IN THE FIJI COURT OF APPEAL
AT SUVA

Criminal Appeal No: AAU0028/2008
High Court Action No. HAC 106 of 2007

BETWEEN:

OPETI DELANA KORO

Appellant

AND

THE STATE

Respondent

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

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

Coram: Scutt, JA

JUDGMENT

1. BACKGROUND

Mr Opeti Delana Koro's petition to the Court of Appeal was originally headed 'Re: Appeal Against Conviction and Sentence – Criminal Appeal No. 1388/07'. It appears that he then scored through 'Conviction', albeit a section of the petition is headed 'Conviction' and carries a number of paragraphs on that aspect. The petition also indicates that Mr Koro seeks bail.

1.1 Albeit the petition – written on the Prisoner's Letter Form (PLF) provided by the prison authorities – does not bear a date, the typed version carries the date '28th January, 2008'. It is unclear how this date became attached to Mr Koro's petition.

1.2 The Memorandum directed to the Registrar, Fiji Court of Appeal, Suva, from the Minimum Security Prison, Naboro, where Mr Koro currently resides, does not indicate upon what date Mr Koro's petition was received by prison authorities. However, the Memorandum itself bears the date 7 February 2008. That Memorandum is stamped 'Received 12 Feb 2008 High Court Registry'. A second Memorandum on the file – this from the Magistrates Court, Suva – is dated 26 March 2008. Addressed to the Registrar, Fiji Court of Appeal, Suva, the Memorandum

states that Mr Koro's petition 'was mistakenly sent to our section' and is forwarded to the Court of Appeal Registrar 'for your necessary actions, please'. It is stamped 'Received 26 Mar 2008 Fiji Court of Appeal'.

1.3 The High Court ruling against which Mr Koro seeks to appeal (along with the Magistrates Court determination of 1 August 2007) was made on 2 November 2007

1.4 Section 26 of the Court of Appeal Act (Cap 12) provides that the time limit set for such an appeal is 30 days. Hence, by 28 January 2008 Mr Koro's petition was beyond the time limit – which expired on or about 2 December 2008. The date factor has considerable significance: if an appeal petition is filed within time, the appellant has an appeal to the Court of Appeal as of right. If not, the appellant is obliged to seek leave to appeal out of time. The general approach of this Court has been to extend latitude up to three months, however, beyond that time an extension becomes more difficult and discretion becomes less likely to be exercised. In any event, reasons for extending time must be provided by an appellant or at least be evident from the material before the Court.

1.5 For Mr Koro, as outlined below, the date of his petition or letter means that whatever the date it was received by the Court of Appeal or is taken to have been received, he is in a position of having to make application out of time. However, because of the importance of this issue, it seems to me equally important to make the following observations. As already noted, the length of delay is relevant to whether or not time will be extended.

1.6 Because a time limit exists, and because of the special difficulties facing persons who are imprisoned, a number of considerations arise in determining the date of receipt by the Court of Appeal of a petition or letter of appeal.

1.7 One way of addressing the matter is to take the date upon which a petition is received by the court system as the date of its filing. That is, in Mr Koro's case, the petition having been received by the High Court on 12 February 2008, to be fair this could be taken as the relevant date for the purpose of calculating the 30 days time limit.

1.8 Those who are not imprisoned are able to attend at the court buildings and hence to be directed to the correct registry for filing documents. Persons who are in prison do not have this liberty. Hence, it seems to me, some latitude should be extended to them. A copy of the petition must be served upon the Respondent however as in the case of criminal appeals this will generally be the Director of Public Prosecutions it seems to me that there would not be a disadvantage to the DPP in allowing a prisoner such latitude. What it does mean is that that part of the court system receiving such a petition should act with promptitude in ensuring that it is transmitted to the Court of Appeal in a timely manner.

1.9 In ***Soloveni Tubuitamana v. The State*** AAU0001 of 2008, HAA 106/07 (14 May 2008) I have addressed section 26 and section 35 of the Court of Appeal Act as to leave to appeal out of time, and the application of Constitutional provisions, in particular the 'equality' provision in section 38. Prisoner's rights are affected by the time upon which a petition is registered as having been received: it can make the difference between a person having access to the Court of Appeal for an appeal as of right, and having access only by way of leave for an extension of time: ss. 22, 26 and 35 This is an important distinction.

1.10 In Mr Koro's case, if the date appearing on the typed version of his petition is accepted as the correct date of its making, then Mr Koro will have been obliged to seek leave to appeal out of

time whatever date the Court of Appeal received it. There is no reason not to accept the 28 January 2008 as the correct date, for the typed version conforms to Mr Koro's wish (as indicated on the handwritten version) that 'Conviction' not be appealed against, consistent with his submissions before this Court.[1]

1.11 However, where the petition or letter is written by the prisoner within the thirty-day period, then in ***Soloveni Tubuitamana v. The State*** AAU0001 of 2008, HAA 106/07 (14 May 2008) five to seven days seem 'fair' in terms of determining a notional date of receipt by the Court of Appeal. If that principle were applied to Mr Koro's petition the date of receipt would be taken as 2 or 4 February 2008. This means that the petition would still be out of time in any event, and Mr Koro would be obliged to obtain leave before proceeding with his appeal. The circumstances in Mr Tubuitamana's case were different from those in the case of Mr Koro. Mr Tubuitamana had not only written his letter or petition within the thirty day period, but well within it, and it was bureaucratic delay through the prison system which led to its being filed in the Court of Appeal some 16 days outside the 30 day time limit. In my opinion, where such a circumstance pertains, then the principle as stated in ***Soloveni Tubuitamana v. The State*** should apply. This circumstance does not pertain for Mr Koro, and hence that principle does not apply.

1.12 For imprisoned persons whose petition or letter is itself written 'out of time', then the date of receipt of it within the court system should in my opinion be taken as the date of receipt by the Court of Appeal. In Mr Koro's case, this would mean that the date of receipt of the petition by the High Court is taken as the date – namely 12 February 2008. This would mean that Mr Koro's petition remains to be considered as an application for leave to appeal out of time. However, the hurdle in time terms as explained below is different depending upon which date is determined upon as the date of receipt of the petition by the Court of Appeal.

