appeal notices.

4.18 In any event, being incarcerated and hence without free or immediate access to the mail system or the courts independently of the assistance of others may come within 'any other ground prohibited by this Constitution': s. 38(2) Other provisions of the Constitution are particularly clear as to the need to protect the rights of persons charged with and convicted of crimes, and those who are incarcerated.

4.19 With 'indirect' discrimination, a question arises in law which does not apply to 'direct' discrimination, namely whether or not the restriction is 'unreasonable in the circumstances'. Is it unreasonable in the circumstances to apply a time limit as per section 26? One would have to answer 'no' for time limits are consistent with ensuring orderly conduct of court processes (and the requirement for such orderly conduct), the need for finality, and the Constitutional requirement for hearings 'within a reasonable time': s. 29(3)

4.20 At the same time, subjecting a person who is imprisoned to a time limit identical with the time limit imposed upon persons who are 'out' in the free world may be said to be unreasonable. No doubt it may be argued that the Court of Appeal's capacity to extend time under section 35 deals with the problem adequately. That is, the Court of Appeal would take into account the fact that the person making the application is a prisoner, or was at the time the application or appeal was sought to be filed. Hence, the 30 day time limit does not discriminate against incarcerated people. (Although this does not address the problem earlier adverted to of rights being dependent upon the exercise of discretion.)

4.21 I am not persuaded that this is the way or the only way to deal with the problem confronting prisoners in filing appeal petitions, and comment further on this below. However, if this is the way to deal with the problem (that is, by judicial discretion), it still seems fair to extend the time granted to a prisoner over and above the time granted to someone who is not imprisoned. That is, persons who are not imprisoned do have time extended under section 35. The reasons they put forward may be compelling however the incarcerated person has at least as great a call upon the Court's discretion, and (because of the unique circumstances) I would suggest more. That is, there should be latitude specifically given in respect of extension of time under section 35 of the Court of Appeal Act for the fact that the convicted person is incarcerated; that restrictions on correspondence exist; and that albeit 'special matters' may be subject to a different regime by prison authorities, this is still dependent upon the prison authorities and, furthermore, the prisoner needs to be aware that the 'ordinary' letter writing rules do not apply and the PLF does not make this sufficiently explicit or clear.[2] This latitude needs to exist over and above any other considerations upon which leave to appeal out of time may be granted.

4.22 Consultation with colleagues at the Court indicates that there is a 'Prison Justices' system that could be of assistance to prisoners seeking to have appeal documents lodged. The Commissioner of Prisons may be amenable to the institution of a system which could ensure (perhaps through the facility of the Prison Justices system) prompt delivery of such documents to the High Court and Court of Appeal Registries in the case of High Court and Court of Appeal appeals respectively.

4.23 I have set out all the above matters as a matter arises here which could have serious implications for a convicted person in terms of their rights under the Court of Appeal Act and the Constitution.

4.24 That is, an appeal under section 22 is 'as of right' so long as the appellant can identify a ground of appeal involving a question of law. If the application or notice of appeal is received by the Court of Appeal within 30 days of the date of conviction, then the Court of Appeal must consider the appeal. If, on the other hand, the application or notice of appeal is received by the Court of Appeal more than 30 days after that date, there is an additional hurdle faced by a convicted person: that is, the hurdle of appealing out of time and hence having the 'time' question dealt with first. Without an extension of time, the Court will not entertain the appeal.

4.25 Yet if the delay in Mr Tubuitamana's application, letter or petition arriving in the Court of Appeal is not due to any dallying on his part but due to bureaucratic delay within the prison system over which Mr Tubuitamana has no control, it seems to me wrong that Mr Tubuitamana has to face the hurdle of 'time' as per section 26 of the Court of Appeal Act, in conjunction with section 35(1) (b). In saying this, I emphasise an acknowledgement on the part of the Court as to matters of staffing in the prison system, the need to address the needs of numbers of inmates, and rules governing correspondence generally which add to the requirements placed on staff.

