

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

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU0049 OF 2008
(High Court Cr. Case No. HAC 153 of 2007L)

BETWEEN : ASAELI TUKITOGA

Appellant

AND : THE STATE

Respondent

Coram : The Hon. Justice Devendra Pathik
Judge of Appeal

Counsel : Appellant – In Person
Mr. P. Bulamainaivalu for the Respondent

Date of Hearing: 15 September 2008

Date of Decision: 24 September 2008

Decision
(Chamber Application for leave to appeal out of time)

- [1] This is an application by the appellant under the Court of Appeal Rules for **leave to appeal out of time** after the time fixed by **section 16** of the Court of Appeal Act has expired.
- [2] The appeal is against sentence which was passed by His Lordship Justice Govind on 7 February 2008.

- [3] The appellant is out of time to appeal by 98 days (3 months 8 days). The Notice to Appeal is dated 13 June 2008. His reason for the delay is that by the time he came to realize that he should appeal he was already out of time. He is pleading to Court to exercise its discretion to extend the time based on his submission on the grounds of appeal in law on the principles of sentencing.
- [4] The learned counsel for the Respondent is opposing the application. He says that this is a second appeal for which s22 of the Court of Appeal Act has to be satisfied before time is extended. On the appellant's submission on point of law on 'totality principle' in sentencing, counsel said that he will leave it to Court to consider.
- [5] What is to be decided by this Court is whether the delay of 98 days in filing Notice of Appeal for leave to appeal is justified to the extent that the Court should exercise its discretion in granting leave.
- [6] I have carefully considered the grounds of appeal in which the appellant raises a point of law on the principles applicable in respect of 'totality principle' in sentencing.
- [7] The appellant was already serving a lengthy sentence when the present sentence was imposed. The sentence which His Lordship passed is as follows:-

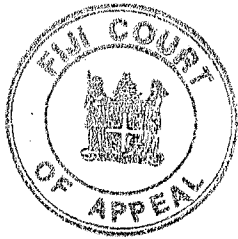
“On Count 1 starting with 7 years, I add 3 years for the facts that this was a home invasion, the large number of people involved and though the weapons were not used, it was simply because the victims were traumatized into submission, and the fact that it was preplanned. I give him a discount of 2 years for his belated plea of guilty though his expression of remorse is questionable as he has 4 previous convictions for similar offences. I give him a credit of 6 months for the minimal role he took in the actual robbery and a

further 3 months for his subjective features, making a total sensation of 7 years and 3 months.

This term of 7 years and 3 months is to commence on 12.12.12 making it 4 years to be served concurrently to the term he is serving and 3 years and 3 months to be served consecutively.

On Count 2 he is sentenced to 3 months imprisonment to be served concurrently with the sentence in Count 1.”

- [8] The appellant was unrepresented. I am of the view that this was one case where legal aid should have been granted to assist the Court as well.
- [9] The Court is of the view that the appellant has some merit in the grounds of appeal as submitted by him which requires consideration on appeal thus fulfilling the requirements of the said section 22.
- [10] For these reasons the application for leave to appeal out of time is granted. The appellant should forthwith apply for Legal Aid and I strongly suggest that it be granted.



A handwritten signature in black ink, appearing to read "D. Pathik".

D. Pathik

Judge of Appeal

At Suva

24 September 2008