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IN THE FIJI COURT OF APPEAL
AT SUVA

Criminal Appeal No: AAU0079/2008
High Court Action No. HAA 59 of 2008

BETWEEN:

SESONI VOLAU

Appellant/Applicant

AND

THE STATE

Respondent

Appearances:

Appellant/Applicant: In Person

Respondent: Ms A. Prasad

Date of Hearing: 3 September 2008, 24 September 2008
6 October 2008

Date of Judgment: 13 October 2008

Coram: Scutt, JA

JUDGMENT

Headnote

Court of Appeal Act (Cap 12), ss. 20, 22, 26, 35; *Court of Appeal (Amendment) (No. 2) Act* 1998, s. 6; Court of Appeal Rules, Rules 5, 36, 37; *Bail Act* 2002, s. 27; *Constitution (Amendment) Act* 1997, ss. 23(1), 27, 28, 29(1) (3), 38(1) (2) (3); Appeal on breach of bail; Notice of Appeal; Amendment of Notice of Appeal; Breach of bail – sentence without charge; Sentence without conviction; Time on remand not taken into account; Earlier appeal re sentence on substantive charges; Matters not raised in High Court; Powers of Court of Appeal re new grounds; Leave to amend grounds; Power to grant leave to amend grounds; Leave to extend time; Whether ground as to ‘legality’ of bail breach sentence encompasses ‘new’ grounds

Christie v. Leachinsky [1947] AC 573

Koro v. State [2008] FJCA 17; AAU0028.2008 (14 May 2008)

Laisenia Qarase and Ors v. Josala Voreqe Bainimarama and Ors (No. 5) (Civil Actions HBC60.07S, HBC398.07S, 11 October 2007)

Lepani Varani v. The State (CrimApp No. HAA 014 of 2007, 30 March 2007)

Sakiusa Basa v. The State (CrimApp AAU0024 of 2005)

Sesoni Volau v. The State (CrimApp No. HAA 96 of 2006, 10 November 2006)

Sesoni Volau v. The State (CrimApp Case No. HAA 059 of 2008, 4 July 2008)

Tubuitamana v. State [2008] FJCA 14; AAU001.2008 (14 May 2008)

United Kingdom Sentencing Guidelines Council, *Fail to Surrender to Bail – Definitive Guideline*, UK Sentencing Guidelines Secretariat, London, UK, 2007 (November 2007)¹

1. RIGHT OF APPEAL

Mr Sesoni Volau was sentenced by the Magistrates Court on 30 May 2006. He sought leave to appeal to the High Court against the sentence imposed for breach of bail, leave being granted on 9 May 2008. On 4 July 2008 the High Court determined that the 9 months sentence imposed by the Magistrates Court was, consistent with *Lepani Varani v. The State* (CrimApp HAA 014 of 2007, 30 March 2007) and as the State conceded, too harsh. The penalty was reduced to 6 months.

1.1 Mr Volau now appeals to the Court of Appeal.

1.2 Albeit endorsed '2 July 2008' (which must be an error), the front of the petition is dated 28 July 2008, as is the wordprocessed version. Mr Volau's appeal is within time: 30 days under section 26 of the *Court of Appeal Act* (Cap 12).²

1.3 Under section 22 of the Court of Appeal Act Mr Volau has an appeal as of right, so long as, and only so long as, at least one of his grounds identifies a question of law: s. 22(1)

1.4 The question then is whether there is a question of law in respect of the subject matter of Mr Volau's appeal. If there is no question of law, Mr Volau's petition must be dismissed.

1.5 This appeal application has highlighted a number of important issues in respect of the *Bail Act* 2002 and the *Court of Appeal Act* (Cap 12) which require consideration. Amongst other matters is the need for the development of Guidelines setting out the procedure to be followed by courts in relation to breach of bail charges, conviction, and sentence. The *Fail to Surrender to Bail – Definitive Guideline*, produced by United Kingdom Sentencing Guidelines Council in November 2007, provides more than a good starting point.³

1.6 Mr Volau's written and oral submissions, and oral submissions provided by Ms Prasad for the State have been of some not inconsiderable assistance to the Court.