4.26 In all the circumstances here, taking into account that Mr Tubuitamana appears to have written his application or appeal well within time and that it was received by the Court of Appeal only 16 days after the expiration of 30 days from the date of the High Court judgment, it seems to

[2] In my opinion, specific and explicit notice needs to be provided to all prisoners as to any special system or rules governing appeal petitions or applications.

me that Mr Tubuitamana should be entitled to exercise his right of appeal 'as of right' rather than via the question of an extension of time.

4.27 The way in which this should fairly be done is by taking the date of his petition or letter as the date upon which it was written by Mr Tubuitamana, then considering what would be the likely length of time (after its writing) for it to be delivered to the Court of Appeal by a person not subject to imprisonment. I have earlier said that five to seven days, at the outside, could be contemplated. In reality, a person who was not imprisoned could deliver the letter or petition on the very day of its writing. Because Mr Tubuitamana wrote his letter or petition well within time, my taking the option of five to seven days does not harm his case: that is, he is as noted still well within time if receipt is calculated as being 20 November 2007. Where timing is shorter in any future case, it will be for the Court to determine whether or not such a petition should be ruled as within time or as requiring an extension of time per section 26 and 35.

4.28 Taking all the above matters into account, I do not grant Mr Tubuitamana an extension of time under section 35 for in my opinion this is not necessary. His appeal was within time and should be treated as such.

4.29 This means that Mr Tubuitamana has a right of appeal in the Court of Appeal and that his appeal should be listed before the Court of Appeal accordingly.

5. GROUNDS AND SUBMISSIONS BY THE PARTIES

In accordance with my earlier stated concerns about the requirement that Mr Tubuitamana's appeal is restricted to questions of law only, I set out here some matters that Mr Tubuitamana may wish to consider in determining whether he wishes to proceed with his appeal.

5.1 The grounds set out by Mr Tubuitamana in his letter of 13 November 2007 are:

1. That the application as an unrepresented applicant prior to the application lack of knowledge for legal system and law relating to the proper and perfect formulation of related matter only that may persuade the respective court to hear my application.
2. That I am not a well educated man and was not in the right state of mind and couldn't stand the harsh 4 years sentence imposed by the magistrate court whereas I filed my appeal to the high court with wrong application of grounds for appeal.
3. That I was ill-advised by my co-accused and could not understand the proper procedure of the principle of the guilty plea.
4. That I find the learned magistrate is erred by law, imposing the same sentence on me from my other accused, charged with same offence, without relevant different for the offence individually or irrespective personal circumstances nor there was any sufficient evidence to prove that I was the instigator. See R. v. Wilson Jan 25 1973 CSPA 92 (1).
5. That section 23(1) of the Constitution allow a person to sentence to imprisonment by a court, whereby in section 28(1)(L) of the Constitution it provides that every person charged with an offence, if found guilty has the right to appeal at High Court.

Sir, those are the respective grounds of my leave to re-appeal out of time; whereas I found that the sentence laid against me by the learned magistrate is too harsh or excessive.

Assuredly, it is your honorable perspective and merciful jurist decision that I will await and rely upon.

May God Bless You Always.

5.2 In submissions before this Court, Mr Tubuitamana drew attention to a number of points which he said had not been taken into account in determining sentence. These included:

- That no injury had been caused to the victims of the robbery;
- That he did not threaten the driver of the vehicle from which the money and cheques were taken.
- That he did not have the knife (he could not recall who – of the other two - had the knife), but he did have the axe.
- That the third person (who was not apprehended) brought the axe.
- That he had been involved in a robbery, but not a robbery with violence.
- That the door of the vehicle was open and he went in and grabbed the bag (continuing the money and cheques) from the seat.
- That he was told by one of the police officers that he was the one who had threatened the driver, but this was untrue because he had the axe and not the knife.
- That matters specifically relating to him were not taken into account by the Court in sentencing him and that the Court did not have regard to differences between him and his co-offender, Mr Koro.
- Why did he receive an excessive sentence when in other cases offenders received lesser sentences.
- He admitted the facts of the case, but denies what he was judged for – that is, he was judged for robbery with violence when he denies that there was violence (alluding also to a lack of injury to the victims).[3]

