

SIMIONE RAURA v STATE (CAV0010U of 2005S)

SUPREME COURT — CRIMINAL JURISDICTION

5 FATIAKI CJ, VON DOUSSA and MASON JJ

25 April, 4 May 2006

10 **Criminal law — jurisdiction — robbery with violence and previous convictions — error of law — early plea of guilty — Constitution of the Republic of Fiji ss 122(1), 122(2) — Court of Appeal Act (Cap 12) ss 22, 22(1), 22(1A), 31, 35(1)(a), 35(1)(b), 35(1)(c), 35(2) — Court of Appeal Rules r 41 — Criminal Procedure Code (Amendment) Act 2003 — Penal Code (Cap 17) ss 293(1)(b), 293(3) — Supreme Court Act 1998 s 7(2).**

15 The Petitioner, with two others, stopped and boarded the taxi of the complainant and committed the offence of robbery with violence. He admitted this, as were 18 previous convictions. The Petitioner had six previous convictions for robbery and robbery with violence and a number of convictions for larceny from a person and acts with intent to cause grievous harm. The Petitioner pleaded guilty in the Magistrates Court to one count of robbery with violence and was sentenced to 6 years' imprisonment. The learned
20 magistrate did not indicate a starting point or base "tariff" for the crime and did not indicate expressly that a discount was allowed for the Petitioner's early plea of guilty. The High Court dismissed the Petitioner's appeal against sentence since there were aggravating factors and no mitigating circumstance. The Petitioner's notice of appeal was considered by the President of the Court of Appeal but was dismissed pursuant to s 35(2)
25 of the Court of Appeal Act (the CA Act) on the ground that the requirements in s 22(1) and (1A) of the CA Act were not met. The Petitioner sought special leave to appeal and was not represented by legal counsel at any stage. He did not understand the limits of the jurisdiction of the court since it was apparent from his written communications with the registrar and from his submissions. The issues were whether: (1) there was error of law by the Court of Appeal in dismissing the Petitioner's appeal without first allowing him to
30 appear before the president under s 35(1)(c) of the CA Act; (2) there was no or insufficient discount was allowed for his early plea of guilty.

Held — (1) The power of summary dismissal under s 35(2) of the CA Act was clear and the learned president did not fall into error of law in dismissing the appeal without hearing the appellant. In the present case, the court agreed with the learned president that none of
35 the four grounds of appeal identified in the notice of appeal raised a "question of law only" as required by s 22(1) of the CA Act and the appeal to the Court of Appeal was bound to fail. As the jurisdiction of this court was no wider than the jurisdiction of the Court of Appeal to hear a challenge against sentence in a criminal matter, in the circumstances, there can be no appeal to this court.

40 (2) The Petitioner's early plea of guilty was considered by the learned judge who heard the appeal to the High Court and the Petitioner's contention was rejected because in all the circumstances of the case, including the early plea, the sentence of 6 years' imprisonment was not wrong in principle or excessive.

Appeal dismissed.

Cases referred to45 *Sashi Suresh Singh v R* [1983] 29 FLR 86, cited.*Aminiasi Katonivualiku v State* [2003] FJSC 17; *Paula Vura v State* [2005] FJSC 7, considered.

50 Petitioner in person

D. Goundar for the Respondent

- [1] **Fatiaki CJ, Von Doussa and Mason JJ.** The Petitioner pleaded guilty in the Magistrates Court on 8 March 2004 to one count of robbery with violence. On 26 March he was sentenced to 6 years' imprisonment. An appeal against sentence was dismissed by the High Court of Fiji on 27 August 2004. The
5 Petitioner then appealed to the Court of Appeal. The President of the Court of Appeal in exercise of the power of a single judge of appeal under s 35(2) of the Court of Appeal Act (Cap 12) dismissed the appeal. The Petitioner now seeks special leave to appeal to this court.
- [2] The Petitioner has not been represented by legal counsel at any stage. It is
10 apparent from his written communications with the registrar, and from his submissions that he does not understand the limits on the jurisdiction of this court.
- [3] The Supreme Court is the final appellate court in the Republic of the Fiji Islands. Under s 122(1) of the Constitution the right of appeal to this court lies
15 only from a final judgment of the Court of Appeal. Section 122(2) limits the jurisdiction of the Supreme Court as follows:
- 122(2) — An appeal may not be brought from a final judgment of the Court of Appeal unless:
- 20 (a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or
(b) the Supreme Court gives special leave to appeal.
- [4] In the present case the Court of Appeal has not given leave to appeal, hence the present petition.
- 25 [5] The Supreme Court Act 1998 further limits the jurisdiction of this court as follows:
- s.7(2) — In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless—
- 30 (a) a question of general legal importance is involved;
(b) a substantial question of principle affecting the administration of criminal justice is involved; or
(c) substantial and grave injustice may otherwise occur.
- [6] As the court said in *Aminiasi Katonivualiku v State* [2003] FJSC 17 at 3:
35 It is plain from this provision that the Supreme Court is not a Court of Criminal appeal or general review nor is there an appeal to the Court as a matter of right and ... the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal...
- [7] As the court may only hear an appeal from a final judgment of the Court of
40 Appeal it is necessary to consider the scope of the appellate jurisdiction of the Court of Appeal in a criminal case. Section 22 of the Court of Appeal Act (Cap 12) relevantly provides:
- s.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
45 jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only ...
- s.22(1A) — 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—
- 50 (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.