2. BRIEF ACCOUNT FROM COURT RECORD

Mr Volau was jointly charged with two others (Mr JR and Mr IS) on two counts:

First Count:

[Mr Volau] on the 30th day of May 2005 at Samabula in the Central Division, unlawfully and without colour of right but not so as to be guilty of stealing took to his own use motor vehicle registration number DL774, the property of Nitya Nand Shankar s/o Gorry Shankar.

¹ *Definitive Guideline*, <http://www.sentencing-guidelines.gov.uk/docs/Fail%20to%20Surrender%20to%20Bail.pdf> (accessed 10 October 2008)

² Amended by *Court of Appeal (Amendment)(No. 2) Act* 1998 to include 'or decision' after 'conviction' so extending the 30 day rule from its restriction to convictions to cover decisions such as the decision on appeal by the High Court in this case. On the discriminatory implications of the 30 day rule, see *Koro v. State* [2003] FJCA 17; AAU0028.2008 (14 May 2008); *Tubuitamana v. State* [2008] FJCA 14; AAU001.2008 (14 May 2008)

³ *Definitive Guideline*, <http://www.sentencing-guidelines.gov.uk/docs/Fail%20to%20Surrender%20to%20Bail.pdf> (accessed 10 October 2008)

Second Count:

[Mr Volau] on the 30th day of May, 2005 at Samabula in the Central Davison, robbed all the items as mentioned in the charge, and immediately before the time of such robbery, threatened to use personal violence to the said Bijendra Prasad, the owner of Supermarket, situated at Moti Street.

2.1 The Court Record further shows that after a number of appearances, when Mr Volau was initially in custody then released on bail, on 15 December 2005 he did not appear and a Bench Warrant was issued. A mention date was set for 9 January 2005: Court Record, p. 13

2.2 Mr Volau did not appear on 9 January 2006. On 17 March 2006 Mr Volau appeared on a Bench Warrant. On 20 March 2006 Mr Volau was present – albeit in the Court Record he is described as ‘Accused 3’ when throughout he has been described as ‘Accused 2’. Later, he reverts to being described as ‘Accused 2’.⁴ The Court Record shows for 20 March 2006:

BEFORE AK ESQ
RESIDENT MAGISTRATE

20 March 2006

For Prosecution: PC Toni
Accused 3: Present

Accused 3 has not been coming to Court since 15/12/05.
Matter – for hearing on 24/03/06.

Court: Remanded till 24/03/2006 for Hearing Court 5.

(Sgd) AK
RESIDENT MAGISTRATE: Court Record, p. 17

3. GROUND OF APPEAL

Mr Volau’s appeal to the High Court was against the sentence of 9 months imposed for ‘forfeiture of bail’. The High Court reduced his sentence to six months.

3.1 (a) *Initial Grounds of Appeal:* Mr Volau’s initial application said:

RE APPLICATION FOR APPEAL AGAINST THE SIX MONTHS SENTENCE FOR F/BAIL SESONI VOLAU V. THE STATE CRIMINAL APPEAL CASE NO: HAA 059 OF 2008

FACTS:

⁴ This in my opinion is another reason for referring to accused persons in the Court Record, and in Court, by their family names. Accused persons have a right to be addressed by their family names rather than being described and addressed as ‘Accused 1, 2, etc. Accused persons do not, or should not, lose their identity nor their right to be identified by their names, simply because they are accused (or convicted) of offences. If accused persons were at all times addressed by their family names in Court and in the Court Record, this would make for a more intelligible record and also one that is more likely to be accurate.

1. a) Your appellant wish[es] to appeal against the six months sentence for forfeiture of bail to this court.
- b) The appeal against the sentence to the High Court on this matter was reduced from nine to six months.

