

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU0101 OF 2007

BETWEEN : JOSATEKI NACAGILEVU *Applicant*

AND : THE STATE *Respondent*

BEFORE THE HONOURABLE JUDGE OF APPEAL MR JUSTICE
JOHN E. BYRNE

Counsel : Applicant – In person
: Ms A. Prasad for the Respondent

Date of Hearing &
Ruling : 12th November 2007

R U L I N G

[1] The Applicant seeks Leave to Appeal to this Court from a Judgment of Shameem J. in the High Court at Suva on the 3rd of August 2007 in which she dismissed an appeal by the Applicant against a sentence of 4 years imprisonment imposed by the Valelevu Magistrates' Court on the 3rd of May 2007 on the ground that the sentence was harsh, excessive and wrong in principle.

- [2] The charge, filed on the 19th of April 2007, alleged that the Applicant with another, on the 17th of April 2007 at Nasinu, robbed a taxi driver Rajendra Kumar of \$300.00 and one mobile phone and at the time of the robbery used personal violence on him.
- [3] The Applicant pleaded guilty on the 19th of April after waiving his right to counsel. The facts were that the Applicant and another man hired Mr Kumar's taxi from Nasinu to Tovata. At Tovata, the two men pressed his mouth and tied a brush cutter cord around his neck. Mr Kumar shouted for help and three farmers at a farm nearby heard him. They came to help and apprehended the Applicant, later handing him over to the police officers of the Tuirara Police Post. The Applicant was interviewed under caution and admitted the offence. He said that his accomplice had taken the cash and the mobile phone from Mr Kumar's shirt pocket.
- [4] These facts were admitted. He was a first offender. In mitigation, he said he was 23 years old, married with a six year old child, unemployed, educated to form six level and an occasional fisherman. He said that his accomplice was the principal offender and admitted that he tied the taxi driver's neck to enable his accomplice to rob him.

- [5] The learned Magistrate starting at 6 years imprisonment later reduced this to 4 years for the early guilty plea, the Applicant's youth and good character, the value of the items stolen, the degree of violence and the lack of injuries.
- [6] On appeal to the High Court, Shameem J. held that the sentence was reasonable in the circumstances. It was a planned robbery and the use of the cord around the victim's neck must have caused much fear to him, a man who was earning an honest living and providing an important service to the public. She also took into account the fact that the Applicant was not the principal offender. In this Court the Applicant had to rely on Section 22(1) of the Court of Appeal Act Cap. 12 and persuade the Court that the decision of the High Court was wrong in law. His appeal was dated the 25th of September 2007 and received in the registry of this Court on the 3rd of October 2007. Thus the Applicant lodged his appeal approximately 19 days later than the time allowed by the rules of this Court. I consider that delay was reasonable and I therefore grant leave to appeal. The question then is whether Shameem J. was wrong in law in upholding the decision of the Magistrates' Court. The

Court has to consider whether the sentence was so manifestly excessive that it could not be held good in law.

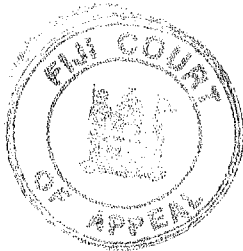
- [7] The Applicant then argued that the learned Magistrate and the High Court had committed a serious error of law in that the Magistrate had not given the Applicant his right to mitigate before he sentenced him. Section 300 of the Criminal Procedure Code requires the Court to ask any person convicted whether he wishes to say anything why sentence should not be passed upon him according to law but the section also says that the omission so to ask him shall have no effect on the validity of the proceedings.
- [8] The Applicant however took Section 300 to mean that by being allegedly denied the opportunity to say something in mitigation he was denied his legal rights.
- [9] If that were the case then I consider it would amount to a mistake in law being a denial of an accused person's fundamental right to natural justice. The proceedings themselves would not be invalidated by Section 300 but arguably any sentence could be if the Court had not considered any mitigating factors.

[10] In this case however there is no substance in the ground of appeal because the Court Record is quite clear that the learned Magistrate did give the Applicant an opportunity to mitigate. At page 2 of the record the Magistrate writes "*Plea in Mitigation*" and underneath there are eight reasons why the Applicant told the Magistrate he should not receive a heavy sentence. These were:

- 23 years old
- Married with one child aged 6 years old
- Unemployed
- Reached Form six level education at Ratu Kadavulevu School in 2002
- I was a fisherman in Solenger Fishing Boat
- I am from Kadavu in Naikorokoro
- First offender
- Pleaded guilty

[11] This Court must accept the record of the lower Court as being accurate and truthful. To mislead this Court as the Applicant has done I find is vexatious and frivolous within the meaning of Section 35(2) of the Court of Appeal Act. It is a waste of the Court's time which can easily be devoted to more genuine applications for leave to appeal.

[12] Apart from that, like the Judge of the High Court I consider that the sentence of 4 years was reasonable in the circumstances for the reasons stated by Shameem J. on page 3 of her Judgment of the 3rd of August 2007. The application is therefore dismissed under Section 35(2) of the Court of Appeal Act as being vexatious and frivolous and because the Applicant has not satisfied me that either the learned Magistrate or Shameem J. committed any error of law.



John E. Byrne

[John E. Byrne]

JUDGE OF APPEAL

At Suva

12th November 2007