5.3 In response, Counsel for the State observed that this is a second appeal – to the Court of Appeal via the High Court – and hence under section 22 Mr Tubuitamana's grounds of appeal are limited to law. Counsel noted that Mr Tubuitamana appealed against both conviction and sentence in the High Court, arguing that his plea of guilty was made in circumstances where there was 'pressure' and he 'did not understand'. Counsel referred, however, to the Magistrate's Court Record, p. 10 where it is indicated that the alleged facts were read to the accused, the Court explained the charge and the accused understood and elected a Magistrate's Court trial. Further, the accused admitted the facts and at sentence admitted previous convictions. Counsel said that the plea of each accused was unequivocal. Further, she said, Mr Tubuitamana was 'not a stranger to court procedure' and hence 'understood what it meant to plead guilty'. She said further that both accused confessed voluntarily and in their plea of mitigation neither Mr Tubuitamana nor his co-accused made any complaint that they were forced to plead.

---

[3] It is important to note that the matters Mr Tubuitamana raises as not having been considered in the Magistrate's sentencing – such as lack of any injury, matters specifically relating to him in mitigation, etc – were in fact considered. On this, see later.

5.4 As to any contention that Mr Tubuitamana 'confessed' to the crime by reason of duress on the part of police officers, Counsel said that there was nothing in the Court Record to indicate that this was raised, suggested or contended for by Mr Tubuitamana or his co-accused at the Magistrates Court. In any event, the statements made by Mr Tubuitamana and his co-accused were not attached as an annexure in the Court Record although Counsel acknowledged that the facts as set out in the Court Record and read to Mr Tubuitamana and his co-accused would have been distilled from the confessions.

5.5 As to the contention that there should have been difference in sentence between Mr Tubuitamana and his co-accused, Counsel said that there was no merit in this contention as this was a joint enterprise and there was premeditation. A delivery van was intercepted and robbed, with a threat of violence through the presence of a knife and an axe.

5.6 Both Mr Tubuitamana and his co-accused had previous convictions and they received similar sentences accordingly.

5.7 As to other cases suggested by Mr Tubuitamana as meaning that his sentence was excessive, Counsel said that one must look at the violence used and whether in fact there were lesser sentences applied in other cases. She referred again to the presence of the knife and the axe, and also to the amount (of monies) taken. She said that if there were different sentences in other cases, then one must look at the reasons for this rather than simply at whether the sentences themselves were different.

5.8 Counsel acknowledged that there was no violence in the sense of violence causing injury of a physical nature to the victims. However, she observed that the presence of weapons constituted a threat and that the fear engendered by the presence of weapons is a relevant aspect in the charge of robbery with violence. This is consistent with the fact of the knife and axe in the charge of robbery with violence to which both Mr Tubuitamana and Mr Koro pleaded guilty.

5.9 Noting that there was a question about the title of the charge, stated as 'ROBBER WITH VIOLENCE' rather than 'ROBBERY WITH VIOLENCE' I asked Mr Tubuitamana about this and whether he had understood the charge. In reply, Mr Tubuitamana said that he was ill-advised by police officers because they said that if he confessed and pleaded guilty then he would receive a lesser sentence. He said that he 'only realised' the charge was robbery with violence when he appeared in Court. He said he trusted the police officers and he would have changed his mind 'back then' about confessing and pleading guilty if he had known that he would receive a harsher sentence.

5.10 Counsel for the State also responded on this point and said that the offence as charged involved the accused having grabbed the delivery boys, restraining them and threatening them, that it was a joint enterprise and it was 'robbery with others' and 'robbery with violence'.

