

IN THE COURT OF APPEAL, FIJI ISLANDS  
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAUOO89 OF 2007

BETWEEN : JONE ANU *Appellant*

AND : THE STATE *Respondent*

**Counsel** : Appellant - In Person  
Ms A. Driu for the Respondent

**Date of Hearing & Judgment** : 28<sup>th</sup> November 2007

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**J U D G M E N T**

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[1] This is an unusual application for leave to appeal from a Judgment of the High Court in Suva dated the 27<sup>th</sup> of July 2007 which was given on an application for leave to appeal out of time against sentences totalling 8 years imprisonment imposed on the Appellant by the Magistrates' Court at Suva on the 30<sup>th</sup> of December 2003. The charges related to an offence of **Robbery With Violence** committed on the 3<sup>rd</sup> of October 2003 where the value of property stolen was \$1,429.00 and a charge for a similar offence committed on the 6<sup>th</sup> of November 2003

where the amount stolen was \$3,544.00. The Magistrate imposed consecutive terms of 4 years imprisonment on each of these charges.

- [2] The Appellant filed his Petition of Appeal on the 24<sup>th</sup> of April 2007, that is 3 years 6 months after the expiry of the 28 days period of appeal prescribed by Section 310(1) of the Criminal Procedure Code Cap. 21.
- [3] The learned Judge concluded, properly in my view, that there was no reason to justify the delay of 3½ years before the Appellant lodged his petition and he therefore refused leave to appeal on these charges. At the hearing before the High Court on the 27<sup>th</sup> of July 2007 the Appellant appeared in person and the State was represented by Ms A. Tuiketeti.
- [4] On the 10<sup>th</sup> of August 2007 the Appellant again appeared before the same Judge appealing against a sentence of 4 years imprisonment imposed by the Magistrates' Court at Suva on the 30<sup>th</sup> of December 2003 for **Robbery With Violence** where the amount stolen was \$1,429.00 and a second count of **Robbery With Violence** committed just over one month later on the 6<sup>th</sup> of November 2003 where the amount stolen was \$3,544.00. The Appellant also appealed on the same day against four other convictions

for *Burglary, Larceny from a Dwelling House, Throwing an Object, Damaging Property and Burglary* all committed between the 14<sup>th</sup> of November 2003 and the 13<sup>th</sup> of December 2003. For these offences the learned Magistrate imposed a total of 8 years imprisonment effective from the 30<sup>th</sup> of December 2003.

[5] The learned Judge in his Judgment of the 17<sup>th</sup> of August 2007 considered that the sentences of 4 years consecutive on each of the two offences of *Robbery With Violence* were inadequate and increased these under the power given him by Section 319(2) of the Criminal Procedure Code to a total of 10 years imprisonment. On the two offences of *Burglary and Larceny from a Dwelling House* committed on the 14<sup>th</sup> of November 2003, the Judge imposed a sentence of 3 years consecutive to the increased sentences of 10 years for the first two offences arriving at a total of 13 years imprisonment.

[6] He then considered mitigating factors such as the age of the Appellant, his likelihood of rehabilitation and his apparent remorse and concluded that the sentence of 13 years imprisonment was excessive and discounted this by 4 years arriving at a total sentence of 9 years for all the

offences committed by the Appellant. He then concluded his Judgment by saying:

*“In the light of the above, the Court makes the following orders:*

- i) The consecutive sentences of 8 years imprisonment imposed by the Magistrates’ Court are hereby vacated;*
- ii) A new sentence of 9 years imprisonment is imposed with effect from 30<sup>th</sup> December 2003 for all the cases from which this appeal was made”.*

[7] Two things will be noted from the above recitation:

First that the Judge made no comment on the fact that the appeals which came before him on the 10<sup>th</sup> of August 2007 were also 3½ years out of time in view of the 28 day limit set by Criminal Procedure Code. Secondly however, and far more importantly, it was never drawn to the learned Judge’s attention by counsel who appeared for the State on the 10<sup>th</sup> of August that the same Judge had previously dealt with an application for leave to appeal

from the first two convictions of *Robbery With Violence* on the 27<sup>th</sup> of July 2007 and refused leave to appeal on the ground of excessive delay by the Appellant.

[8] It is obvious to me, and Ms Driu for the Respondent agrees, that counsel who appeared on the second occasion before the Judge on the 10<sup>th</sup> of August should have informed him that he had previously dealt with the first two offences on the 27<sup>th</sup> of July and refused leave on the ground of failing to seek leave to appeal in time.

[9] The learned Judge clearly did not realise this himself. That leaves the position of the Appellant with the fact that he has been sentenced to a total of 8 years imprisonment by the Magistrates' Court on the two charges of *Robbery With Violence* and that the High Court Judge has refused him leave to appeal these two sentences. The learned Judge obviously had considered the sentences of 8 years and increased them to 9 years which in my Judgment was wrong. Having refused leave to appeal on the first two charges, in my Judgment the sentences of the Magistrates' Court must stand. It follows in my view that the learned Judge had no jurisdiction to deal with the same charges again and that consequently his sentence of 9 years on all five charges cannot stand.

[10] The only option this Court has in the circumstances is to uphold the appeal from the Judgment of the 17<sup>th</sup> of August 2007 and restore the sentence of 8 years imposed by the Magistrates' Court on the 30<sup>th</sup> of December 2003 from which the Judge had refused leave to appeal.

[11] Clearly the problem of this case could have been avoided if counsel for the State on the 10<sup>th</sup> of August had liaised with his colleague who appeared on the 27<sup>th</sup> of July.

[12] The order I make is therefore that leave to appeal against the Judgment of the 17<sup>th</sup> of August 2007 is granted. The Judgment of the Magistrates' Court is restored. The Appellant is to continue to serve his term of 8 years imprisonment.



*John E. Byrne*

[ John E. Byrne ]  
**JUDGE OF APPEAL**

At Suva

28<sup>th</sup> November 2007