

**RONALD MAHENDRA KUMAR v STATE (AAU0027 of 2010)**

COURT OF APPEAL — CRIMINAL JURISDICTION

5 CALANCHINI AP

4 September, 12 October 2012

10 **Criminal law — appeals — appeal against sentence — appellate jurisdiction of High Court — question of law only — right of appeal — vexatious or frivolous — whether sentence imposed by High Court in appellate jurisdiction — Court of Appeal Act ss 22(1), 22(1A), 35(1), 35(2); — Penal Code ss 292, 293.**

15 The High Court, in its appellate jurisdiction, dismissed the appellant's appeal against his conviction and the sentence imposed by the Magistrate's Court. The appellant sought to extend the time for filing an appeal, and to appeal against sentence.

**Held —**

20 (1) The appeal against sentence was dismissed by the High Court in its appellate jurisdiction. The decision did not constitute a sentence imposed by the High Court. Section 22(1A) of the Court of Appeal Act has no application to the present proceedings.

25 (2) The grounds of appeal do not raise any error of law only on the part of the High Court, nor do the grounds of appeal suggest the adoption or acceptance by the High Court of any error of law apparent from the magistrate's sentencing decision. Having regard to the approach taken by the High Court in reviewing the sentence, no error of law was involved. Proper consideration was given by the magistrate to both mitigating and aggravating factors, and both the tariff and starting point were consistent with decisions of this Court.

Appeal was dismissed for lack of jurisdiction.

**Cases referred to**

30 *Joji Waqasaqa v The State* [2006] FJSC 6; *Naikelekelevesi v The State* [2008] FJCA 11, AAU 61 of 2007 delivered 27 June 2008; *Sakiusa Basa v The State* [2006] FJCA 23, cited.

*Penioni Tubuli v The State* (unreported criminal appeal CAV 9 of 2006 delivered on 25 February 2008); *Rakula v The State* AAU 18 of 2004, followed.

35 *R v Sargeant* [1974] 60 Cr App 74, not followed.

*Appellant in person*

*S Puamau* for the Respondent

40 **Calanchini AP.** On 19 May 2008 the Appellant was convicted on two counts of robbery with violence under s 293 (1) (b) of the Penal Code Cap 17 and one count of unlawful use of a motor car under s 292 of the Penal Code in the Nasinu Magistrates Court. On 29 May 2008 in the same Court the Appellant was sentenced to a total term of eight years imprisonment. The Appellant had pleaded not guilty to all three counts.

45 The particulars of the two robbery offences may be stated briefly. On the first robbery count the Appellant with others on 7 December 2005 at Nasinu robbed Satya Nand of cash and property valued at \$12,619.00 and immediately before and during such robbery the Appellant with others used violence on the victim. On the second count the Appellant with others on 7 December 2005 at Nasinu 50 robbed Mohammed Faiyaz of cash and property valued at \$305.00 and before doing so used personal violence on the victim.

The Appellant subsequently appealed to the High Court against conviction and sentence. On 31 October 2008 the High Court dismissed the Appellant's appeals against both conviction and sentence.

On 18 February 2010 the Appellant filed a letter indicating his desire to appeal  
5 against the sentence imposed by the Magistrate. There are therefore two issues that require determination. The first issue is whether the Appellant should be allowed to proceed out of time with this appeal. The second issue is whether this Court has jurisdiction to hear the appeal under s 22 of the Court of Appeal Act Cap 13.

10 The letter filed by the Appellant on 18 February 2010 was more than one year out of time. The explanation given by the Appellant was that when he checked with the prison to find out when his appeal letter had been sent to the Court, he was informed that it was still in his file. Counsel for the State informed the Court that the Respondent did not oppose the application for further time to lodge the  
15 appeal. Under the circumstances I indicated that I was prepared to extend the time for filing the appeal to 10 February 2010 pursuant to s 35 (1)(b) of the Court of Appeal Act.