5.11 From the foregoing, it appears to me that Mr Tubuitamana contests the 'robbery with violence' charge because no injury was caused and he carried the axe, not the knife. Rather than the framing of the charge or its title, therefore, the issue is as to the plea of guilty to the offence as charged.

6. QUESTION OF LAW ALONE?

Mr Tubuitamana is an unrepresented person. Hence, it appeared proper to me to hear his submission on all his grounds of appeal, whether or not on their face they involve solely matters of law, or mixed law and fact, or fact alone. At the outset, I should say that it appears to me

difficult to fault the procedure in the Magistrate's Court or the sentence imposed by that Court, just as it is difficult to fault the judgment of the High Court on appeal. In those circumstances, I am bound to say that having considered all the matters raised in oral submissions, the written grounds and cases referred to, Mr Tubuitamana's appeal as presently framed may face considerable difficulties in the Court of Appeal in bringing itself within the strictures of section 22 as to a question of law alone, or questions of law alone.

6.1 Insofar as the plea of guilty is in issue, in ***Bodui v. State*** [1999] FJCA 54; AAU0002u.1999s (27 August 1999)(High Court Criminal Case No. 9 of 1998/S0, the Court of Appeal determined:

> The sole basis of the appeal to this Court is the question of equivocation in the plea. For reasons we have set out below, we do not consider that that raises a question of law only and it does not, therefore, give a right of appeal ...
>
>> ... the grounds of appeal ... are based solely on the question of equivocation. In the present case, the sole challenge depends on the meaning and effect of the plea in mitigation. That is not an issue of law only and thus gives no right of appeal to this Court under section 22, as a second appeal [after the High Court]. However, in the event, the learned judge ruled on it and his conclusion, with respect, was clearly correct. The authorities have long established the principle that any question about the propriety of a plea tendered shall be ascertained on the record alone ...: at 2, 3

6.1 The High Court's determination on this point is clear. As was said in ***Kuruka Bogwalu & Ifereimi Nakauta v. The State*** [1998] AAU 006 of 1996, followed in ***Chand v. State*** [2008] FJHC 30; HAA01.2008 (29 February 2008), at 2:

> If it can be demonstrated that an accused person has pleaded guilty in a manner that is in anyway equivocal or uncertain, or that the accused entered the plea when he did not have a full understanding of the effect of the plea, namely that he was admitting that he committed the offence with which he has been charged, an appeal against conviction may be entertained despite the guilty plea ... Whether a plea of guilty is effective and binding will be a question of fact to be determined by the appellate court ascertaining from the record and from other evidence tendered, what occurred at the time the plea was entered. The onus will be on the appellant to establish the facts on which the validity of the plea is challenged.

6.2 In ***Chand v. State*** the High Court addressed what occurred in relation to the facts as follows:

> ... court record shows that the charge was read and explained to the appellant. He understood the charge. His right to counsel was also explained to him by the learned Magistrate and he advised the court that he will defend himself. He then pleaded guilty and the appellant advised the court that he was not forced nor induced to plead guilty. When the facts were put [to] the appellant he admitted it. After admitting the facts the appellant was then convicted as charged. The appellant then mitigated and in his mitigation he said nothing that would suggest that he did not fully under[stand] the nature and likely effect of this plea. On those facts and in the absence of any other evidence from which the Court may understand fully what occurred at the time the plea was

> entered, I find that the guilty plea entered by the appellant was in the circumstances of this case unequivocal and the conviction properly entered: at 2

6.3 In ***Joji Waqasaqa & Sarwan Kuma v. The State*** [2005] HAA 006 of 2004:

> ... Justice Winter after reviewing from the record what occurred at the time the plea was entered, and they were almost identical to those in this case, concluded that the guilty plea was unequivocal: at 4

6.4 Arguably, the same may be held to apply here: Justice Mataitoga reviewed from the record what occurred at the time the plea was entered, and the facts as stated in the record were 'almost identical' to those in ***Chand v. State*** – with the apparent difference being that there was no explicit advice to the court by Mr Tubuitamana that he 'was not forced nor induced to plead guilty'. Mr Tubuitmana now states that the police interviewing him held out that he would receive a lesser sentence than he ultimately received, if he confessed and pleaded guilty.