[8] In *Paula Vura v State* [2005] FJSC 7 at [8]. This court observed:

This Court has no wider powers than the Court of Appeal and therefore can consider appeals against sentence only if it is contended that a sentence is unlawful or was imposed in consequence of an error of law.

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[9] To understand the issues raised by the Petitioner before this court it is necessary to refer briefly to the facts of the Petitioner's offence, and to the proceedings in the courts below.

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[10] On 6 March 2004 at 11.30 am the complainant was driving along Raiwaqa Market when the Petitioner with two others stopped his taxi and boarded it. The Petitioner asked the complainant to drop them at Dilo Street in Samabula. At Dilo Street the Petitioner tied rope around the complainant's neck and assaulted him. He stole \$47 cash only \$8 of which was later recovered. These facts were admitted by the Petitioner, as were 18 previous convictions. Of these, the

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[11] In sentencing the Petitioner the learned magistrate did not disclose the process of reasoning that led to the length of sentence imposed; in particular he did not indicate a starting point or base "tariff" for the crime, and did not indicate expressly that a discount was allowed for the Petitioner's early plea of guilty. (although the length of the sentence strongly suggests to us that a significant discount for the early plea was given.)

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[12] The Petitioner's grounds of appeal to the High Court included that inadequate weight had been given to his plea of guilty.

[13] In dismissing the appeal the High Court said:

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The State opposes this appeal, saying that the sentence is within the tariff for robbery with violence cases, and that in the light of the aggravating features of the case, the appeal should be dismissed. I agree. Although the learned Magistrate did not indicate his starting point, there were a number of aggravating features in this case. One was the attack on a taxi driver. Another was the strangling with the rope. It is probable that the unfortunate victim believed that he was being killed. The third is that the Appellant was part of a group of three. There appear to be no mitigating factors, other than the reference to "dissocial personality disorder" [*contained in a psychiatric report ordered by the learned Magistrate*] and the early guilty plea.

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[14] The Petitioner then filed his notice of appeal in the Court of Appeal. Section 35 of the Court of Appeal Act gives certain powers to a single judge of appeal. Relevant to this petition, s 35 provides:

s.35(1) — A Judge of the Court may exercise the following powers of the Court—

(a) to give leave to appeal to the Court;

(b) to extend time within which notice of appeal or an application for leave to appeal may be given;

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(c) to allow the appellant to be present at any proceedings in cases where he or she is not entitled to be present without leave;

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(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.

[15] The notice of appeal was considered by the President of the Court of Appeal, and dismissed by him pursuant to s 35(2) on the ground that the requirements in s 22(1) and (1A) of the Court of Appeal Act (set out above) were not met. The Petitioner's notice of appeal identified four grounds of appeal, one of which was that the magistrate failed to consider the prompt pleas of guilty, and to give a discount in the sentencing process. The learned president considered that all the grounds of appeal raised questions of fact or mixed law and fact and none involved a question of law only. Accordingly there was no right of appeal; the appeal was bound to fail, and should be dismissed.

[16] In this court the Petitioner pressed two arguments. First, that there was error of law by the Court Appeal in dismissing his appeal without first allowing the Petitioner to appear before the president. This argument was based on s 35(1)(c) of the Court of Appeal Act. Second, that no or insufficient discount had been allowed for his early plea of guilty by the learned magistrate.

