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

CRIMINAL APPEAL NO. AAU0067 OF 2007S
(High Court Criminal Action No.HAA079 of 2006S)

BETWEEN: JONE DI ATULAGA

Appellant

AND: THE STATE

Respondent

Coram: Mataitoga, JA
Goundar,JA
Lloyd, JA

Hearing: Friday, 3rd April 2009, Suva

Counsel: F. Vosorogo for the Appellant
U. Ratuvili for the Respondent

Date of Judgment: Friday, 3rd April 2009, Suva

JUDGMENT OF THE COURT

Introduction

[1] On 12 May 2006 Jone Di Atulaga ('Appellant') appeared before a Magistrate charged with the offence of escaping from lawful custody contrary to the provisions of s.138 of the Penal Code.

[2] He pleaded guilty to the offence and on the same day was sentenced by the Magistrate to a term of imprisonment of one year. The brief facts the subject of the

escape charge are that in the early morning hours of 28 August 2005 the appellant was found to be missing from his cell at Korovou Prison where he had been serving a term of imprisonment for other offences. At the time of the cell check when the appellant was discovered to be missing a "dummy carton covered with blankets" was observed on top of his bed. The appellant was re-arrested in late September 2005.

[3] On 12 May 2006 the appellant appealed the severity of the sentence imposed by the Magistrate for the escape charge to the High Court. On 21 July 2006 the High Court Judge hearing the matter reduced the appellant's sentence to a term of imprisonment of 5 months to be served consecutively to any existing term of imprisonment he was serving.

[4] The appellant now seeks the leave of this Court to appeal the severity of the sentence imposed by the High Court Judge, submitting the sentence is wrong in law given that on 28 August 2005 in Prison Disciplinary Proceedings he pleaded guilty to a breach of Prison Regulation 123(3) of escaping from lawful custody for the very same escape the subject of the criminal charge that came before the Magistrate at Suva and the High Court Judge. For breach of the Prison Regulation he was ordered to lose one month of remission.

[5] The appellant submits in written submissions dated 2 May 2008 and 22 November 2008 that his Constitutional rights are being infringed, he being punished twice for the same offence.

The merits of the appeal

[6] Under s.22(1A)(a) of the Court of Appeal Act the appellant has the right to appeal the sentence imposed by the High Court Judge if the sentence "was an unlawful one or was passed in consequence of an error of law."

[7] The issue that arises in this case has arisen before in this Court. It is clear from the decision of this Court in ***Joeli Tawatatau v. The State*** (Criminal Appeal No. AAU0002 of 2007) that the charging of the offences of escape under s.138 of the Penal Code and under Prison Regulation 123(3), when they are based on identical facts (as here), amount to the same offence (see [39] of judgment). As the Court of Appeal said in **Tawatatau** (at [45]) a Magistrate dealing with such an escape charge should first ascertain whether a prison tribunal had already imposed any punishment for the escape. If it had, he should invite the prosecution to withdraw the charge. In **Tawatatau** the Magistrate did not make that inquiry and imposed a sentence of imprisonment. The Court of Appeal was of the view it had no alternative but to quash both conviction and sentence in respect of the charge dealt with by the Magistrate.

[8] In its original written submissions to this Court dated 4 June 2008 counsel for the respondent conceded this Court has no alternative but to allow this appeal and, based on this Court's decision in **Tawatatau**, quash the conviction and sentence imposed by the High Court Judge. In additional written submissions filed on 24 February 2009 different counsel for the respondent suggests we adopt an alternative approach of reducing the sentence imposed by the High Court Judge by one month, the period of remission ordered to be forfeited by the Prisons Tribunal. We do not feel that in the circumstances of this case it is appropriate to do this. Section 20 of the Penal Code is specific in its terms; a person cannot be punished twice for the same offence. That is what has happened here. The first imposed punishment was under the Prison Regulations. The second punishment for the offence under s.138 of the Penal Code was wrong in law and should be quashed.

Orders of the Court

[9] For the reasons stated above we order that:

1. The appeal is allowed.
2. Both the conviction and sentence imposed upon the appellant by the High Court Judge on 21 July 2006 are quashed.

Mataitoga, JA

Goundar, JA

Lloyd, JA

Solicitors:

Office of the Legal Aid Commission, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent