

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

CRIMINAL APPEAL NO. AAU0071 OF2007S
(High Court Criminal Action No. HAA 071 of 2007S)

BETWEEN:

KELEPI SALAUCA

Appellant

AND:

THE STATE

Respondent

In Chambers:

Randall Powell, Justice of Appeal

Hearing:

Tuesday, 4th November 2008, Suva

Counsel:

Appellant in Person
A.G. Elliott for the Respondent

Date of Judgment: Tuesday 4th November 2008, Suva

RULING

- [1] On 14 January 2007 Kelepi Salauca ("the applicant") and Peni Koroi and kidnapped, assaulted, robbed, tied up and left for dead a mini-cab driver. The driver was found the next day and admitted to hospital in a critical condition with serious injuries.
- [2] On 19 April 2007 the applicant, who was 17 years old, and Mr Koroi who was 18 years old, were convicted on their own pleas of robbery with violence and sentenced to 5 years imprisonment by a Magistrate. They appealed to the High

Court against the severity of the sentence and on 28 June 2007 Govind J reduced the sentences to three and half years imprisonment.

[3] An application for leave to appeal the severity of the re-determined sentence was received by the Court on 24 July 2007.

[4] Section 22 of the **Court of Appeal Act** provides:

(1A) No appeal under subsection (1) [to the Court of Appeal from a decision of the High Court in the High Court's appellate jurisdiction] 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.

[5] The applicant say that Govind J erred in:

- failing to consider the promptness of the applicant's guilty plea;
- failing to consider his age;
- failing to take into account section 17(2) of the Criminal Justice Act (1948) ("the Act") which states that a court should not imprison a person under 21 years of age unless the Court is of the opinion that no other method of dealing with him is appropriate. This is an Act of the United Kingdom.
- in failing to consider that because of the applicant's co-operation with the police the stolen items were recovered
- handing down a sentence that was manifestly excessive and wrong in principle.

[6] The problem for the applicant is that Govind J did consider all those matters. He started with a sentence of 6 years, reduced it by 2 years for the early guilty pleas, added 1 year *"for use of the weapons, the act done in company and leaving the complainant in a cane field, where he was not found till half a day and a night later"*, and then reducing the sentence by 18 months for *"their youth and previous good character."* Of course he didn't specifically consider s.17 of the Act because the Act is not Fiji Islands legislation.

[7] Govind J noted that as far as possible young offenders should be kept out of the prison system and regretted *"that the circumstances of this case do no allow for a non custodial sentence. This was a callous and brutal attack with some degree of pre-planning."*

[8] In my opinion the applicant is fortunate that Govind J did not increase the sentence by at least 4 years, instead of just one, for the callous and brutal nature of the attack, and an appeal court might well do that.

[9] However because the applicant has in his appeal challenged Govind J's sentence on the basis of errors of law it seems to me that the appeal doesn't require leave of the Court. This is curious result because an appeal against sentence passed by the High Court in its original jurisdiction does require leave: see section 21(1)(c) of the ***Court of Appeal Act.***

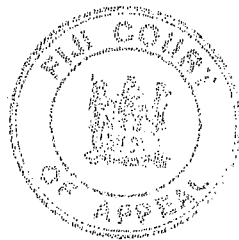
[10] Section 35 of the Court of Appeal Act, which specifies the powers of a single judge of appeal, provides:

(2) *If on the filing of a notice of appeal or 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 to appeal or nor right to seek leave to appeal, the judge may dismiss the appeal.*

[11] Although I am of the opinion that the appeal is bound to fail, that does not allow me to dismiss it unless I was of the opinion that it was bound to fail because there was no right to appeal.

[12] However I give the appellant the clearest warning that if he proceeds with this appeal he runs the risk that the Court of Appeal will increase the sentence to at least 6½ years.

[13] Leave is given to appeal on the ground that the trial judge erred in imposing a custodial sentence given that the appellant was under 21 years of age.



A handwritten signature in black ink, which appears to read "Randall Powell".

Randall Powell
Justice of Appeal

Solicitors:

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

MEMORANDUM

To: Justice Byrne

From: Justice Powell

Date: 5 November 2008

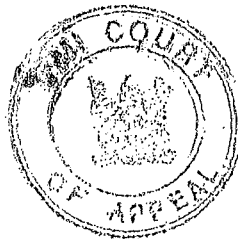
Guidelines on Sentencing for Drug Offences

I attach a copy of a Ruling given by me yesterday in Salua v The State AAU0093 of 2008S in which leave to appeal sentence was given in a matter involving the possession of drugs.

You will see from the Ruling and the few cases referred to therein that:

1. There is great variation in the sentences that are being handed down for drug offences;
2. That the State agrees that this is a suitable vehicle for the Court of Appeal to give comprehensive Sentencing Guidelines for drug offences
3. That it is hoped that this case can be ready for hearing in the week beginning 23 March 2008.

Justice Lloyd will be sitting during that week. He has a great deal of experience in dealing with drug offences and with sentencing guidelines for drug offences and it would be logical to list the matter in a Court that included Justice Lloyd.



Richard Powell

Justice Powell

Enc.

c.c: Acting Chief Justice
Justice Lloyd