1.13 If I am wrong in this and the date should properly be taken as 26 March 2008 (the date it first came into the Court of Appeal), then in considering the question of leave to appeal out of time all the foregoing matters should be taken into account. That is, Mr Koro's position as an incarcerated person should be borne in mind and he should not, in time terms, be disadvantaged. This of course applies whether the date of receipt is 2/4 February 2008 (if the principle in ***Soloveni Tubuitamana v. The State*** is applied – although as noted the circumstances there differ from those in Mr Koro's case), 12 February 2008 (receipt within the court system) or 26 March 2008 (receipt by the Court of Appeal).

1.14 In my opinion, the date of receipt within the court system is important (for Mr Koro, 12 February 2008), as it means that Mr Koro's petition is considered as having been received by the Court of Appeal just outside three months after the 2 November 2007 decision by the High Court dismissing his appeal, and just outside two months after the 30 day time limit. If 26 March 2008 is taken as date of receipt, then Mr Koro's petition is made almost five months after the High Court decision, and almost four months after the 30 day time limit.

1.15 In accordance with the Constitution provision of 'equality' I consider receipt by the court system should be the proper date to be applied to Mr Koro's petition. This principle, in my opinion, should apply to petitions that are written outside the 30 day time limit set by section 26, as in Mr Koro's case.

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[1] Also, the date of receipt within the court system – 12 February 2008 (receipt by High Court) means that the petition or letter took 14 days to arrive if the date of its writing was 28 January 2008.

1.16 Section 38(1) of the Constitution states that every person 'has the right to equality before the law'. That provision goes on to say that 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 any other ground prohibited by this Constitution.

1.17 Mr Koro is not being 'directly' discriminated against by section 26 of the Court of Appeal Act and the thirty-day limitation. There is no 'unequal treatment' or 'less favourable treatment' discrimination (which are more readily understood ways of describing 'direct' discrimination). Section 26 does not say that prisoners only are required to have their petitions in within 30 days, or 'target' prisoners by setting a specific time limit upon them. It says that 'everyone' seeking to appeal must have her or his petition in within that timeframe.

1.18 However, Mr Koro is being 'indirectly' discriminated against by reason of his status as an incarcerated person. 'Indirect' discrimination is more readily understood when described as 'differential impact' or 'disparate impact' discrimination, or 'equal' treatment discrimination. That is, the rule looks 'equal' on its face as it applies to 'everyone' seeking to appeal, but the rule does not operate equally. It has a differential or disparate impact upon persons in Mr Koro's situation.

1.19 The thirty-day time limit is 'neutral' on its face. However, the general application to 'all comers' of a thirty-day limitation period impacts differentially or disparately upon persons who are imprisoned. As explained in ***Soloveni Tubuitamana v. The State***, by reason of imprisonment persons seeking to appeal against conviction and/or sentence by the Magistrates Court and/or High Court are disadvantaged relative to persons who are not imprisoned. Those who are not imprisoned who seek to appeal have access to the court system in ways persons who are imprisoned do not – whether by ability to freely purchase stamps and envelopes, attend at the General Post Office (GPO) or a local post office or mailing box, and send their petition through the mail system, or travel to the Court of Appeal Registry itself. If in the latter case the appellant arrives at the Magistrates Court Registry or the High Court Registry in error, s/he will be alerted to this and directed to the Court of Appeal Registry. If in the former – posting – the petition goes astray, the petitioner is not in as disadvantaged position in that s/he has not been reliant on the petition's traveling through the prison bureaucracy as well as the court bureaucracy or (sometimes) vagaries of the postal system. In any event, a person outside prison is able to send a petition by registered or certified mail, so will have a receipt showing the date of posting. If they have no receipt, they are still able to affirm to the Court that they posted the petition on a particular date. A prisoner is not able to so affirm – but can affirm as to when the petition began its journey through the prison system.

1.20 Disparate or differential impact discrimination can be lawful where the rule or requirement or – in this case – statutory 30 day limitation is 'reasonable in the circumstances'. Unarguably, it is reasonable to have a limitation period for the receipt of appeal applications or petitions, just as it is reasonable to have time limits on other processes in the legal system. This complies with a need for finality, a need for timeliness and with the Constitutional requirement of 'speedy justice' or justice within a reasonable time under section 29:

(3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.

1.21 At the same time, as section 38(3) says, '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'. Furthermore, as section 38(4) states:

> 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.

1.22 As noted in ***Soloveni Tubuitamana v. The State***, 'public places' must include the courts and the court system. 'Access' includes not only by way of physical ingress and egress, but other methods and means of access to ensure the capacity of persons with a sight or hearing disability to gain access (through hearing loops, enlarged fonts for reading, Braille and so forth). The disability of imprisonment – recognised as such historically – requires addressing in the instance of timelines for lodging appeal petitions. Whether this right should be dependent upon judicial discretion is an issue I raised in ***Soloveni Tubuitamana***.

1.23 Insofar as Mr Koro's petition is concerned, bearing all the above in mind I take 12 February 2008 (receipt in the court system) as the proper date for the purposes of determining leave to appeal out of time. On that basis and generally, I consider that Mr Koro's application should be granted insofar as the time alone is in issue. However, for his application for leave to appeal out of time to be successful, Mr Koro still has the hurdle of satisfying this Court that his grounds disclose a reasonable chance of success in terms as required by section 22 of the Court of Appeal Act.

2. GROUNDS OF APPEAL

Under section 22 of the Court of Appeal Act, Mr Koro is able to appeal on a question of law only. This is because he appealed from the Magistrates Court to the High Court. Section 22 says:

> (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) …
>
> (3) On any appeal brought under the provisions of this section, the Court of Appeal may, if it thinks that the decision of the magistrate's court or of the High Court should be set aside or varied on the ground of a wrong decision of any question of law, make an order which the magistrate's court or the High Court could have made, or may remit

the case, together with its judgment or order thereon, to the magistrate's court or to the High Court for determination, whether or not by way of trial *de novo* or re-hearing, with such directions as the Court of Appeal may think necessary:

Provide that, in the case of an appeal against conviction, if the Court of Appeal dismisses the appeal and confirms the conviction appealed against, it shall not ... increase, reduce or alter the nature of the sentence imposed in respect of that conviction, whether by the magistrate's court or by the High Court, unless the Court of Appeal thinks that such sentence was an unlawful one or was passed in consequence of an error of law, in which case it may impose such sentence in substitution therefore as it thinks proper.

