

**IN THE COURT OF APPEAL**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO: AAU0039 of 2012**  
**(High Court Case No: HAM 12 of 2012 Ltk)**

**BETWEEN** : **JOSUA NASIGAYA**  
*Appellant*

**AND** : **THE STATE**  
*Respondent*

Coram : Goundar JA

Counsel : Appellant in Person  
Mr. L. Fotofili for the Respondent

Date of Hearing : 28 April 2014

Date of Ruling : 6 June 2014

**RULING**

- [1] After unsuccessfully applying for an enlargement of time in the High Court to appeal against his conviction and sentence, the appellant filed an appeal to this Court. The High Court judgment was pronounced on 16 May 2012. This appeal was filed on 12 June 2012. This appeal is timely.
- [2] On 11 March 2010, the appellant was sentenced to 10 years' imprisonment after he pleaded guilty to a charge of robbery with violence in the Magistrates' Court at Ba. On 31 January 2012, he filed an application for an extension of time to appeal against his conviction and sentence.
- [3] The right of appeal from the Magistrates' Court to the High Court is governed by the Criminal Procedure Decree. Section 246(1) provides for a right of appeal against

conviction and sentence. Section 247 restricts appeals from guilty pleas to the extent, appropriateness or legality of the sentence. Section 248(1) states that the appeal should be filed in writing and within 28 days of the date of the decision appealed against. Section 248(2) gives the High Court discretion to extend the 28-day appeal period for good cause. Without imposing limitations, 'good cause' includes –

- (a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;
- (b) any case in which a question of law of unusual difficulty is involved;
- (c) a case in which the sanction of the Director of Public Prosecutions or of the Commissioner of the Fiji Independent Commission Against Corruption is required by any law;
- (d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents."

[4] For an enlargement of time to appeal, the courts further consider:

- the length and reasons for the delay,
- any prejudice to the respondent, and
- the merits of appeal.

[5] The ultimate test for an enlargement of time is whether the appellant will suffer injustice if the appeal is not heard.

[6] It is clear that the learned High Court judge applied these principles in refusing an enlargement of time to appeal. The appeal was filed 21 months after the appeal period had expired.

[7] The appellant blamed the prison administration for the delay. The learned High Court judge considered these matters and found the appellant did not show good cause for the

delay. The learned High Court judge also found the grounds of appeal lacked merits. For all these reasons, the application for an enlargement of time was refused by the High Court.

- [8] The appeal to this Court is governed by section 22 of the Court of Appeal Act. Section 22 provides:

“22(1) Any party to an appeal from a magistrate’s 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 ...:

- [9] The grounds of appeal advanced by the appellant are as follows:

**Ground 1**

That the sentencing Magistrate erred in law by failing to put the right to election to the appellant as stipulated under section 4(1)(b) of the Criminal Procedure Decree 2009 hence is a failure to comply with procedures.

**Ground 2**

That the plea was equivocal in a manner that the Sentencing Magistrate failed to enquire and record whether the appellant was guilty due to any force, pressure or threat or on free will.

**Ground 3**

That the Learned Sentencing Magistrate erred in Law in entering (9) convictions on the offences that the plea is not recorded or determined.

**Ground 4**

That the Learned Magistrate erred in law in accepting the guilty plea which was prejudiced for lack of legal representation.

**Ground 5**

That there is an obvious disparity in the sentence.

**Ground 6**

That the sentence was passed in consequence of an error of law.

**Ground 1 – Electable offence**

- [10] Whether robbery with violence was an electable offence triable in the Magistrates’ Court is a question of law alone. However, the question cannot possibly succeed. Robbery with

violence was an electable offence at the time the appellant was arraigned in the Magistrates' Court. According to the Magistrates' Court record, the election was put to the appellant, and he elected to be tried in the Magistrates' Court. This ground is frivolous.

**Ground 2 – Plea equivocal**

[11] The appellant contends that his plea was equivocal because the learned Magistrate failed to enquire whether the plea was made freely and voluntarily. According to the court record, the guilty plea was a true admission of guilt. There is nothing in the court record to suggest the appellant was forced to plead guilty. Furthermore, the appellant was represented by counsel when he pleaded guilty. In any event, whether the appellant's guilty plea was equivocal is not a question of law alone.

**Ground 3 – Sentenced for offences not convicted**

[12] There is no support for this ground in the court record. The learned Magistrate sentenced the appellant for only robbery with violence. It appears that by the time the appellant appealed to the High Court he was convicted of burglary and received a concurrent sentence. The learned High Court judge found the total effective sentence was appropriate in all circumstances of this case.

**Ground 4 – Lack of legal representation**

[13] This ground is misconceived. The appellant was represented by legal aid counsel when he pleaded guilty.

**Ground 5 – Disparity in sentence**

[14] The co-offender was sentenced to 4 years' imprisonment. The appellant was involved in more than one offence and he also had previous convictions. The co-offender was only sentenced for one offence and he was a first offender. Thus the disparity in sentences was justified.

**Ground 6 – Error of law in sentence**

[15] The appellant contends that his sentence was passed in consequence of an error of law. There is nothing in the sentencing remarks of the learned Magistrate to show that the sentence imposed on the appellant was passed in consequence of an error of law.


[16] The maximum sentence for robbery with violence was life imprisonment. The term of 10 years' imprisonment was within the tariff for gang robbery and the sentence was lawful in a sense that the learned Magistrate had power to impose that sentence.

[17] I am satisfied that the appellant has failed to meet the requirements for an appeal under section 22 of the Court of Appeal Act. The appeal is bound to fail because there is no right of appeal.

**Result**

[18] The appeal is dismissed under section 35(2) of the Court of Appeal Act.



  
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Hon. Justice D. Goundar  
**JUSTICE OF APPEAL**