

- [5] In addition, the notice of appeal can be dismissed pursuant to **Section 35(2) Court of Appeal Act, Cap.12, 1978, as amended by the Court of Appeal (Amendment) Act 1998, (Act No, 13 of 1998):**

"Powers of a single judge of appeal

35 (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."

- [6] Thus, Mr Rawaqa must be able to demonstrate that on the filing of his notice of appeal that the appeal against sentence is a question of law or otherwise the Court may determine that his appeal is vexatious or frivolous or is bound to fail because there is no right of appeal, and thus the Court may dismiss the appeal.

THE NOTICE OF APPEAL

- [7] Mr Rawaqa initially appeared before me on 7 May 2008 and the matter was adjourned so that he could apply for Legal Aid. The matter was adjourned on 27 May and 20 June 2008 to allow the Applicant to clarify whether the Legal Aid Commission would be appearing on his behalf and, if so, to also clarify the grounds of Appeal.

- [8] The Director of Legal Aid filed on 15 August 2008 an "*Amended Notice of Appeal on the question of Law alone*" as follows:

- "1. THAT the sentence of 6yrs imprisonment made consecutive did not properly take into account the totality principle of sentencing.*
- 2. THAT the sentence failed to properly take into account the early guilty plea that the Appellant entered which would attract some reduction in sentencing.*
- 3. THAT the sentencing of 6yrs imprisonment was harsh and excessive in all the circumstances of the case."*

THE HEARING OF THE GROUNDS FOR LEAVE

- [9] The Director of Legal Aid appeared on 15 August 2008 on behalf of the Appellant and Mr Rayawa appeared on behalf of the Office for the Director of Public Prosecutions.
- [10] In relation to the First Ground regarding totality, the Director submitted that the error of law was that the overall effect of the sentence was that it was harsh and excessive and that taking into account totality the sentence should have been from 3 August 2007 rather than being ordered to be served consecutively to his current sentence which means that when his current sentence ends in 2011 he will then begin this sentence to conclude in 2017. In effect, this will mean delaying punishment until 2011. The submission of the Director is that if it was ordered to commence from 3 August 2007 it would then be served partly concurrently and partly consecutively.
- [11] The Second Ground of appeal argues that the early guilty plea was not sufficiently taken into account and some discount should have been given.
- [12] As for the Third Ground the Director submitted that this was an extension of Grounds 1 and 2.

DPP's Submission in Reply

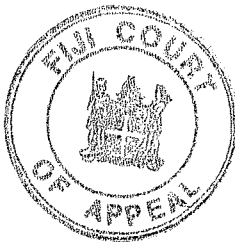
- [13] Counsel for the DPP submitted as follows:
- (a) That on page 11 of the judgment the Magistrate gave the Appellant a substantial reduction in sentence (see judgment of Mataitoga J, bottom of page 4 top of page 5);
 - (b) In relation to the totality principle, clearly this was a balancing act;
 - (c) In relation to the final details of the sentence the Magistrate had only ordered 6yrs to be added as from 2011 and in the view of the DPP the Appellant had been treated leniently when one considers the horrific nature of this crime and the Appellants prior record of some 146 previous convictions.

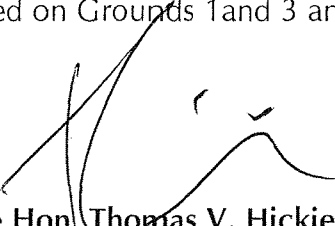
DECISION

- [14] There is some substance to the argument put forward by the Director of Legal Aid in asking rather than the sentencing commencing in three years hence that it should have begun or commenced from 3 August 2007 so that the Appellant is serving some part of it concurrently and some will be served consecutively so that he will remain in prison until 2013.
- [15] Balancing that however is the fact of the Appellant's appalling record together with the horrific nature of this crime. Perhaps what should have happened was that the Magistrate should have considered a longer sentence to be served partly concurrently and partly consecutively.
- [16] Although the Court has concerns that a sufficient deterrent effect must be included in the sentence which was imposed in this matter, the question raised by the Director of Legal Aid on the totality of principle of sentencing is a proper question of law to be considered by the Court of Appeal.

ORDERS

- [17] This Court makes the following Orders:
1. Leave to Appeal is granted on Grounds 1 and 3 and refused on Ground 2.




The Hon. Thomas V. Hickie
Judge of Appeal

Solicitors:
Legal Aid Commission
Office of the Director of Public Prosecutions for Respondent