(4) ...

2.1 The question then, in considering Mr Koro's application for leave to appeal out of time, whether Mr Koro's grounds disclose a question of law in relation to which there is a reasonable chance of success.

2.2 Mr Koro's petition says:

Re Appeal Against Sentence [and Conviction][2] Criminal Appeal No. 1368/07

With due respect I, the undersigned, do hereby wish to submit my application regarding the above mention[ed] subject for your esteem[ed] deliberation.

The following submissions are in support of this submission:

Sentence

That the 4 years imposed is too harsh and excessive and wrong in principle in all the circumstances of the case. Please see ***R. v. Waddingham*** (1983) 5 CrAppRep (5) 66; (1983) CrimLR 492

That there was no reasonable credit given by both the learned Magistrate and learned High Court Judge on the first available opportunity by the appellant to plead guilty see ***R. v. Moananki*** (1983) NZLR 537

That notwithstanding the confession was obtained under duress, facts extracted and discovered in consequence thereof and so much of such confession was distinctly related to such facts were not proved (see ***R. v. Gould*** [1840] G Cap. 364, 173 ER 870)

That the Court fail[ed] to properly exercise its discretion to disallow the confession, considering that the strict rules of admissibility operated unfairly against me (see ***Nor Mohammed v. R.*** (1994) AC 694, 36 CrAppR 39; also ***R. v. Murray*** (1951) KB 391, 195 ER 870)

Conviction

[On the understanding that, as indicated by the written petition (where 'Conviction' is crossed out) and the typed version of the petition, and most importantly the oral submissions by Mr Koro made at the hearing on 23 April 2008, Mr Koro does not wish to proceed with an appeal against conviction, this part of the petition is not included here.]

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[2] Scored through in the handwritten version.

Conclusion

1. That your humble appellant respectively submit[s] an application for Bail pending appeal in this submission.

In view of the above grounds, your humble Appellant reserves the right to file additional grounds pertaining to this appeal upon receive the case record …

2.3 At the hearing, Mr Koro handed up a further document setting out grounds of appeal:

1.0 **Background.**
I Opeti Delana Koro, made an application for sentence appeal. I am appealing against a sentence of Four years that was imposed by the Suva Magistrate Court on the 1st day of August, 2007 on the charge of Robbery with Violence.

2.0 **Additional Grounds of Appeal**
Your appellant, pursuant to section 35(3) of the Appeal Act, do wish to submit additional grounds for sentence appeal seeking your favorable consideration.

2.1 That the four years imposed by the court is too harsh and manifestly excessive and wrong in principle in all the circumstances of the case. Please see ***R. v. Waddingham*** (1983) 5 CrAppR (5) 66), (1983) CrimLR 492.

2.2 That where the sentence is excessive or inadequate to such an extent as to satisfy the court that when it was passed there was a failure to apply the right principle, it was the duty of the court to interfere immediately, per ***JR v. Ball***, ante, FP 165 in bring[ing] the court's judgment.

2.3 That the judgment contains general observation on the principle of sentencing, particular in relation to the need for it should be as short as possible consistently only with the duty of the court to protect the public and deter the criminal.

2.4 In ***R. v. Sergeant*** (1974) CO [60] CrAppR 74 Lawton LJ (at p. 77) the court fails to apply the 4 classic principle[s] of sentencing in dealing with my case.

2.5 In ***R. v. Williscroft*** (1975) VR 292 (CCA), Starke dissenting at 303 states: 'Justice and humanity both require that the previous character and conduct and probable future life and conduct of individual offender. And the effect of the sentence on these should also be given the most consideration although this factor is necessarily subsidiary to the main consideration that determines the appropriate amount of punishment.

2.6 That there was no clear or direct evidence to prove the offence I am charged with. See ***R. v. Clay***, AppR 92; ***R. v. Pearson***, 4 CV AppR 40; ***R. v. Johnson*** 6 CVAppC 82

2.7 That the trial magistrate erred in law and fact, in convicting the appellant by relying on circumstantial evidence and inadmissible evidence.

2.8 That the trial magistrate erred in law and in fact, by misdirecting himself on the issue of the burden and standard of proof.

2.9 That the prosecution failed to prove the elements of crime the appellant is charge with beyond reasonable doubt.

3.0 **Disparity of Sentence**

In the Case of ***State v. Jovilisi Draveto*** Criminal case No. 91/06, he was sentenced to two years.

In the case of ***State v. Jotame Nacili***, Criminal Case No. 1164/07, he was sentenced to eighteen months.

In the Case of ***State v. Julian Miler***, Criminal Case No 14/05, he was sentenced to three years.

In the Case of ***State v. Jone Ameqia***, Criminal Case No. 1121/06, he was sentenced to one year.

In the Case of ***State vs. Josefa Ravula***, Criminal Case No. 1174/07, he was sentenced to two years and was later reduced to eighteen months on Criminal Appeal No. HAA 130/07.

Conclusion

In view of the above stated grounds of submission, I sincerely believe that your good self will consider this supplication and deduct the sentence that was imposed by the Suva Magistrate Court.

Opeti Delana Koro
Defendant

3, SUBMISSIONS BY THE PARTIES

At the hearing, Mr Koro and the DPP made oral submissions and, as noted, Mr Koro handed up further written grounds including submissions.

3.1 *(a)* ***Mr Koro's Submissions:*** Mr Koro said that his plea of guilty was not taken into account by the Magistrate in sentencing him to four years imprisonment, and nor was the fact that no injury was caused or inflicted taken into account.

3.2 He said further that he was 'forced to give a statement' this force, he said, being applied by interviewing police. He said that he was told by police: 'If I admitted it then I would be given a lenient sentence – a suspended sentence.' This he said was stated to him by the interviewing officer at the Nabua Police Post. He said he was given no time at the Magistrates Court to tell the Court that this happened.

3.3 Mr Koro said that four years imprisonment is too harsh and excessive. He said he wished to apply for bail and that in that respect he is 'not well-versed in the law' and 'needs legal advice and assistance' in order to run his appeal. This is why he is seeking bail and needs his application to be granted.