Since this is an appeal from the High Court exercising its appellate  
20 jurisdiction, it is necessary to determine whether the Appellant's appeal falls within the requirements of s 22 of the Court of Appeal Act. So far as is relevant to the present application, s 22 provides:

“(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.  
25 (1A) No appeal under sub section (1) 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.  
30 (2) - (8) \_ \_ \_.”

The significant point to note from these provisions is that there is an automatic right to appeal to the Court of Appeal from a decision of the High Court exercising its appellate jurisdiction from a magistrates' court on a question of law  
35 only. Leave is not required under such circumstances. The appeal lies in respect of a question of law only. Since leave is not required there is no jurisdiction given to a single judge of the Court under s 35 (1) of the Court of Appeal Act to consider the appeal.

The position is that a single judge may nevertheless exercise the jurisdiction  
40 given under s 35 (2) of the Act:

“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.”

45 In the context of the present appeal, it remains open to me to discuss whether the Appellant's notice of appeal which is an appeal under s 22 of the Act (a) is bound to fail because there is no right of appeal or (b) is vexatious or frivolous.

An appeal is bound to fail when there is no right of appeal. There is no right of appeal when the Court of Appeal has no jurisdiction to hear the appeal. Under  
50 s 22 (1) an appeal from the High Court exercising its appellate jurisdiction to the Court of Appeal is on a question of law only. But that is not necessarily the end

of the matter. There is a further consideration. When an appeal is brought under s 22 (1) (ie on a question of law only) and involves a challenge to a sentence imposed by the High Court in its appellate jurisdiction there are two further constraints. Under s 22 (1A) no appeal on a question of law (which is the initial requirement under s 22 (1)) in respect of a sentence imposed by the High Court in its appellate jurisdiction lies unless the appeal is on the ground that (a) the sentence was an unlawful one or was passed in consequence of an error of law or (b) the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence.

10 At the outset it should be noted that the decision of the High Court in respect of the appeal against sentence was set out in paragraph 28 of the judgment:

*'After reviewing the sentence passed in this case, I conclude the appeal against sentence has no merit and is dismissed. I uphold the sentence in the court below.'*

15 The question arises whether confirmation by the High Court of the sentence imposed by the Magistrate's Court (i.e. where the appeal against sentence is dismissed) constitutes a sentence imposed by the High Court in its appellate jurisdiction for the purposes of s 22 (1A) of the Act. The answer to that question was provided by the Supreme Court in *Penioni Tubuli v The State* (unreported criminal appeal CAV 9 of 2006 delivered on 25 February 2008). At paragraph 24 the Supreme Court stated:

25 *'It may be that an appeal is brought against 'a sentence imposed by the High Court in its appellate jurisdiction' under s 22 (1A) and attracts the constraints imposed by that subsection. A sentence will be imposed by the High Court in its appellate jurisdiction when it increases or reduces a sentence imposed by a sub-ordinate court. Dismissal of an appeal against sentence by the High Court does not amount to imposition of a sentence by that Court and therefore the limitations applicable under s 22 (1A) do not apply in such a case.'*

30 The limitations applicable to an appeal to the Court of Appeal that are set out in s 22 (1A) apply to appeals that challenge a sentence imposed by the High Court in its appellate jurisdiction. In the present case the appeal against sentence was dismissed by the High Court in its appellate jurisdiction. The decision did not constitute a sentence imposed by the High Court. Section 22 (1A) has no application to the present proceedings. The question remains whether the grounds of appeal raised by the Appellant involve a question or questions of law only for the purpose s 22 (1).

35 Since the learned High Court Judge dismissed the appeal against sentence, it is appropriate to commence the analysis by reference to the learned Magistrate's sentencing decision.

40 The learned Magistrate noted that the appropriate tariff for robbery with violence involving home invasion was 4 to 9 years. His starting point was 7 years imprisonment. The learned Magistrate reduced by 4 years to 3 years the sentence on account of the mitigating factors raised by the Appellant and then added 5 years for aggravating factors which he outlined in his sentencing decision. It is appropriate to refer briefly to one of the mitigating factors. As one of a group the Appellant was party to the use of physical violence on the victims. One child was severely affected by the crime. The Magistrate sentenced the Appellant to 8 years imprisonment on each robbery with violence count to be served concurrently.

