

IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

Criminal Appeal No: AAU0038/06
[High Court Action No: HAC 9 of 2004]

Between:

MAKARIO ANISIMAI

Applicant

And:

THE STATE

Respondent

Coram: Shameem, JA
Mataitoga, JA
Goundar, JA

Hearing: 7th February 2008

Counsel: Mr. A.K. Singh for applicant
Mr. P. Bulamainaivalu for the respondent

Judgment: 26th March 2008

JUDGMENT OF THE COURT

1. The applicant seeks leave to appeal out of time from the full court of the Court of Appeal. Leave was refused by a single Judge of Appeal (per Ward P) on the 26th of September 2006 in the applicant's absence. He had escaped from the custody of prison officers. He now seeks to have the matter reconsidered before the full court, pursuant to section 35(3) of the Court of Appeal Act Cap. 17.

History

2. For the purposes of this application the history of the case in the magistrates' court is relevant.
3. The applicant was charged with another with one count of robbery with violence. He was charged alone with a further count of robbery with violence and one count of larceny. The charges were read to the accused on the 26th of November 2003. Both pleaded not guilty. The applicant elected High Court trial. The alleged accomplice elected magistrates' court trial. The prosecutor then said:

"We wish to make section 220 application for matters to be remitted to the High Court for trial – serious charge – large amounts involved."

4. Counsel (who appeared only for the alleged accomplice) opposed the application. The court adjourned for the section 220 application to be made in writing. The application was filed and the court ordered service on counsel and the applicant. There were two further mention dates and on the 24th of December 2003, 14 days were given to counsel to file their responses to the State's application for High Court trial.
5. On the 7th of January 2004, the magistrate adjourned for a paper preliminary inquiry to be conducted. By this time, both accused were unrepresented. On the 21st of January 2004, both accused asked for High Court trial. The court then explained the "new Criminal Procedure Code." It appears that this is a reference to the transfer procedures created by the Criminal Procedure (Amendment) Act No. 13/2003. The record then reads: ***"Accused 1&2: Ask two weeks to consider – if correct for High Court under new Criminal Procedure Code provision."***

6. The matter was adjourned again to the 4th of February 2004 when ***"Both accused refuse consent to new Criminal Procedure Code for High Court. Elect Paper Preliminary Inquiry in this Court."*** It is apparent that because the accused did not consent to the transfer, and because they were charged before the effective date of the Amendment Act 13/2003, the presiding magistrate had correctly decided to proceed with an "old-style" paper committal.
7. On the 27th of April (the date set for the preliminary inquiry) the prosecution said that they were ready to "transfer" the case to the High Court. The Court asked the accused: ***"Do you have any objection that this matter be tried at High Court?"*** Both accused said they did not. The case was transferred to the High Court forthwith, without a preliminary inquiry being held.
8. The matter was called before the High Court on the 28th of April 2005. The trial was adjourned on several occasions and it finally proceeded on the 17th of May 2006. The applicant was unrepresented. The evidence led by the prosecution was that there was an armed robbery of a security van at the back of the Village Six cinemas on the 6th of December 2003. Approximately \$500,000 was missing. One month after the robbery, on a search of the applicant's house a number of expensive items, bank deposit slips and cash were seized. He was interviewed and he accompanied the police on a reconstruction of the scene. During the trial he alleged torture, oppression and unfairness. A trial within a trial was held, and the statements made to the police were held to be admissible.
9. The trial concluded with the unanimous opinions of guilt by the assessors to one count of robbery with violence and one count of the theft of a number plate. On the 1st of June 2006, the applicant was sentenced to 14 years imprisonment on the count of robbery with violence and 6 months imprisonment on the count of larceny. The sentences were to be served concurrently.