3.4 As to Mr Koro's further written grounds and submissions (which are replicated above), Mr Koro stated further that the list of cases therein shows that offenders received two or one years imprisonment whereas 'I got four years'. He said further:

> This is my first robbery with violence case and both my parents are elderly parents.

3.5 He said that the interviewing police officer was an accused person in a recent murder case. He stated further that the third offender was 'not found'.

3.6 ***(b) DPP's Submissions:*** For the State it was contested that the matters going to conviction were not appealed to the High Court and not considered, so that there 'can be no error' and Mr Koro 'is precluded from arguing them'.[3] The DPP said that the plea of 'guilty' was unequivocal and not challenged in the High Court. The challenge to the confession 'relates to conviction which was not challenge in the High Court or Magistrates Court', where Mr Koro (and his accomplice) pleaded guilty.

3.7 As to the question of the sentence being harsh and unreasonable, section 22(1A) was referred to, with the admonition that it must be abided by, namely:

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

3.8 This is a 'high threshold', said Ms Prasad 'so it must be shown that there is a wrong principle or error of law'. She said that the sentence imposed was 'within the tariff before the Court'. She said that the maximum is life imprisonment and credit was given for the 'guilty' plea. She observed that a discount of three years was given to Mr Koro, with the starting point being six years. She said there was 'no merit' in the challenge to the sentence and no error of law as required by section 22(1A)(a). It was submitted for the DPP that the sentence was a 'proper and adequate' one.

3.9 Referring to the cases to which Mr Koro compared and contrasted his, it was said that these 'cannot be compared as each case stands and falls on its facts – here, there were weapons and threats.

3.10 In answer to a question by the Court as to the recovery of some of the proceeds and failure to recover the remainder, and as to the status of the third accomplice who had not been apprehended, Ms Prasad said that there was no indication in the Court Record that the third person was the instigator and took all (or the bulk) of the money and cheques taken in the robbery.

3.11 As to matters put in mitigation, and whether these were taken into account by the Magistrate in sentencing Mr Koro (and his co-offender, Mr Tubuitamana), Ms Prasad drew attention to appearances by Mr Koro and Mr Tubuitamana on 26 July 2007 and 31 July 2007. As referred to later, the Court Record indicates that factors in mitigation were put to the Court.

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[3] See further later - the petition of appeal refers to conviction as well as sentence, the High Court Judge's review notes (dated 9 October 2007) indicate amongst other matters '1. Appeal is against sentence only.' However, His Lordship's Ruling does refer to both sentence and conviction.

3.12 As to the question of bail pending an appeal, Ms Prasad observed that the situation is different where an accused has been convicted and is serving a sentence. In this circumstance, she said, there is a presumption against bail when the applicant for bail is in custody after conviction. She said that matters that must be considered by the Court in such a case include:

- likelihood of success of the appeal;
- time during which an appeal will come on for hearing;
- amount of time served by the applicant.

3.13 For the DPP it was submitted that the grounds of appeal must not be 'just arguable' but must have 'every chance of success'. It was noted that persons in prison do have the opportunity to contact a lawyer and for the purposes of an appeal, this means that the prisoner is able to seek and obtain legal advice.

3.14 *(c)* ***Mr Koro's Submissions in Response:*** Mr Koro reiterated that his sentence of four years is 'too excessive' and 'harsh'.

4, MAGISTRATES COURT SENTENCE & HIGH COURT APPEAL

The sentence in the Magistrates Court was arrived at after Mr Koro and Mr Tubuitamana (one of his accomplices: see ***Soloveni Tubuitamana v. The State*** AAU0001 of 2008, HAA 106/07 (14 May 2008)) pleaded guilty. The third accomplice was not apprehended, so was not charged, nor convicted or sentenced.

4.1 The statement of facts appears in the Magistrates Court Record as follows:

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.

4.2 In the Court Record, the grounds of appeal before the High Court indicate that Mr Koro and Mr Tubuitamana raised conviction as well as sentence in that appeal, albeit in terms of what occurred at the appeal itself, there is some indication that they appealed against sentence only, and this is the view of the DPP.[4]

4.3 The letter or petition to the Registrar of the High Court says:

<u>Re: Application for Appeal on Sentence and Conviction Case No. 1388/07 Robbery with Violence</u>

We Opeti Delana and Mr Soloveni Tu[b]itamana are humbly seeking for your mercy to grant us Leave for conviction and sentence.

1. The grounds to render our sentence appeal are: -

    a) The sentence is unduly harsh and excessive given our background as appellant and the circumstances of the offence ad
    b) Further grounds as the appellant may advise and this honourable court may permit.

2. The grounds to render our conviction appeal are:-

    a) The learned magistrate erred in law to consider that we were not the principal party to the offences and passed a sentence which is too harsh as well as being excessive.
    b) The learned magistrate erred in law by taking into account our confession which was obtained through duress.
    c) Further grounds will be submitted as the honourable court may permit.

Your kind consideration on this ed3elicate matter will be mostly appreciated.

Opeti Delana (Sgd)
Appellant

[4] As earlier noted (fn 3) the Judge's Notes indicate 'appeal against sentence only', also – albeit the Ruling includes reference to both conviction and sentence.

4.4 However, as noted, despite this exposition of appeal .going to conviction as well as sentence, the High Court Judge's review notes (dated 9 October 2007) indicate that Mr Koro (and Mr Tubuitamana) limited their appeal to sentence only:[5]

> 1. Appeal is against sentence only.
> 2. Accused 1 & 2 sentenced to 4 yrs imprisonment after pleading guilty to one count Robbery with Violence, Contrary to section 293(1) Penal Code, Cap 17.
> 3. Liable penalty is 14 yrs imprisonment.
>
> Grounds of Appeal
>
> 1) Harsh & Excessive: I think not 4 years is within the tariff outlined in ***Sakusa Basa*** FCA Crim App No: AAU 0024/2005
> 2) Sentence is a bit lenient.
> 3) No wrong principle.

4.5 Those review notes follow a hearing on 5 October 2007, when the headsheet indicates:

1. Appellants wish to have a lawyer. Matter to be adjourned.
2. State's submissions to be given to Appellants.
3. Appellants to seek lawyer.
4. Hearing is set for 2/11/07 at 9.30am.
5. Production order to issue.

4.6 The hearing went ahead on 2 November 2007, upon which day the ruling of the High Court was made.

4.7 In the event, the High Court addressed conviction as well as sentence insofar as reference is made to the unequivocal nature of the guilty pleas. The appeal 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 (as above); and
- then, and only then, were the accused convicted as charged.

4.8 In those circumstances, said His Lordship, '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

4.9 In full, the High Court ruling says:

[5] This is consistent with the approach of Mr Koro in this Court.

RULING

1. Opeti Koro and Soloveni Tubuitamana, you are the appellants in this case. You were jointly charge[d] as follows:

   Statement of Offence

   Robbery with Violence: Contrary to section 293(1) Penal Code, Cap 17.

   Particulars of Offence

   OPETI DELANA KORO AND SOLOVENI TUBUITAMANA with another on the 24th day of July 2007, at Nabua, Suva in the Central Division, robbed RAJENDRA DEO s/o SURYA DEO of cash $4,146.53 and cheques of $835.98 to the total value of $4982.51 and immediately before such robbery did use personal violence on the said RAJENDRA DEO s/o SURYA Deo

2. You both were present in the magistrates court on 26 July 20076 when the charge against you were first called. On that day you both pleaded guilty to the charge.

3. Your right to counsel were explained to you both and you waived it. You both elected trial in the magistrates court.

4. Before conviction was entered, the summary of facts were outlined and you both admitted the facts as outlined. You were then convicted as charged.

Appeal

5. By a Petition of Appeal filed on 20 August 2007, you both appeal against conviction and sentence. You have submitted the following grounds in support of your appeal against conviction:

   i) the learned magistrate erred in law in considering that we were the principal party to the offence;

   ii) the learned magistrate erred in law in considering the confessional statement which was obtained by duress.

6. For their sentence appeal, the appellants claim that the 4 years imprisonment sentence is harsh and excessive.

The Conviction

7. The manner in which the grounds of appeal is phrased make it difficult to understand what exactly is the ground they are submitting. This was a case in which there were no trial because both the appellants pleaded guilty to the charge of robbery with violence they faced.

8. In the circumstances in which the learned trial magistrate entered conviction outlined above, there is [no][6] basis for claiming that the plea was equivocal. The please of guilty was unequivocal. Section 309(1) of the Criminal Procedure Code Cap 21 will only permit review of the guilty pleas if there were inappropriate.

9. Ordinarily the inappropriateness of guilty pleas arise 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. Non of these was present in this case. The pleas was unequivocal and there is no appeal allowed in such circumstances. There is no merit in the appeal against conviction.

Sentence

10. The tariff for robbery with violence offence is 4 to 7 years imprisonment: ***Sakusa Basa*** [2006] FJCA 23 (AAU024/2005). In this case the learned magistrate took 6 years as his starting point and discounted the early guilty pleas properly. He accounted for the aggravating factors and concluded that 4 years imprisonment was proper.

11. There was nothing wrong in principle with the sentence and the approach adopted by the learned magistrate in this case.

12. The sentence was not harsh or excessive given the level of planning and violence involved to carry out the offence. If anything, the sentence may have been lenient.

13. The appeal against sentence has no merit and is dismissed.

14. The conviction and sentence in the magistrates' court is upheld.

5. ASSESSMENT OF GROUNDS

The High Court ruling addresses two of Mr Koro's grounds now put forward insofar as they relate to the plea of 'guilty', namely:

> That notwithstanding the confession was obtained under duress, facts extracted and discovered in consequence thereof and so much of such confession was distinctly related to such facts were not proved (see ***R. v. Gould*** (1840) G Cap. 364, 173 ER 870)

> That the Court fail[ed] to properly exercise its discretion to disallow the confession, considering that the strict rules of admissibility operated unfairly against me (see ***Nor Mohammed v. R.*** (1994) AC 694, 36 CrAppR 39; also ***R. v. Murray*** (1951) KB 391, 195 ER 870)

5.1 For the DPP it was said that neither Mr Koro nor Mr Tubuitamana's confessions was admitted into evidence in any event, albeit Ms Prasad acknowledged that effectively the Summary of Facts will have been drawn up by reference to confessions made by the two offenders.

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[6] I have inserted 'no' here as the context makes clear that this was intended by His Lordship.

5.2 Be that as it may, in addressing the question of duress and determining upon the unequivocality of the plea of guilty by each accused, Mr Koro and Mr Tubuitamana, in the High Court His Lordship has made a finding of fact. Having done so, there is no question of law to be addressed on these grounds by the Court of Appeal. Hence, I cannot find that Mr Koro's grounds (or either of them) as here stated have a reasonable chance of success. For the sake of completeness I now, however, refer to the cases cited by Mr Koro and address them below.

5.3 Insofar as ***R. v. Gould*** [1840] 9 Car&P 364, 173 ER 870 is in issue, the facts in that case are distinguishable from those here, and hence the legal principle does not apply. In ***Gould*** the accused was indicted for burglary in a dwelling-house. He had been tried and acquitted previously for having murdered the owner or resident of the dwelling-house in the same circumstances as were now put to the Court on the charge of burglary (that is, in furtherance and prosecution of the burglary). It was held that as he was not charged with burglary with violence but burglary only, he could be found guilty. However, had he been charged with burglary with violence the outcome would have been different: the earlier acquittal would have answered such a charge because on the charge of murder Mr Gould could have been convicted of manslaughter or even of assault. This would have been an answer to the allegation of violence had it been inserted into the indictment for burglary.

5.4 In Mr Koro's case, he and his accomplice were charged with robbery with violence. There was no previous charge or acquittal on the same facts or in relation to the same incident or matter, at all. There was no previous charge or acquittal as to 'violence' or some component of the offence now charged which could lead to any possibility that what applied in ***Gould*** could or should apply in the present case.