50 On appeal to the High Court the learned Judge made the following comments:

“25. Against sentence I have summarized your submissions as complaining on two grounds: that the sentence is harsh and excessive and it is unprincipled in that it did not consider whether it could have been shorter and still satisfy the need to protect the public and deter criminals.

5 26. In reviewing your claim that the sentence harshness and excessive, the court must look at whether the trial magistrate sentence is incorrect given the establish tariff sentence that is applicable for offenders found guilty of the same offence. In this case he chose 7 years as the starting point and given the prevalence of the offence, the need to protect the public and seriousness of the offence, the starting point is within the tariff considered appropriate by the Court of Appeal in *Sakiusa Basa v The State* [2006] FJCA 23, which in my view is lenient. It should have been higher given the later  
10 decisions of the Court of Appeal in *Naikelekelevesi v The State* [2008] FJCA 11 and the Supreme Court in *Joji Waqasaqa v The State* [2006] FJSC 6.

15 27. The trial Magistrate did take into consideration all the relevant mitigating factors and discounted the sentence by 4 years. For aggravating factors which were outlined in his judgment, the trial Magistrate rightly referred to the home invasion factors that warrant consideration and as a result increased your sentence by 5 years. Your total imprisonment of 8 years imprisonment given the totality of the offending in this case is proper. It will be a reminder that if you do the crime you will do the time.

20 28. After reviewing the sentence passed in this case, I conclude that the appeal against sentence has not merit and is dismissed. I uphold the sentence in the court below.”

The grounds of appeal are:

25 “1) That the appellant was a first offender and have no history of previous conviction.  
2) That the sentence was manifestly harsh and excessive in view of all the circumstances of the case.

30 3) That the learned trial Judge’s judgment fails to contract general observation as to the principle of sentencing particularly in relation to the need for sentencing court to ensure that where immediate custodial sentence is called for it should be short as possible, consistent only with the duty of the court to protect the public and deter criminals. It should also consider the (4) classic principle of sentencing.

- Please see: *R v Sargeant* [1974] 60 Cr App 74 Lawton LJ.

35 4) That the learned trial Judge’s judgment fail to further repeating the commendable efforts of the accused to become a decent citizen, it would not serve the interest of society to send him back into the company of Criminals Justice would be better served if he were allowed to continue on his path to better himself and to carry on with his endeavour to become a decent and useful citizen.

- Please see: HAC: 022 of 2007 in the High Court Lautoka.”

40 In my judgment the grounds of appeal do not raise any error of law only on the part of the High Court nor do the grounds of appeal suggest the adoption or acceptance by the High Court of any error of law apparent from the learned Magistrate’s sentencing decision. As a result I have concluded that having regard to the approach taken by the High Court in reviewing the sentence imposed by the learned Magistrate, no error of law was involved. Proper consideration was given by the learned Magistrate to both mitigating and aggravating factors. Both  
45 the tariff and the starting point were consistent with decisions of this Court (see *Naikelekelevesi v The State* AAU 61 of 2007 delivered 27 June 2008).

50 There is one other observation that should be made. The Appellant is appealing the decision of the learned Judge by the High Court sitting in his appellate jurisdiction. It follows that any ground which was not raised in the appeal in the High Court cannot be considered in this Court. (See *Rakula v The State* AAU 18 of 2004 delivered 26 November 2004).

As the appeal grounds do not raise an error of law only there is no right of appeal under s 22 (1) of the Act. The Court of Appeal has no jurisdiction to hear the appeal and as a result the appeal is bound to fail. The appeal is dismissed under s 35 (2) of the Act.

5

*Appeal dismissed.*

10

15

20

25

30

35

40

45

50