

IN THE COURT OF APPEAL
FII ISLANDS AT SUVA

[Criminal Appeal No. 0021/2010]

Before the Acting President, Hon. Mr. Justice John E. Byrne

BETWEEN : RICHARD ALLEN
(APPELLANT)

AND : STATE
(RESPONDENT)

COUNSEL : Appellant in Person
: D. Toganivalu for the Respondent

Date of Hearing : 30th June 2010

Date of Judgment: 20th August 2010

**RULING ON APPLICATION FOR LEAVE
TO APPEAL OUT OF TIME**

- [1] The appellant was charged with the offence of Burglary in the Magistrate's Court Nasinu and on his own plea of guilty he was sentenced to two years imprisonment on the 13th October 2009.
- [2] The appellant appealed against his sentence to the High Court.
- [3] On 4th March 2010, the High Court increased the sentence from two years to three years.
- [4] The appellant filed a Notice of Appeal against this sentence on the 12th of April 2010 although his actual Memorandum appealing was dated the 24th of March 2010. If one takes the date of his Notice of Appeal as the date on the Memorandum from the Naboro Prison, his application was made in time. If one takes the date it was received in the Registry of this Court, the 12th of April 2010 then it was eight days over the thirty days prescribed in the Court of Appeal Act.
- [5] On the 23rd of April 2010 when the matter first came before me I granted the appellant leave to appeal out of time and fixed the hearing of the substantive application for leave to appeal to the Full Court on the 22nd of June 2010. This was later changed to the 30th of June when the parties informed me that they relied on their written submissions.
- [6] In his judgment of the 4th of March 2010, Fernando, J in the High Court considered the facts of the case and held that there were aggravating factors because of which he held that the sentence of two years imposed by the Magistrate's Court was inadequate bearing in mind the prevalence of this offence and the fact that the appellant had seven previous convictions and had not made any effort to correct himself.

[7] **THE LAW**

Section 22(1) and 1A of the Court of Appeal Act Cap. 12 stipulates:

“Any party to an appeal from a magistrates’ court to the High Court may appeal, under this Part, 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.

Provided that no appeal shall lie against the confirmation by the High Court of a verdict of acquittal by a magistrate’s court.

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) 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.”*

[8] It is thus clear that the Court of Appeal has jurisdiction to consider an appeal from the High Court when there has already been a conviction in the Magistrates’ Court only on a question of law.

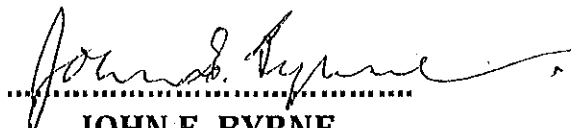
[9] The respondent submits that no question of law is involved here and therefore leave to appeal to the Full Court should be refused.

[10] In support of its opposition to the application one of the cases on which the respondent relies is Mateni v State (1999) FJCA 30; AAU 0021.1998 (14th May 1999).

- [11] The appellant argues that this case does not assist the respondent and I agree. There the Court consisting of Sir Moti Tikaram, President and Sir Maurice Casey, Judge of Appeal held that the High Court does not have power to increase a sentence in a Magistrate's Court beyond the maximum sentence which a Magistrates' Court may impose. There was no argument about this on this application so that I hold that Mateni's case is irrelevant to the instant case.
- [12] Nevertheless Fernando, J was well within his powers when he increased the sentence of the Magistrate's Court by only one year. Arguably he could have increased it by more. I therefore find that there is no appealable error by Fernando, J which would warrant me giving the appellant leave to appeal to the Full Court. The offence of burglary carries a maximum sentence of life imprisonment which the appellant appears to overlook.
- [13] I accordingly refuse the application for leave to appeal to the Full Court as having no merits and disclosing no error in law by the High Court.

Dated at Suva this 20th day of August 2010.




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JOHN E. BYRNE
Acting President