5.5 As to the question of evidence, in ***Gould*** a statement had been made by Mr Gould to a police officer 'under some peculiar circumstances'. This induced the prosecution 'with the approbation of the Court' to decline offering it in evidence. However, there was in the statement an allusion to a lantern which was found afterwards at a particular place. The police officer was asked whether, 'in consequence of something ... the prisoner had said, he made search for the lantern'. Both Tindal, CJ and Parke, B. were of the opinion that the words used by Mr Gould, 'with reference to the thing found, ought to be given in evidence and the policeman accordingly stated that [Mr Gould] had told him that he had thrown a lantern into a pond in Pocock's Fields'. The other parts of the statement were not given in evidence.

5.6 Does this have application in the present case?

5.7 Mr Koro now says that his confession was extracted by reason of a representation made to him that he would have a lighter sentence than that which the Magistrate ultimately determined upon. There is, however, no issue which arises as to the confession consistent with the principle espoused in ***Gould.*** There was no issue as to parts of the confession being admitted and parts not, or a reliance upon parts and disregard of others.

5.8 I can find nothing in ***Gould*** to assist Mr Koro in his appeal and hence determine that insofar as the reference is made to ***Gould*** there is no chance of success on this ground.

5.9 As to ***Nor Mohamed v. R.*** (1994) AC 694, 36 CrAppR 39 as cited by Mr Koro in his submissions, the following applies.

5.10 ***Nor Mohamed v. R.*** bears no comparison to Mr Koro's case. In ***Nor Mohamed*** evidence was allowed into his trial on a charge of murder of a woman who was living with him, which the

Court on appeal held ought not to have been admitted. The woman with whom he was living died of potassium cyanide poisoning. Mr Mohamed's wife had died of potassium cyanide poisoning two years and four months earlier. That death had not been the subject of any criminal charge. However, evidence of his wife's death by that means was led to meet a possible defence of accident or suicide. No such defence had been put. It was held that the admission of the evidence offended against the principles set down in ***Makin v. Attorney-General for New South Wales*** (1894) AC 57, at 65 for:

- First, it plainly tended to show that Mr Mohamed had been guilty of a criminal act other than that with which he was charged, so as to lead to a conclusion that he was a person likely from his criminal conduct or character to have committed the offence for which he was on trial; and
- Secondly, it could not be said to be relevant to any issue in the case;
- Finally, upon those bases, in light of the facts which, if accepted, it revealed, its admission could not be justified on any ground.

5.11 There was and is in Mr Koro's case no issue of evidence being admitted as to character or prior events, or matters other than those going to the offence with which he was charged, so as to form a basis or possible basis for his conviction on the charge of robbery with violence. ***Nor Mohamed*** does not apply. There is no basis in ***Nor Mohamed*** for any prospect of success on an error of law here.

5.12 As to ***R. v. Murray*** (1951) KB 391, 195 ER 870, this case relates to a jury trial where the accused contended his confession was made by reason of an inducement, namely a promise made by police. On voir dire, the Recorder hearing the case ruled the confession admissible. At the trial proper, the Recorder refused to allow the defence to argue before the jury that the confession had been obtained by inducement, and cross-examine police on that point. Upon appeal, this ruling was determined to be wrong in law: albeit the Recorder had held the confession admissible by reason of its having been voluntarily obtained, the Recorder should have allowed the matter to be reagitated before the jury, with police officers cross-examined, so that the jury could determine upon the confession's weight and its value:

> .. its weight and value were matters for the jury, and in considering such matters they were entitled to take into account the opinion which they had formed on the way in which it had been obtained. Mr Hooper [for the defence] was perfectly entitled to cross-examine the police again, in the presence of the jury as to the circumstances in which the confession was obtained, and to try again to show that it had been obtained by means of a promise or favour. If he could have persuaded the jury of that, he was entitled to say to them: 'You ought to disregard the confession because its weight is a matter for you': at 397-98

5.13 As I have said, this does not assist Mr Koro in his appeal, and provides him with no reasonable chance of success on the confession points. There is no question of law for the Court of Appeal.

5.14 As to the grounds:

> That the 4 years imposed is too harsh and excessive and wrong in principle in all the circumstances of the case. Please see ***R. v. Waddingham*** (1983) 5 CrAppRep5) 66; (1983) CrimLR 492

> That there was no reasonable credit given by both the learned Magistrate and learned High Court Judge on the first available opportunity by the appellant to plead guilty see ***R. v. Moonanki*** (1983) NZLR 537

the Court Record indicates that the Magistrate did take into account the plea of 'guilty'. The High Court addressed the question of principle, finding against Mr Koro and his accomplice on this point. I can see no basis upon which an error of law lies for the Court of Appeal to consider.

5.15 The Court Record indicates that on 1 August 2007 in delivering sentence, the Magistrate said amongst other matters:

> You have pleaded guilty to Robbery with violence. Contrary to Section 293(1) of the Penal Code.
>
> I take into account your guilty pleas [for Mr Koro and Mr Tubuitamana] as you have saved time of the Court: Court Record, p. 12

5.16 As to the ground that there was 'no clear or direct evidence to prove the offence I am charged with' and the reference to ***R. v. Clay***, CrimAppR 92; ***R. v. Pearson***, 4 CV AppR 40; ***R. v. Johnson*** 6 CrAppC 82, in my opinion there is no reasonable grounds of success. Mr Koro pleaded guilty to the charge with the summary of facts read in open court. These together with his guilty plea constituted the 'clear and direct evidence' as to proof of the offence. There is no basis upon which it could be considered that the trial magistrate 'erred in law and fact, in convicting' Mr Koro 'by relying on circumstantial evidence and inadmissible evidence'. First, an error of fact is not a ground upon which the Court of Appeal can entertain an appeal under section 22 of the Court of Appeal Act. Secondly, there is no error of law for the conviction was as noted based upon a summary of facts to which Mr Koro pleaded guilty. All elements of the offence were covered.

5.17 There is no basis upon which it can reasonably be contended that the magistrate 'erred in law and in fact, by misdirecting himself on the issue of the burden and standard of proof'. Were there factual error, this would not be a ground which the Court of Appeal could consider under section 22, and there is no indication that the Magistrate did other than apply the criminal standard of proof beyond a reasonable doubt. Similarly as to the ground that the prosecution 'failed to prove the elements of crime' with which Mr Koro was charged 'beyond reasonable doubt'.