6.5 Nothing of this was stated at the trial. What was said was that he (and his co-accused) had 'pleaded guilty to the charge ... and helped in saving courts time. I have also co-operated with police in their investigations and all items have been recovered ...': Mr Tubuitamana's letter/petition of 30 July 2007Criminal Appeal No. HAA106 of 2007

6.6 It is apparent that insofar as the Magistrates Court is concerned, Mr Tubuitmana would not be minded to raise the holding out of a lesser sentence until he had actually received the sentence – because he would not know, until that point, what sentence he was to receive and whether it were to be higher than he anticipated. He could obviously know this only after the sentence was imposed. However, he did raise the matter before the High Court where the grounds were stated as including:

> The learned magistrate erred in law by taking into account our confession which was obtained through duress: Magistrates Court Record, p. 6 – Application for Appeal on Sentence and Conviction Case No. i388/07 Robbery with Violence

6.7 As noted, the High Court fully addressed this ground in the appeal before it and as it does not constitute a question of law alone, it would not seem to come within the requirement of section 22 of the Court of Appeal Act.

6.8 Mr Tubuitamana's ground as to his having filed the 'wrong application of grounds for appeal' in the High Court may face difficulties as a ground of appeal. Albeit the High Court considered that the grounds were phrased in a manner 'making it difficult to understand what exactly is the ground' submitted, it appears to me that the matters set out do not differ in any substantial way from the matters that are now put in this Court. His Lordship did not specifically address the contention that the Magistrate 'erred in law to consider that we were not the princi[pal] party to the offences'. I take this to mean that Mr Tubuitamana's complaint is that he was regarded as a principal party to or in the offence charged.

6.9 Insofar as the High Court's consideration of the matter, the contention that the sentence was 'harsh as well as being excessive' was explicitly addressed and hence the question of error was a part of His Lordship's consideration.

6.10 Even if this did not address Mr Tubuitamana's concern, the statement of facts to which Mr Tubuitamana agreed in the Magistrates Court makes clear the equal involvement of each of

the accused and the third party who was not apprehended. As Counsel for the State said, this was a matter of robbery with violence in concert, or a joint enterprise. Each of the accused was a principal offender in this regard; none of them was classified as a 'ringleader' or instigator of the others or another, or another or others following a 'ringleader'. Nor was there any implication that some were designated followers, or one a designated follower with (for example) Mr Tubuitamana the principal offender or 'leader'.

6.11 As there is no indication in the Magistrates Court sentencing of the matter complained of, it is difficult to see that this would be an arguable ground of appeal.

6.12 Mr Tubuitamana's ground as to being 'ill-advised' by his co-accused and 'not understand[ing] the proper procedure of the principle of the guilty plea' was as noted dealt with by the High Court as going to the unequivocal nature of the guilty plea and as noted this not a question of law alone: ***Kuruka Bogwalu & Ifereimi Nakauta v. The State*** [1998] AAU 006 of 1996; ***Chand v. State*** [2008] FJHC 30; HAA01.2008 (29 February 2008), at 2. Hence, Mr Tubuitamana would have difficulty in bringing this ground within section 22 of the Court of Appeal Act.

6.13 Mr Tubuitamana next contends that the Magistrate 'erred by law, imposing the same sentence on me from my other accused, charged with same offence, without relevant different for the offence individually or irrespective personal circumstances nor there was any sufficient evidence to prove that I was the instigator. See R. v. Wilson Jan 25 1973 CSPA 92 (1)'.

6.14 First, to appeal on sentence, Mr Tubuitamana must meet the requirements of section 22(1) as to there being an error of law in the sentence or any principle by which it was imposed. Further, as Mr Tubuitamana's appeal has come to the Court of Appeal via an appeal to the High Court, section 22(1A) must be met. That is, no appeal under section 22(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.