2. LEAVE:

This court is asked to grant leave to appeal against the sentence of six months for the reason as follows:

- a) The Learned appeal judge erred in law for not fairly directing her mind to the purpose of the penalty provision under section 26 of the Bail Act 2002.
 - b) It is submitted that the purpose of the penalty, section 26 of the Bail Act 2002, is to ensure the accused is able to attend court whenever the court gives the date.
 - c) Where there is no need for the penalty under section 26 because the bail penalty was imposed subsequently after the substantive cases has been disposed of.
3. It is submitted that this sentence should have been made concurrently or appropriately set aside.
 4. Your indigent appellant sought justice before your Honourable court and gravely invoke[s] your judicious discretion to grant leave to appeal against the legality of this six months sentence for breach of bail ...

3.2 The matter first came before this Court on 3 September 2008, whereupon Mr Volau and Ms Prasad for the State each made submissions. Various matters were raised by the Court, as a consequence of which the matter was set down for further hearing on 24 September 2008, and Mr Volau was to provide further written grounds on or before 15 September 2008.

3.3 *(b) Further Grounds & Submission:* On 5 September 2008 Mr Volau composed further grounds and a submission to the Court, each in a separate document, both received by the High Court Registry on 17 September 2008 under the cover of Memoranda by the Officer in Charge, Medium Prison, dated 8 September 2008. On that day, Mr Volau's documents were transferred to the Fiji Court of Appeal.

3.4 The further grounds of appeal stated:

RE: FURTHER GROUNDS OF APPEAL AGAINST THE SIX MONTH SENTENCE FOR BREACH OF BAIL

THE APPELLANT INTENDS TO APPEAL AGAINST THE DECISION OF THE LEARNED TRIAL JUDGE GIVEN ON THE 4TH OF JULY 2008

GROUNDS OF APPEAL

1. The Appellant submits that the sentence is too harsh and excessive, see *R. v. Singh (Harbax)*(1979) QB 319, 68 CrAppR 108 (CA).

2. The six month[s] that the court gave the appellant was made hastily and with no reference to the appellant having led any opportunity at all to mitigate his behalf.

3.5 The submission said:

APPELLANT'S SUBMISSION

BACKGROUND

1. The appellant's sentence was reduced from initial nine months to the present six months before [the] High Court ... on 4th July 2008.

2. The appellant intends to further seek the court's judgment for further reduction of current sentence.

3. That the six month therefore is not merited due to the fact that the accused was not charged.

4. The appellant submits that the circumstances of this case is not similar to *Lapani Varani v. The State* CrimApp HAA 614 of 2007.

5. The *Varani case* is distinguished on facts. In *Varani*, the appellant was charged. As such it is submitted ... that the court consider awarding the appellant a sentence lesser than six month[s].

Further ... it is respectfully submitted that the court consider the accused's previous history as irrelevant in that this is the appellant's first offence of breaching bail condition. There was no evidence presented that the appellant breached any bail conditions in any of the cases he had in his previous conviction listing.

CONCLUSION

The appellant prays that in all the circumstance of the case, the appellant was greatly prejudiced in that it rendered the trial as unsafe to have convicted the appellant for such [a] serious offence.

3.6 At the hearing on 6 October 2008, Mr Volau made submissions as did Ms Prasad for the State. Mr Volau emphasised three matters:

1. That he had not been charged with breach of bail at the original sentencing for that offence, and he had had no trial and no facts had been put to him as they ought.
2. That this was a new ground however that he had not raised it earlier should not be held against him and he should be able in the course of justice to have this Court deal with it.
3. The two weeks he had spent in custody after having been arrested on Bench Warrant due to his non-appearance when on bail should be credited to him and it had not been.