5.18 Insofar as the question of difference in relation to other sentences imposed on offenders, 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 Koro's case, this does not seem out of step. There is no principle disclosed which provides Mr Koro with a reasonable chance of success on appeal.

5.19 As for ***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, though 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).

5.20 Once more it does not appear that a distinction is to be drawn between the sentence of Mr Koro and those in ***R. v. Moananui.*** Mr Koro, with Mr Tubuitamana and the third participant, were considered to be equally involved in the offence so that the sentence for Mr Koro (as that for Mr Tubuitamana) would have to be compared with that of Mr Poi or Mr Moananui. If one year is deducted because Mr Moananui led the other two in the offence, this leaves four years which is the equivalent of Mr Koro's sentence. If Mr Poi is taken as the correct comparator, adding 6 months because Mr Poi was a follower, but Mr Koro was an equal offender means that four years is the appropriate sentence. 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. Neither Mr Koro or Mr Tubuitamana could compare himself with Mr Kuka, so that comparison with his sentence is inappropriate.

5.21 It appears the difficulty Mr Koro has (as does Mr Tubuitamana) with the sentence imposed and 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 Koro (and Mr Tubuitamana) are similar to those in ***R. v. Moananui*** so that using this case as a comparator in confirming the appropriateness of the four year sentence rather than its being 'harsh and excessive' is apt.

5.22 Sentences in ***R. v. Moananui*** were imposed where a knife and gun were 'used' in a robbery, in the sense that they were taken to the scene and carried by the two offenders who entered the service station. The gun and knife 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, threatening to shoot him, however, that was disregarded in the sentencing. Thus, the sentences imposed here are, as noted, aptly relevant to Mr Koro (and Mr Tubuitamana). Albeit they did not physically injure 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 observed taken into account by the Magistrate in sentencing.

5.23 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 be found guilty of robbery with violence, so as to be sentenced for that offence. The charge to which Mr Koro answered and pleaded guilty and the statement of facts upon which his guilty plea was based make the 'with violence' aspect explicit. In hearing the statement of facts read in court, there could be no misunderstanding as to what the accused were charged with and in respect of which they then pleaded guilty.

5.24 The title of the charge includes the word 'violence'. 'With violence' is employed in the charge in conjunction with 'Robber'. '... held them at knife point' is a clause included in the Summary of Facts – relating to Mr Koro and the third accomplice. Mr Koro acted in concert with the third accused and Mr Tubuitamana, who 'entered the truck with an axe, threatened (PW1), grabbed the money bag' and then 'they all ran towards the Mead Road main Road ...'

5.25 'Held them at knife point' makes clear the existence of a threat, as does the possession during the robbery of the knife and the axe. As all three acted in concert, that one held a knife, one an axe and one appears to have held no weapon does not render any one of them 'uninvolved' in a robbery with violence. The Summary of Facts is explicit as to the element of violence. This tends to negate any contention as to a lack of comprehension on the part of Mr Koro or his accomplice of the nature of the charge.

5.26 There is, therefore, little chance of success in this regard insofar as Mr Koro's appeal to the Court of Appeal and it is difficult to see that this would be considered as a question of law alone as required by section 22 of the Act.

5.27 As regards Mr Koro's grounds that:

- the sentence is 'excessive ... to such an extent as to satisfy the court that when it was passed there was a failure to apply the right principle' placing an obligation on the court to 'interfere immediately'; and
- the principles of sentencing require a sentence 'to be as short as possible consistently only with the duty of the court to protect the public and deter the criminal',

this has effectively been answered in his appeal to the High Court. As the High Court said, the principles of sentencing were properly applied and it may be that Mr Koro's sentence 'was lenient' in the circumstances.

5.28 As to the reference to Justice Starke's dissenting judgment in ***R. v. Williscroft*** (1975) VR 292 (CCA), as to the requirement of justice and humanity in the necessity of taking into account previous character and conduct and probable future life and conduct of individual offender', a perusal of the Magistrates Court sentencing decision indicates that this was done.

5.29 The Magistrate explicitly took into account the individual circumstances of the two offenders, Mr Koro and Mr Tubuitamana. 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.

5.30 Mr Koro (and Mr Tubuitamana) had more than one opportunity to put matters in mitigation and bring their individual circumstances to the attention of the Magistrate, including 'previous character and conduct and probable future life and conduct of individual offender'.

5.31 The Court Record shows that the first appearance of Mr Koro and Mr Tubuitamana was on 26 July 2007, when each pleaded guilty to the charge of robbery with violence, admitting the facts as read to the Court by the prosecution from the Summary of Facts. Mr Koro admitted

previous convictions (as did his co-accused). In mitigation on that day the following was put to the Court:

> [Mr Koro]
>
> 24 years single
> Telecom worker
> Delivery boy to Islands
> Earn $120.00
> Ask Bail: Would get someone to mitigate.
> Sorry. Won't re-offend.
>
> Mr Koro (with his co-accused) was remanded in custody and 'given opportunity to seek someone (counsel) to mitigate on your behalf). The matter was adjourned to 31 July 2007 for mention only, 'for further mitigation and sentence'.

5.32 On 31 July 2007 Mr Koro again appeared before the Magistrate (as did Mr Tubuitamana). The record reads:

> **ACCUSED:** We have mitigated. No one to represent but we got a letter to Court. Further mitigate.
>
> **ACCUSED 1** (Mr Koro): Read out letter to Court. Co-operated. Item recovered.
>
> **ACCUSED 2** (Mr Tubuitamana) ...
>
> **COURT:** Will consider further mitigation in light of facts before me.
>
> Remanded in custody till tomorrow 1/8/07 for sentence: Court Record, pp. 1-11

5.33 In sentencing both Mr Koro and Mr Tubuitamana on 1 August 2007, the Court Record confirms that 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 Koro that he had 'previous convictions[7] and court had shown you leniency': Magistrates Court Record, p. 12[8]

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[7] The Court Record shows that Mr Koro had four items on his record: CRO No. F/25482 ... SQ CR 395/07: 13 February 2003, Suva Court – Criminal Trespass, Bound over for the sum of $200 for good behaviour and not to reoffend for 12 months; 8 July 2005, Juvenile Bureau – Criminal Trespass (Count 1), 2 months Imp. Suspended for 6 months; 8 July 2005, Juvenile Bureau – Criminal Trespass (Count 4), 2 months Imp. Suspended for 6 months; 15 March 2007, Nasinu – Indecently Insulting or Annoying Females, Proceeding stayed for 12 months.