6.15 Section 22 (!A)(b) does not apply. However, Mr Tubuitamana must satisfy the Court of Appeal that the sentence imposed by the Magistrates Court 'was an unlawful one' or 'was passed in consequence of an error of law'.

6.16 As noted, there is no indication in the Magistrates Court sentencing of Mr Tubuitamana that he was sentenced as 'the instigator'. As stated above, and is clear from the statement of facts to which Mr Tubuitamana agreed and the Magistrate's sentencing, this was a joint enterprise with no one being labeled or sentenced as 'instigator'. Further, the Magistrate did take into account the matters that were put by and for each accused. That the accused were ultimately sentenced each to four years does not mean that the Magistrate did not consider each accused individually, or as an individual offender:

6.17 The Magistrate:

- Took into account the guilty pleas noting the accused had 'saved time of the Court';

- Noted cash recovered to the sum of approximately $800, but the 'rest of the cash sum and cheques were still unaccounted for and not recovered';
- Noted family circumstances and mitigation in writing – each of the accused provided written documentation to the Court, setting out their individual circumstances and the matters they wished to have taken into account, so that the Magistrate must be taken to have considered the individual aspects as put by each of them as to their own circumstances;
- Took into account for Mr Tubuitamana – 'you also have previous convictions;[4]
- Observed that an axe and knife were used 'to threaten the complainant before robbery' – Mr Tubuitamana acknowledges that he had the axe; he denies he had the knife. In my opinion the Magistrate is not suggesting here that one of the accused (whether Mr Tubuitamana or Mr Koro) had both the axe and the knife: rather, he is saying that the offenders had these weapons – axe and knife – when they jointly (with the third party) carried out the robbery);
- Noted that the robbery was well planned and executed;
- Noted that the balance of the money was used – Mr Tubuitamana acknowledges he spent money on various items with which he was found;
- Gave a discount for 'no injuries caused to complainant as in other robbery with violence cases'.

6.18 In taking the tariff as 6-10 years with the maximum sentence being 14 years, the Magistrate dealt with each accused separately, saying:

> **Accused 1 [Mr Koro]:** I start with 6 years. Reduce it for your plea of guilty and factors as mentioned by 3 years.
>
> Increase it for the weapons used and planning by 1 year. Total 4 years imprisonment.
>
> **Accused 2 [Mr Tubuitamana]:** I consider your guilty plea and mitigation. You also didn't learn lesson.
>
> Starting from 6 years reduce it by 3 years – guilty plea. Increase it for weapon used and planning by 1 year. Making it to total of 4 years imprisonment and you have 28 days to appeal.

6.19 In the High Court, it was observed that the Magistrate did address the correct principles in applying the sentence. Hence, Mr Tubuitamana may have difficulty in persuading the Court of Appeal that the Magistrates Court and/or the High Court applied a wrong principle of law or engaged in error of law in determining upon sentence or addressing the appeal on sentence as 'harsh and excessive'.

6.20 Insofar as the question of difference in relation to other sentences imposed on offenders, I have reviewed the cases referred to by the appellants. In ***R. v. Waddingham*** [1983] CrimLR 492 (3 March 1983) the offender received six years imprisonment on each count of robbery (two counts) and theft (one count), in housebreaking incidents, with five other offences taken into account. There were previous convictions. When compared with four years in Mr Tubuitamana's case, this does not seem out of step.