3.7 Ms Prasad made submissions for the State:

1. There was no charge for the breach of bail offence. This was a breach of procedure and natural justice for Mr Volau in consequence of there being no charge did not know the precise nature of the charge and had no proper opportunity to answer it. Although an exercise was carried out by the Magistrate in advising Mr Volau of the bail breach and that he was being breached for bail, and Mr Volau had answered, there should have been a proper charge. Further, there 'appears to be no conviction' on the record and the State concedes the right to appeal on this matter. Further, in all likelihood the State would concede that ground at the appeal proper.
2. In relation to the two weeks spent in custody – that should be considered in relation to the sentence. It was considered neither in relation to bail, nor in relation to the substantive sentence.
3. On the question of its being a new matter not raised previously before the High Court, this means that on the papers before the Court there is no error alleged and any appeal should be based on the appeal papers and hence should not be considered by the Court. However, there is a right of appeal on a matter of law and this matter should be dealt with by the Full Court of the Court of Appeal as soon as possible.

3.8 The matter was then stood down so that Mr Volau could place before the Court his further or amended grounds. Upon resumption, he stated these as follows:

Re: FURTHER AMENDED GROUND OF APPEAL

- (1) That the Learned Magistrate erred in law and in fact when His Worship failed to consider to take into account the time spent in custody on remand (2 weeks) to be deducted from the Substantive Charge & Breach of Bail Charge.
- (2) That the Learned Magistrate erred in law and in fact when His Worship failed to direct himself that the Breach of law was violated when the appellant was not charge[d] for the offence of breach of bail, thus resulting [in] a miscarriage of justice.

Nevertheless I believe that this is the very court to which I shall rely on in order to safeguard my rights protected under certain provisions of the Constitution, Penal Code and Human Rights Act 1998 ...

4. MATTERS IN ISSUE – AMENDED GROUNDS

To determine whether Mr Volau has an appeal as of right for his appeal to go before a Full Bench of the Court of Appeal, the first matters in issue are:

- Whether Mr Volau is entitled to submit further or amended grounds of appeal, namely those which were not submitted nor argued before the High Court;
- If so, whether a single Judge of the Court of Appeal has power to grant leave.

4.1 (a) *Amended Grounds of Appeal:* Rule 5 of the Court of Appeals Rules (applying generally to proceedings before the Court of Appeal) provides:

Appellant confined to the grounds of appeal

5. The appellant shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of objection not stated in his notice of appeal but the Court of Appeal in deciding the appeal shall not be confined to the ground so stated:

Provided that the Court of Appeal shall not rest its decision on any ground not stated in the notice of appeal, unless the respondent has had sufficient opportunity of contesting the case on that ground.

4.2 Rule 36 (applying to criminal appeals) provides:

Appeals from the High Court in its appellate jurisdiction in criminal cases

32. (1) The notice of appeal shall state precisely the question of law upon which the appeal is brought.

(2) Subject to the foregoing provision of this Rule, and to the provisions of the Act, the provisions of this Part of the rules (except Rules 49, 50, 57, 59(2), 62 and 63 shall apply mutatis mutandis to appeals to the Court of Appeal under the provisions of section 22 of the Act.

4.3 Rule 37 (applying to criminal appeals) states:

Amendment to notice of appeal

37. - (1) A notice of appeal may be amended –

(a) by or with the leave of the Court of Appeal, at any time;

(b) without such leave, by supplementary notice filed with the Registrar in quadruplicate and served, not less than 14 days before the opening day of the sitting of the Court of Appeal at which the appeal is listed to be heard, upon each of the parties upon whom the notice to be amended was served ...

4.6 (b) **Power of Single Judge to Grant Leave:** Reading all these Rules together, Mr Volau has a right to seek and be granted leave to amend his Grounds. The question then is whether a single Judge of the Court of Appeal is empowered to grant leave.

4.7 Applicable to civil appeals, section 20 (amended by the Court of Appeal (Amendment) Act 1998) of the Court of Appeal Act covers ‘Powers of a single judge of appeal’, providing that a Judge of the Court may exercise, amongst others, the power of the Court to ‘give leave to amend a notice of appeal ...’: s. 20(1)(c).