[8] For Mr Tubuitamana it was observed that he 'also [had] previous convictions'.

- Observed that an axe and knife were used 'to threaten the complainant before robbery' – at the hearing in this Court, Mr Tubuitamana acknowledged he had the axe, denying he had the knife. He was unsure who had the knife. In my opinion the Magistrate is not suggesting here that one of the accused (whether Mr Koro or Mr Tubuitamana) had both axe and 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 acknowledged he spent money on various items with which he was found; some $800 was found in Mr Koro's possession when he was taken into custody by police;
- Gave a discount for 'no injuries caused to complainant as in other robbery with violence cases'.

5.34 All this, in my opinion, makes it difficult for Mr Koro to sustain a submission that there is a question of law for the Court of Appeal as to the application of any wrong sentencing principle in the Magistrates Court sentencing process and its determination of the sentence of four years, or in the High Court reconsideration on appeal to that Court.

5.35 Similarly as to the contention that the court 'failed to apply the four classic principles of sentencing', citing ***R. v. Sergeant*** (1974) 60 CrAppR 74, per Lawton, LJ (at p. 77). In ***Sergeant*** Lawton, LJ said:

> What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution,[9] deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing ...

5.36 It appears to me that in taking all the aforesaid matters into account, the Magistrate addressed the necessary principles of sentence The High Court observed that the Magistrate addressed the correct principles in applying the sentence. I cannot but agree and consider that Mr Koro would 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'.

5.37 As to further submissions made by Mr Koro on disparity of sentencing, it appears to me that submissions made by Ms Prasad for the DPP have force, namely that the individual circumstances and facts of the particular case are the primary indicator of whether or not a sentence is 'harsh and excessive' and whether it is the appropriate sentence in the circumstances.[10] In my opinion, Mr Koro would have difficulty persuading the Court of Appeal that he has a sustainable case on a matter of law m- or that the sentence was an unlawful one or was passed in consequence of an error of law, as required by section 22(1A)(a).

5.38 Having found no prospects of success in the ground of appeal put forward by Mr Koro, I am bound to refuse the application for an extension of time to appeal.

[9] I note that there is some debate about the principle of retribution in contemporary criminological literature and sentencing texts.

[10] The Court had some difficulty in locating the cases to which Mr Koro referred in his written submission provided on 23 April 2008, as the names of the cases did not appear to accord with the numbers provided.

6. APPLICATION FOR BAIL

As I am unable to find that Mr Koro has a reasonable chance of success on any of the grounds he puts forward in his petition, oral submissions and the written submissions provided to the Court, I am unable to grant Mr Koro's application for bail.

6.1 In this regard I have had reference to section 33 of the Court of Appeal Act and to ***Ratu Jope Sentiloli, Ratu Rakuita Vakalalabure, Ratu Viliame Volavola, Peceli Rinakama and Viliame Savu v. The State*** Criminal Appeal No. AAU0041/04S, HC Cr. Appeal No. 0028/003 (23 August 2004), copy of which was provided to me by Counsel for the DPP.

6.2 In ***Ratu Jope Sentiloli and Ors*** the President of the Court of Appeal observed that the ***Bail Act*** 2002 'largely consolidates the law on bail and provides, by section 3, that there shall be a rebuttable presumption in favour of granting bail to a person charged with a criminal offence'. The President went on to observe, however, that there is 'a considerable difference between a person who has not been convicted and to whom the presumption of innocence still applies and a person who has been convicted and sentenced to a term of imprisonment'. For this reason, section 3(4) of the Bail Act says:

> The presumption in favour of the grating of bail is displaced where –
>
> ...
>
> (c) the person has been convicted and has appealed against the conviction.

6.3 The President referred to ***Amina Koya v. State*** [1996] (unreported) AAU0011/96 where Tikaram, P. explained:

> I have borne in mind the fundamental difference between bail applicant awaiting trial and one how has been convicted and sentenced to jail by a court of competent jurisdiction. In the former the applicant is innocent in the eyes of the law until proven guilty. In respect of the latter he or she remains guilty until such time as a higher court overturns, if at all, the conviction. It, therefore, follows that a convicted person carries a higher burden of satisfying the court that the interests of justice require that bail be granted pending appeal.

6.4 This principle is now enshrined statutorily in the Bail Act.

6.5 Section 17 of the Act, as adverted to in submissions by Ms Prasad for the DPP, sets out the matters to be taken into account in an application for bail pending appeal:

> (3) When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account –
>
> (a) the likelihood of success in the appeal;
> (b) the likely time before the appeal hearing;
> (c) the proportion of the original sentence which will have been served by the applicant when the appeal is heard.

6.6 As I have said, because in my opinion Mr Koro has little likelihood of success in his appeal, I am unable to grant bail. Insofar as consideration of the other two aspects referred to in section 17(3), I am able to say as follows. The likelihood of Mr Koro's appeal being able to be

heard in a relatively short time is high: my understanding of the Court of Appeal's capacity to hear appeals is that it is presently well situated in this regard. However, that there is such a high likelihood cannot, in my view, overcome the former impediment to the grant of bail (lack of likelihood of success of the appeal) and that Mr Koro has not served a large proportion of his sentence. He was sentenced on 1 August 2007. It is now 14 May 2008. This is not a case where an applicant for bail pending the hearing of an appeal has served a large proportion of the original sentence.

6.7 Hence, I am bound to refuse Mr Koro's application for bail.

7. DETERMINATION

For all the aforesaid reasons, Mr Koro's application for leave to appeal out of time is refused. Similarly as to bail: for the reasons set out in this judgment, Mr Koro's application for bail is refused.

8. RIGHT OF APPEAL VIS-À-VIS THIS DETERMINATION

Mr Koro is entitled to be made aware of section 35(3) of the Court of Appeal Act, which provides:

> 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.

Orders

1. Leave to appeal out of time refused.
2. Bail refused.

Jocelynne A Scutt
Judge of Appeal
Suva
14 May 2008