

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0024 OF 2007S

(High Court Criminal Action No. HAA 47 of 2006S)

BETWEEN: **ILIVASI NAVUNICAGI**

Appellant

AND: **THE STATE**

Respondent

Coram: Ward, President
Ellis, JA
Penlington, JA

Hearing: Wednesday, 20th June 2007, Suva

Counsel: Appellant in Person
W Kuruisaqila for the Respondent

Date of Judgment: Monday, 25th June 2007, Suva

JUDGMENT OF THE COURT

[1] The appellant and his co-accused faced one count of breaking and entering and larceny contrary to s.300 of the Penal Code Cap.17. The offence was committed on 7 March 2006. The appellant and his co-accused appeared in the Magistrates Court on 9 March 2006. They were unrepresented. They pleaded guilty and were sentenced on that day. The appellant was sentenced to 4 years imprisonment.

- [2] On 27 March 2006 the appellant filed an appeal against sentence.
- [3] The Magistrates Court file was received by the High Court on 18 April 2006. It was allocated to Winter J on 19 April 2006. The file was minuted (undated) by the Judge "first call 26 May."
- [4] A notice of hearing was issued on 1 May 2006 by the High Court Registry. Likewise a production order to the officer in charge of the Suva Prison was issued on the same day ordering the production of the appellant on 26 May.
- [5] On 3 May 2006 the Office of the Director of Public Prosecutions was served with the hearing notice and service was acknowledged.
- [6] On 11 May 2006, the Production Order was served at the Suva Prison Office and, service was acknowledged. There was a notation on the production order dated 9 May 2006:
- "Please also find a copy of Court Record attached herewith for appeal purposes."
- [7] The appellant, in his notice of appeal to this Court asserted that he escaped from prison on 13 May 2006 not knowing that the appeal had been listed for hearing. That date was disputed by the State. We have no evidence to resolve the issue. For the purposes of this appeal we propose to treat 13 May 2006 as the date of the appellant's escape from prison.

[8] There is no evidence on the Court File that the notice of hearing issued by the High Court office and directed to the appellant concerning the hearing on 26 May was served on him at any time.

[9] On 26 May 2006 the appeal was called in the High Court. The Judge's note shows that there was no appearance by the appellant. The Judge recorded:

"(1) Appellant 'escaped'

(2) Adj in his absence to 23 June 06

(3) Order Production

(4) If no appearance appeal struck out."

[10] On a hearing sheet dated 23 June 2006 there is a notation by the Judge "Adj to 26".

[11] On 26 June 2006 the appeal was again called. The Director of Public Prosecutions entered an appearance.

[12] The Judge made a minute for the hearing on 26 June 2006 which reads:

"(1) No appearance of the appellant for the second time

(2) Orders: Appeal struck out for abandonment by non appearance (1050)."

- [13] A memorandum dated 27 June 2006 was sent by the officer in charge High Court (Criminal) Suva to the Acting officer of the Magistrates Court Nasinu advising that on 26 June 2006 the appeal was struck out due to the non appearance of the appellant. The Magistrate's Court file was returned.
- [14] On 14 August 2006 the appellant was back in custody. Shortly afterwards he wrote to the High Court inquiring as to his appeal. He did not receive a reply until 8 February 2007 when he was informed that the appeal had been "set aside." On 12 February 2007 he wrote to the High Court requesting a 'reassessment' of his appeal.
- [15] The appellant then appealed to this Court against the sentence of 4 years imprisonment.
- [16] On 30 March 2007 Ward, P sitting as a single Judge of this Court refused leave to appeal against sentence by virtue of s.22(1A) of the Court of Appeal Act, which only allows an appeal from the High Court, sitting in its appellate jurisdiction, to this Court on the grounds that the sentence passed was unlawful or was passed in consequence of an error of law. The grounds of the appellant's appeal fell outside those grounds.
- [17] Ward P, however, granted leave to the appellants to appeal on the question of the propriety of the High Court Judge striking out the appeal when he had no evidence that the appellant had been notified of the date of either hearing and when he made no inquiry as to whether he was still at large when the appeal was dismissed.
- [18] We commence our consideration of this appeal by referring to s.28(1)(l) of the Constitution which provides that every person charged with an offence has the right, if found guilty, to appeal to a higher court. The appellant exercised that

Constitutional right on 27 March 2006. Thereafter the procedure laid down by s.314 of the Criminal Procedure Code Cap. 21 was required to be followed. Under that provision the Chief Registrar of the High Court is enjoined, inter alia, to enter the appeal for hearing, serve a notice of hearing on the parties to the appeal and supply the respondent, that is the State, with a copy of the appellant's appeal and a copy of the judgment or order (in this case the sentence) appealed against.

[19] Before that procedure had run its course the appellant, by his own deliberate action had escaped from prison well knowing that his appeal was then on foot. By his own action he had made it impossible for one of the procedures prescribed by s.314 to be carried out, namely, service on him of the notice of hearing.

[20] We accept when the appeal was first called on 26 May 2006, the appellant was unaware of the date of hearing. That was his own fault.

[21] Here we refer to *R v Flower* [1966] 1 QB 146. Widgery J in delivering the judgment of the Court of Criminal Appeal said at page 151:

“The practice of this court where an appellant escapes, and for that reason is not present when an appeal is called on, is either to adjourn the appeal or dismiss it, according to the justice of the case.”

[22] That statement was approved and followed in this Court in *John Yogendra Singh v. The State* Criminal Appeal AAU0025/99S. Having set out the statement in *Flower* this Court referred to the right of appeal to a higher Court contained in s.28(1)(l) of the Constitution and went on to say:

“That right is always available to citizens, but to avail themselves of it they must be prepared to subject themselves to the lawful jurisdiction of duly established Courts. Where that jurisdiction is rejected, the right must be taken to have been waived or abandoned.”

- [23] In this case Winter J adjourned the appeal for just under one month, no doubt on the basis if the appellant was apprehended in the meantime he would be able to conduct his appeal. When the case was listed again on 23 June it was adjourned to 26 June. The appellant was still at large.
- [24] On 26 June the appeal was again called. We accept that there is no record that the Judge inquired as to whether he was still at large but, even if he had done so, he would have been told of that fact.
- [25] On 26 June the Judge dismissed the appeal on the ground that it had been abandoned by non appearance.
- [26] When the appellant filed his appeal on 27 March 2006 the High Court became seized of it. The appellant had then subjected himself to the lawful jurisdiction of the High Court.
- [27] Had the appellant not escaped but remained in custody he would have known of the various hearing dates. By his own actions he denied himself that knowledge.
- [28] By his escape, having filed an appeal to the High Court the appellant created a situation in which he was at risk of being held to have abandoned his appeal. Not surprisingly, the Court reached that conclusion and struck it out on that account. The decision of the Judge was in accordance with the authorities set out above. We therefore conclude that there was no impropriety on the part of the Judge and the appeal is therefore dismissed.

Result

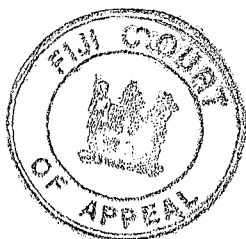
- [28] The appeal is dismissed.

Ward

Ward, President

A. J. Ellis

Ellis, JA



J. Penlington

Penlington, JA

Solicitors:

Appellant in Person

Office of the Director of Public Prosecutions, Suva for the Respondent

D:WD\WIN\USHA\AAU0024U.07S