---

[4] For Mr Koro it was noted he had 'previous convictions and court had shown you leniency': Magistrates Court Record, p. 12

6.21 In ***R. v. Moananui*** [1983] NZLR 537 three men were convicted of a premeditated robbery taking $1200 in cheques and $2400 in cash from a service station. Two were armed with weapons and one acted as getaway driver. Mr Moananui was 'the ringleader' carrying a 0.303 rifle, whilst Mr Poi carried 'a large skinning knife'. All had previous convictions, but none for an offence as serious as this. The getaway driver had not previously received a custodial sentence. Mr Moananui (22 years) was sentenced to two years nine months imprisonment, Mr Poi (aged 20) to two years imprisonment, and Mr Kuka (aged 17) to one years imprisonment. On appeal, reviewing sentences imposed in various cases for aggravated robbery and proceeding on the basis that the rifle was unloaded, the sentences were increased to five years (for Mr Moananui), three and a half years (for Mr Poi) and one and a half years (for Mr Kuka).

6.22 Again, it does not appear to me that there is a distinction to be drawn between the sentence of Mr Tubuitamana and the sentences here. Mr Tubuitamana, together with Mr Koro and the third participant, were considered to be equally involved in the offence so that the sentence for Mr Tubuitamana (as that for Mr Koro) would have to be compared with that of Mr Poi or Mr Moananui. If one year is 'taken off' because Mr Moananui led the other two in the offence, this leaves four years which is the equivalent of Mr Tubuitamana's sentence. If Mr Poi is taken as the correct comparator, adding 6 months because Mr Poi was a follower, but Mr Tubuitamana was an equal offender means that four years is the appropriate sentence. Neither Mr Tubuitamana nor Mr Koro could compare himself with Mr Kuka. If they compare themselves with Mr Poi (without any 'add on' for the fact that they were not 'followers' whereas Mr Poi was), then the sentences are comparable in any event. If they compare themselves with Mr Moananui, their sentence is below his – five versus four years.

6.23 I note also in this regard that it appears the difficulty Mr Tubuitamana (and Mr Koro) has with the sentence imposed and with the offence with which the pair were charged is that it is 'robbery with violence'. It is the 'violence' aspect of the charge they query. However, the facts for Mr Tubuitamana (and Mr Koro) are similar to those in ***R. v. Moananui*** so that using this case as a comparator is apt.

6.24 In ***R. v. Moananui*** the sentences were imposed in respect of a robbery where a knife and gun were 'used' in the sense that they were taken to the scene and were carried by the two offenders who entered the service station. They were used as a threat, albeit they were not used to physically injure the attendant. There was a suggestion that Mr Moananui had held the rifle to the head of the attendant and threatened to shoot the attendant, however, that was not taken into account in the sentencing. Thus, the sentences imposed here are relevant to Mr Tubuitamana (and Mr Koro). Albeit they did not injure physically anyone when they engaged in the robbery and took the cash and cheques, they did have an axe and a knife. The lack of physical injury was, as already noted, taken into account by the Magistrate in sentencing.

6.25 Robbery with violence involves 'violence' in the sense not only of causing physical injury, but in terms of threatening people with injury. Carrying weapons is a threat in itself: an offender does not have to point a gun at someone's head or hold a knife at someone's throat, or hold a raised axe over someone's head to 'threaten' and hence to be found guilty of robbery with violence. The charge to which Mr Tubuitamana answered and pleaded guilty and the statement of facts upon which his guilty plea was based make the 'with violence' aspect explicit.

6.26 That is, the title of the charge carries the word 'violence'. 'With violence' is the term used in conjunction with 'Robber'. '... held them at knife point' is a clause included in the Summary of Facts – relating to the other accused and accomplice. Insofar as Mr Tubuitamana is

specifically referred to, the Summary of Facts says he 'entered the truck with an axe, threatened (PW1), grabbed the money bag and they all ran towards the Mead Road main Road ...' The specific juxtaposition of the words 'axe' and 'threatened' along with the title of the charge: 'Robber [sic] with Violence' appears to undercut Mr Tubuitamana's contention as to a lack of comprehension of the charge.

6.27 Again, in any event, this recanvasses the question of the guilty plea, already addressed. There is, therefore, a question whether this would be considered to be a question of law alone as required under section 22 of the Court of Appeal Act.