10. The applicant then apparently appealed against conviction and sentence. A copy of the original petition of appeal is not on the record, but State counsel attached it to his submissions. It is dated the 26th of June 2006, and it was forwarded to the officer-in-charge of the Suva High Court by the officer-in-charge of the Suva Prison, on the 27th of June 2006. The grounds set out in the letter of appeal include breaches of constitutional rights by the police, prejudice as a result of lack of legal representation, and a harsh and excessive sentence. State counsel in his submissions said that the appeal was not lodged until the 27th of July. A handwritten note on the memorandum addressed to the O/C Suva High Court, suggests receipt of the petition of appeal on the 5th of July 2006. With the 30 day time limit under section 26(1) of the Court of Appeal Act, Cap. 12, the applicant was then only five days out of time.

11. The matter was listed before Ward P on the 8th of August 2006. The applicant was represented by counsel (M. Naco) who asked for an adjournment. The application (for leave to appeal) was listed for the 15th of August and counsel again asked for an adjournment. After leaving the judges' chambers, the applicant escaped from the custody of prison officers. The case was next called on the 26th of August 2006. The applicant was still at large. Counsel did not appear. The court record reads: **"RE: APPEAL AGAINST SENTENCE & CONVICTION."** We assume that this is an error because what was listed was a leave application. What is not clear is whether it was an application for leave to appeal out of time, or an application for leave to raise questions of mixed law and fact. The record suggests that his Lordship treated it as the latter. It reads:

"A. Driu: I understand he escaped immediately after the last hearing.

***Court: I can see no pure ground of law and now requires leave.
There is no substantive part raised.***

Leave to appeal refused."

12. This reference to grounds of "pure law" being required is obviously a mistaken one. This was an appeal from a trial in the High Court and the appeal was not limited to grounds of law alone.

13. On the 12th of September 2007, the applicant made a fresh application for leave to appeal out of time. He asks for the matter to be heard before the full court. He raises for the first time, a number of matters of law. The proposed grounds of appeal are set out below:
 - a) That the applicant elected for magistrates' court trial, but the trial magistrate in breach of the Electable Offence Decree No. 22 of 1988 transferred the matter to the High Court and by reason of which circumstances (the circumstances) there was a material irregularity in the course of the proceedings before the court such that a substantial miscarriage of justice occurred.

 - b) That the said matter was transferred in the High Court without allowing the applicant a right for preliminary enquiry and thereby breached section 224 of the Criminal Procedure Code Cap 21.

 - c) That the learned trial judge erred in law when he failed to exclude the confession of the appellants that were not voluntary or supported by any independent evidence.

 - d) That the learned trial erred in law regarding the principal offenders under section 21 of the Penal Code Cap 17.

 - e) That the learned trial erred in law when he directed the assessors that *"You can be sure that the accused's confession and so the State says we have discharged the burden of proving Makario Anisimai is guilty as charged beyond reasonable doubt of robbery with violence and larceny"* and by reason of which circumstances (the circumstances) there was a material irregularity in the course

of the proceedings before the court such that a substantial miscarriage of justice occurred.

f) That the learned trial erred in law when he failed to properly direct the assessors that:

- (i) There was no identification parade held and or that none of the witnesses at the scene identified the accused;
- (ii) That the burden is on the police to prove that the cash of \$83,920.00 that was recovered from the accused's house were stolen;
- (iii) That none of the witnesses identified that the money recovered were stolen money taken out from ANZ Bank;
- (iv) That the alleged \$83,920.00 was never tendered as evidence in court;
- (v) That the full Station diary that would assist the accused person were never produced in court and as such it favours the accused evidence that he was assaulted or that his confession were in correct;

and by reason of which circumstances (the circumstances) there was a material irregularity in the course of the proceedings before the court such that a substantial miscarriage of justice occurred.

- g) That the trial judge erred in law when he directed that "with this an arm robbery and that the accused subsequently confessed to after the Police found the proceeds of crime in his house and bank or was he not involved in the theft of the license plate and armed robbery at Village Six cinemas at all and was his confessional statement unfairly obtained from him by the police and untrue" and thereby a substantial miscarriage of justice occurred.
- h) That the learned judge erred in law by not allowing the applicant the right to have a lawyer to defend himself after his initial lawyer withdraw from the matter or was not present in court.