4.8 Curiously, this power is not granted to a single Judge of Appeal in the criminal jurisdiction. Hence, section 35 (which is set out in full to illustrate this limitation) says:

Powers of a single judge of appeal

35.- (1) A judge of the Court may exercise the following powers of the Court –

- (a) to give leave to appeal to the Court;
 - (b) to extend the time in which notice of appeal or of an application for leave to appeal may be given;
 - (c) to allow the appellant to be present at any proceedings in cases where he or she is not entitled to be present without leave;
 - (d) to admit an appellant to bail;
 - (e) to cancel an appellant's bail on good cause being shown;
 - (f) to recommend that legal aid be granted to an appellant.
- (2) If on the filing of a notice of appeal or of an application for leave to appeal, a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal.
- (3) If the judge refuses an application on the part of the appellant to exercise a power under subsection (1) in the appellant's favour, the appellant may have the application determined by the Court as duly constituted for the hearing and determining of appeals under this Act.
- (4) The decision of a single judge to cancel bail under subsection (1)(e) may at the appellant's request be reviewed by the court as duly constituted for the hearing and determining of appeals under this Act.
- (5) A reserved judgment of the Court may be delivered by a single judge of the Court if any or all judges who heard the appeal are absent.

4.9 I say 'curiously', because the Court of Appeal Act and the Rules clearly contemplate amendment of grounds. Why a single Judge should be precluded from so amending is unclear. This appears to be an oversight for there is no good reason for so limiting a single Judge's powers, nor for the apparent distinction between the powers of a single Judge sitting in the civil as opposed to the criminal jurisdiction of the Court of Appeal.

4.10 In the present case, as noted earlier, leave was granted to Mr Volau to amend his grounds. This was done without objection from the State and, in light of the State's submissions (including an urging of the Court to deliver judgment expeditiously so that the matter could go before the Full Court as soon as possible), it would be fair to say with the State's acquiescence. Hence, to be fair to Mr Volau and to the State, and in light of the right to a speedy trial under section 29(3) of the *Constitution*, it seems to me that the following approach should be taken:

1. This Court grants an extension of time to Mr Volau (beyond the 30 day limit), consistent with sections 26(1) and 35(1)(b), to lodge his application for appeal in terms of the grounds filed with the Court on 6 October 2008.
2. In accordance with section 37 of the Court of Appeal Act, the Court refers to the Full Court a question of law, namely whether a single Judge of Appeal has the power under section 35(1)(b), consistent with section 26(1) and taking into account the Court of Appeal Rules on amendment of Grounds, to extend the time of appeal so as to enable an Appellant/Applicant to incorporate into his appeal new Grounds.

4.11 The Attorney-General should be advised of this lacuna in the Court of Appeal Act, so that as soon as Parliament is reconvened an amendment may be made to correct it.

4.12 Despite this, however, as the Full Court has power to grant leave to amend the grounds, ultimately Mr Volau's appeal should take into account all the grounds.

5. MATTERS IN ISSUE – QUESTION OF LAW

Further as to an appeal as of right, the question is:

- Whether there is a question of law in the grounds originally submitted; and/or
- Whether there is a question of law in the amended grounds of appeal.

5.1 (a) **Grounds Dated 28 July 2008 – Purpose of Bail Act:** Mr Volau's first grounds are, in short compass, that the purpose of section 26 of the *Bail Act* 2002 is to ensure the accused 'is able to attend court whenever the court gives the date'; that there is no need for the penalty under section 26 'because [it] was imposed ... after the substantive cases had been disposed of'; and Her Ladyship Justice Shameem 'erred in law for not fairly directing her mind' to this purpose of section 26 of the *Bail Act*.

5.2 There is no valid ground here, for Shameem, J. explicitly refers to Mr Volau's appearance 'on all the dates ordered by the court' from 1 June 2005 and observed that he 'continued to respect his bail conditions until' 15 December 2005 when he first failed to appear. Her Honour focused upon Mr Volau's 'failure to respect bail' and 'failure to observe his bail conditions', all of which appears to me to take into account the purposes of section 26 as referred to by Mr Volau.