6.28 As to the charge's having been headed 'Robber with Violence' rather than 'Robbery with Violence' it is difficult to see that this could create any doubt for Mr Tubuitamana as to the offence with which he was charged. He has as noted contested the 'violence' aspect of the charge, not the 'robber' or 'robbery' aspect. There is no prospect of success in any contention that the charge should have been properly labeled 'Robbery' with Violence rather than 'Robber' with Violence.

6.29 I turn then to the Constitutional ground raised by Mr Tubuitamana. Section 23(1) of the Constitution provides:

> A person must not be deprived of personal liberty except:
>
> (a) for the purpose of executing the sentence or order of a court, whether handed down or made in the Fiji Islands or elsewhere, in respect of an offence of which the person has been convicted ...

6.30 In all the circumstances of the case and taking into account Mr Tubuitamana's personal circumstances, it appears that a sentence of imprisonment was inevitable in respect of the offence for which Mr Tubuitamana was convicted. Hence, it would appear that his incarceration accords with section 23(1) of the Constitution.

6.31 Section 28(1)(l) of the Constitution says:

> Every person charged with an offence has the right ...if found guilty, to appeal to a higher court.

6.32 Mr Tubuitamana has availed himself of this right in appealing to the High Court. He has again availed himself of this right in appealing to the Court of Appeal. Because in my view his appeal is within time, he has an appeal as of right and his appeal will be listed before the Court of Appeal in due course.

7. CONCLUSION

As I have said earlier, the aspect of Mr Tubuitamana's case which I find troubling is that relating to the leave to appeal out of time under sections 26 and 35 of the Court of Appeal Act. As noted, appeal under section 22 is as of right, albeit confined to questions of law. It seems wrong to me that a prisoner may be disadvantaged by the very fact of her or his imprisonment, so that instead of an appeal as of right she or he faces the additional hurdle of seeking leave to appeal out of time, when the lack of timeliness is short and not due to her or his tardiness but to bureaucratic delay or simply the fact of incarceration. It is also wrong, as stated earlier in this judgment, that in such circumstances whether or not the prisoner can appeal is dependent upon discretion under section 35.

7.1 As earlier noted, Mr Tubuitamana had his letter or petition of appeal 'in the system' well within time and it was only its passage through the channels which meant it arrived in the Court of appeal some 16 days after the 2 December 2007 'deadline' per section 26.

7.2 Albeit Mr Tubuitamana's grounds are problematic in my opinion in terms of meeting the requirement of section 22 as to a question of law alone, this is of course not a question that can or should be addressed with any finality at this stage.

7.3 This is a matter for the Court of Appeal when Mr Tubuitamana's appeal as of right is heard should he determine to proceed with his appeal as he has a right to do.

7.4 However, should the Full Court of the Court of Appeal consider that I am wrong as treating Mr Tubuitamana's appeal as within time, then section 35(3) ensures that Mr Tubuitamana can have his appeal dealt with as an application for leave to appeal out of time:

> If the judge refuses an application on the part of the appellant to exercise a power under subsection (1) in the appellant's favour, the appellant may have the application determined by the Court as duly constituted for hearing and determining of appeals under this Act.

7.5 If the Court of Appeal should disagree with my determination that Mr Tubuitamana's appeal is within time, then it would properly consider his application for leave as having been refused in accordance with this provision and, as I have said, consider his application as one for leave to appeal out of time and determine accordingly.

8. DETERMINATION

Mr Tubuitamana's application is wrongly characterised as an application for leave to appeal out of time. In my opinion the fact that he wrote his letter or petition well within time and its delivery in the ordinary course would have brought it well within the 30 day time limit means that he has an appeal to the Court of Appeal as of right under section 22 of the Court of Appeal Act.

8.1 Hence, his appeal should proceed before the Court of Appeal as duly constituted for hearing and determining appeals under the Court of Appeal Act.

Jocelynne A. Scutt
Judge of Appeal
Suva
14 May 2008