- i) That the learned trial judge erred in principle of sentencing when he sentenced the applicant to 14 years imprisonment.

14. The hearing of the application was made on the 7th of February 2008.

The application

15. The substance of the application is that there are merits in the appeal, that the trial itself was a nullity because the transfer to the High Court was a nullity, and that the applicant should be given the opportunity to canvass his grounds in an appeal. The State conceded that there appeared to be a breach of the Criminal Procedure (Amendment) Act No. 13/2003 but said that it would now be impractical to order a new trial. State counsel further submits that the learned trial judge made no error of law, that the applicant's unrepresented status was a matter of his own making, that he was in any event not prejudiced thereby and that the sentence was within the tariff. There being no obvious merits in the appeal, the application should be dismissed.

Principles

16. Relevant to this application is the length of the delay before the application for leave to appeal was filed, the reasons for the delay, and any obvious merits in the appeal.
17. The period of delay to be considered by this court, is the period of delay between the end of the appeal period, and the date of the lodging of the application in the Court of Appeal registry. The role of this court is to re-examine the application listed before Ward P on the 26th of August 2006. It is not to compute the further delay between that date and the 12 of September 2007 when the further proposed grounds were filed as part of this application before the full court.

18. The delay we consider is therefore of only 5 days. Furthermore, the applicant's letter of appeal was written within the appeal period. It was the transmission from the prison to the Court of Appeal registry which caused the delay. This is relevant. The delay was not of the applicant's making.
19. There are no obvious merits in the appeal. Counsel now raises the question of an irregular transfer to the High Court which he says, nullified the trial. This ground is not included in the original petition of appeal filed by the applicant, and which was before Ward P on the 26th of August 2006.
20. However, the ground raised has no merits at all, despite the concessions made by State counsel. The court record, which we have set out in detail in early part of this judgment, shows that the charges were laid before the enactment of the Criminal Procedure (Amendment) Act. The purpose of that Act was to repeal the preliminary inquiry procedure and to replace it with a "transfer" procedure. For all accused persons charged before the commencement of the Act, the new procedure only applied if the accused consented to it, and if the offences with which they are charged, are electable offences. Section 15 of the Act states:

"This Act does not apply to charges for electable offences pending in the magistrates' courts before the commencement of this Act except where the accused person consented to his or her case being transferred to the High Court under the new section 226."

21. The meaning of this section has already been the subject of judicial determination in this court, in the case of Abhay Kumar Singh v. State Criminal Appeal No. AAU0009 of 20045. In that case, the appellant faced three charges of perverting the course of justice. The charges were filed in the Suva Magistrates' Court on the 25th of July 2003. The Criminal Procedure (Amendment) Act came into force on the 13th

of October 2003. The offences were non-electable for the accused. However, the Director of Public Prosecutions applied for High Court trial under sections 220 and 222 of the Criminal Procedure Code. The appellant objected, but the case was nevertheless transferred to the High Court.

22. The appellant appealed against the transfer, firstly to the High Court, and then to this court. His principal ground of appeal was that the transfer could not have been made without his consent. The law before and after the new procedure was canvassed at length both in the High Court and the Court of Appeal.
23. This court held:

"We conclude that that provision creates an exception from the application of the remainder of the Amendment Act. It provides that the Amendment Act does not apply to charges for electable offences pending in the Magistrates' Court before the commencement of the Act i.e. 13 October 2003, unless the accused has consented to a transfer to the High Court under the new section 226 We consider that this is an understandable exception in that before the Amendment Act came into effect a person charged with an electable offence had a right of election as to the mode of trial and the right to a preliminary hearing if he elected a High Court trial. Parliament by this transitional provision has preserved that right."