5.3 (b) **Grounds Dated 28 July 2008 – Consecutive Not Concurrent Sentence:** Mr Volau's next ground is that the sentence should have been made concurrent with the sentence for the substantive charges or 'appropriately set aside'.

5.4 Shameem, J. addressed the sentence for the substantive charges in *Sesoni Volau v. The State* (CrimApp No. HAA 96 of 2006, 10 November 2006), observing that Mr Volau's appeal there was based in his mitigation's 'not being properly considered' whilst his sentence was inconsistent with that imposed on Mr JR, the first co-accused. Her Ladyship said:

In relation to the two counts against him, the learned Magistrate found the offences to have been committed within a short period of time, and treated them as part of a single transaction. [Mr Volau] had five previous convictions from 1992 for housebreaking, act[ing] with intent to cause grievous harm, being found in possession of dangerous drugs and robbery with violence. This last conviction was in 2002, in respect of which he was sentenced to four years imprisonment.

He considered [Mr Volau's] guilty pleas, and sentenced him to 6 years imprisonment on Count 2, and 6 months imprisonment on Count 1. The sentences were to run concurrently ...: at 3-4

5.5 Shameem, J. dealt with the 'inconsistent sentences' proposition noting that Mr JR was, in total, serving a term of 11½ years imprisonment. She then observed that in *Sakiusa Basa v. The State* (CrimApp AAU0024 of 2005) a 6 year term 'was described as lenient', going on to say that in Mr Volau's case the facts 'were very serious':

[Mr Volau] was in a group of men who threatened shoppers and the owner of the supermarket with a cane knife and empty beer bottles. \$4000 worth of goods were stolen and very little ... recovered. [Mr Volau] has previous convictions. In these circumstances a total sentence of 6 years imprisonment was not harsh or excessive': at 4-5

5.6 Her Ladyship then went on to note that Mr Volau was in remand for 5 months and in those circumstances reduced his sentence by 6 months 'to take into account this period in remand'. His sentence was reduced to 5 years and 6 months: at 5

5.7 These matters are referred to both because the two weeks spent in prison after breach of bail were not taken into account at sentencing, nor on appeal in respect of the substantive offences,⁵ and because the seriousness of the substantive offences can be taken into account when deciding whether an accused person should, in respect of a bail offence, receive a penalty to be served consecutively or concurrently. The principle is that the character of the original offence may impact upon the harm or its likelihood, caused in the accused person's not complying with the conditions of bail.⁶ As the United Kingdom Sentencing Guidelines Council, *Fail to Surrender to Bail – Definitive Guideline*, UK Sentencing Guidelines Secretariat, London, UK, 2007 (November 2007) state on this point, relevant to the 'concurrent vs consecutive' matter also:

(ii) Consecutive and concurrent custodial sentences

33. Where a custodial sentence is imposed for the original offence and a custodial sentence is also deemed appropriate for a Bail Act offence, a court should normally impose a consecutive sentence.⁷ However, a concurrent sentence will be appropriate where otherwise the overall sentence would be disproportionate to the combined seriousness of the offences: at p. 8

5.8 It appears from the High Court Record that Mr Volau did not raise the consecutive vs concurrent issue as an appeal ground. Shameem, J.'s notes indicate Mr Volau as stating that he preferred the Court to proceed to judgment: 'I just want my prison term to be reduced.' He was asked whether he required time to prepare submissions and responded:

No. I agree with the state that I am due for release July 2010: Notes on Court File

5.9 In that circumstance, it seems to me that this is a new ground rather than one arising out of the appeal to the High Court.

5.10 If Mr Volau is able to raise this as a new matter before this Court (see later), then it is properly characterised as a question of law: it is unclear upon precisely what basis the Magistrate imposed the sentence of 9 months consecutive, rather than concurrent. It may be surmised from the record that His Worship took into account the nature of breach of bail generally and it further may be surmised that he took into account the seriousness of the substantive offences to which Mr Volau pleaded guilty as factors resulting in consecutive, not concurrent, sentences. However, in my opinion surmise is not sufficient. In criminal matters the principle sustaining the giving of

⁵ It was not raised in this respect in Mr Volau's Appeal Notice in the High Court.