[17] Central to the first argument is s 35(2). In our opinion the power given by this subsection is one generally intended to be exercised in a summary way on a consideration of the notice of appeal. It is a power exercisable only where and when it appears from the notice of appeal 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. These are the preconditions for the exercise of the power. The power enables a judge to terminate an appeal without a hearing and without prior notice to the appellant, and for this reason it is a power that should be used sparingly and only in cases where one of the preconditions is plainly met. In *Sashi Suresh Singh v R* [1983] 29 FLR 86 at 88 a like view was expressed by the Court of Appeal about a similar statutory provision. That decision also demonstrates that an appeal may lie from an order of dismissal if one of the preconditions of the exercise of the power is not met.

[18] However, while the power is one generally intended to be exercised in a summary way on a consideration of the notice of appeal and without hearing any party, circumstances may arise where the single judge does hear the appellant.

[19] Section 31 of the Court of Appeal Act provides:

31(1) An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it and is not prevented by sickness or other cause, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal shall not be entitled to be present, except where rules of court provide that he shall have the right to be present or where the Court of Appeal gives him leave to be present.

The Court of Appeal Rules make provision in relation to the exercise of certain of the powers under s 35(1); for example r 41 concerns the powers of a single judge of appeal under s 35(1)(a) and (b). However the Court of Appeal Rules make no provision in relation to s 35(2) which would entitle an appellant to be present if and when the notice of appeal is considered.

[20] Section 31 recognises that the Court of Appeal may give leave to an appellant to be present at "any proceedings preliminary or incidental to an appeal". The consideration of a notice of appeal under s 35(2) is in our opinion such a proceeding, and a single judge of appeal acting under s 35(2) is exercising the powers of the Court of Appeal. It follows that the single judge may give leave to an appellant to be present at the consideration of the notice of appeal.

[21] Section 31(1)(c) on which the appellant bases his argument therefore has application to a consideration of a notice of appeal under s 35(2). However, given the summary nature of the power under s 35(2) a single judge is entitled to exercise that power without prior notice to the appellant and in his absence unless
5 the appellant has been given leave to be present if summary dismissal is to be considered. It will probably be rare that leave will be given as many appellants will be unaware of their entitlement to seek it, and in the present case the petition had not sought to be present. Nevertheless the power of summary dismissal under s 35(2) is clear, and the learned president did not fall into error of law in
10 dismissing the appeal without hearing the appellant.

[22] In the present case, we agree with the learned president that none of the four grounds of appeal identified in the notice of appeal raised a “*question of law only*” as required by s 22(1) of the Court of Appeal Act, and the appeal to the Court of Appeal was bound to fail. As the jurisdiction of this court is no wider
15 than the jurisdiction of the Court of Appeal to hear a challenge against sentence in a criminal matter, in the circumstances there can be no appeal to this court.

[23] The present petition must for this reason fail, and it is not necessary to address the further limitations on the jurisdiction of this court imposed by s 7(2) of the Supreme Court Act. However, in deference to the arguments of the parties
20 we state our agreement with the submission of the State that the petition does not raise a question of general legal importance or a substantial question of principle affecting the administration of criminal justice. The issues raised by the petition concern only the application of well-established principles of sentencing to the particular circumstances of the Petitioner alone.

[24] In so far as the Petitioner contends that he has suffered a substantial and grave injustice because his early plea of guilty was not sufficiently recognised by the learned magistrate, that question was considered by the learned judge who heard the appeal to the High Court, and the Petitioner’s contention was rejected
30 because in all the circumstances of the case, including the early plea, the sentence of 6 years’ imprisonment was not wrong in principle or excessive.

[25] The Petitioner in the course of his submissions questioned the power of the learned magistrate to impose a term of more than 5 years’ imprisonment. That submission reflected two misconceptions: *first*, that he was charged under s 293(3) of the Penal Code [Cap 17] and *second*, that the jurisdiction of the Magistrates Court was limited to the imposition of a sentence of imprisonment not exceeding 5 years. In fact the Petitioner was charged and convicted under s 293(1)(b) with robbery with violence, an offence which carries a maximum sentence of life imprisonment. As for the sentencing powers of the Magistrates
35 Court, that had been increased by the Criminal Procedural Code (Amendment) Act 2003 to permit the imposition of a maximum sentence of imprisonment not exceeding 10 years.

[26] We see nothing in the processes of the courts below, or in the sentence awarded to the Petitioner that is indicative of injustice having occurred.

45 [27] The petition for these reasons is dismissed.

Appeal dismissed.