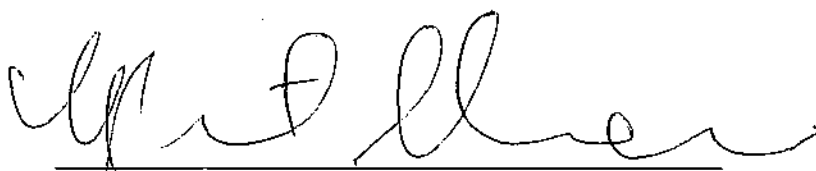
24. In the case before us, this decision is on point. The applicant was charged with an electable offence (robbery with violence), before the commencement date of the Amendment Act. He elected High Court trial. The prosecution made an application for the remaining charges to be similarly tried in the High Court. This appears to be because the 2nd accused had elected magistrates' court trial. The presiding magistrate explained the new transfer procedure to the applicant and his co-accused. They refused to consent. A preliminary inquiry date was set. On the day of the inquiry the applicant consented to the transfer. In doing so, he waived

his right (preserved by virtue of section 15 of the Amendment Act) to a preliminary inquiry. The fact that he had earlier refused consent suggests that this waiver was informed and unequivocal. There was no breach of the Act. There is no merit in that ground of appeal.

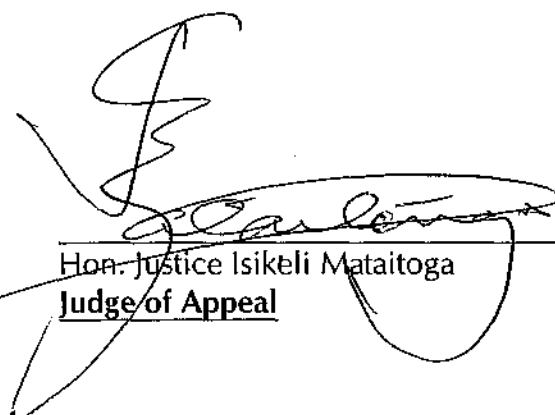
25. The remaining grounds raise issues in relation to representation and trial. The record shows that the applicant had asked for time to make arrangements for counsel of his own choice. He did not avail himself of the opportunity despite a two year time lapse from transfer to trial. During the trial, he cross-examined the police and civilian witnesses and presented a coherent defence to the court. The record shows that he was assisted by the trial judge. A trial within a trial was held to determine the admissibility of his interviews. The ruling sets out the law and facts correctly and fairly. There are no obvious errors of law or fact.
26. Similarly, we find no merit in the proposed appeal in relation to his Lordship's summing up. The opinions of the assessors are not perverse and are unsurprising. The reference in the proposed grounds of appeal that the assessors were told that ***"you can be sure about the confession"*** is in fact a summary of the State's case. Later in the summing up his Lordship clearly left the weight of the confession to the assessors. The sentence was clearly explained. The tariff for the offence of robbery with violence was increased by this court in ***Raymond Sikeli Singh & Others v. The State*** [2004] AAU008/04 and ***Sakiusa Basa v. The State*** [2006] AAU0023/06. This was a large robbery of a security van. The applicant was said to have received \$120,000 for his part. The evidence showed that this was, as the learned trial judge said, ***"a well-planned and well executed armed robbery effected with violence."*** In the circumstances we can see no merit in the appeal against sentence.

Conclusion

27. We accept that the applicant was not substantially out of time when his application was heard by Ward P in August 2006. We also accept that there is good reason for the delay. However we are of the view that there are no merits in the appeal either in law or on the facts. As such, we refuse leave to appeal out of time.



Hon. Justice Nazhat Shameem
Judge of Appeal



Hon. Justice Isikeli Maitoga
Judge of Appeal



Hon. Justice Daniel Goundar
Judge of Appeal

Solicitors:

A.K. Singh Law for the applicant
Office of the Director of Public Prosecutions for the Respondent