⁶ See United Kingdom Sentencing Guidelines Council, *Fail to Surrender to Bail – Definitive Guideline*, UK Sentencing Guidelines Secretariat, London, UK, 2007 (November 2007), (iii) **Nature and seriousness of original offence**, p. 5.

⁷ Mr Volau needs to bear this in mind in respect of his contention that a concurrent rather than consecutive sentence should have been imposed for the bail breach.

comprehensive reasons is that an accused person thereby has clarity as to why s/he has received a particular sentence, as well as enabling an appellate court to address, with clarity, the matters in issue.

5.11 His Worship referred to section 27 of the Bail Act, which says:

27.-(1) This section applies where bail is granted subject to the provision of security pursuant to section 22.

(2) If a person who has been released on bail fails without reasonable cause to surrender into custody the court may-

(a) order that the whole or any part of the money deposited or security given by the person be forfeited to the State;

(b) unless cause is shown to the contrary within a period the court directs, order that the whole or any part of the money deposited or security given by a surety be forfeited to the State.

(3) Any sum ordered to be paid under this section maybe enforced as if it were a fine and as if the order were a sentence for an offence.

(4) A court may review a decision made under subsection (2) if it is satisfied on an application made by or on behalf of the accused person or a surety that the accused had reasonable cause of the failure to surrender to custody.

5.12 Most specifically, His Worship said:

On 15/12/05, when their case was called in Court No. 3, Seson Volau was not present in Court. A Bench Warrant was then ordered by the Court for his arrest.

He appeared in Court on 24/3/06, and on 31/3/06, he was remanded into custody.⁸ The court did not forfeit his bail recognizance of \$1,000.00, pursuant to section 27(2)(a) [?and] (3) of the Bail Act. Such inaction [?an action] is crucial to the efficient administration of the court. And, also, to remind bailees, that to enter into bail recognizance, is not a trivial matter to be treated lightly with.

This Court shall raise this question of the whereabouts[s] of the Accused person, from 15/12/05 to 24/3/06. If the Accused's reply is found unsatisfactory, his bail recognizance of \$1,000.00, shall be treated as his fine and committed to Prison for 9 months, pursuant to Section 27(3) of the Bail Act. His reply must show 'reasonable cause of the failure to surrender to custody', pursuant to Section 27(4) of Bail Act 2000 [sic]: Court Record, p. 32

⁸ This raises an issue in itself. Is His Worship saying that Mr Volau appeared on the Bench Warrant on 24 March 2006, but then was not remanded in custody, being so remanded only upon 31 March 2006? If this is so, then it appears that he was not, on 24 March 2006 (despite his earlier absence and the issue of the Bench Warrant) perceived to be a flight risk or unlikely to appear upon the next court date. This entry in the Court Record seems odd, for generally it would seem that an accused person appearing on a Bench Warrant due to failure to appear when on bail would be remanded immediately upon that appearance.

5.13 It then appears, taking the above into account and the Court Record, that after the Court delivered the sentence, His Worship then asked Mr Volau:

Where were you on 15/12/05 to 24/03/06.

5.14 To which Mr Volau replied:

I was doing farming in my village Taci.

5.15 His Worship is then recorded as saying:

Your \$1,000.00 Bail is forfeited in default nine months imprisonment: Court Record, p. 24

5.16 Next on the record appears:

Total: Six years 9 months. Bail forfeited inclusive: Court Record, p. 24

5.17 All this indicates the unsatisfactory nature of what occurred in the sentencing of Mr Volau for breach of bail. It is unclear whether he was sentenced to a fine of \$1000 – His Worship said, in the sentence (Court Record, p. 32) that if Mr Volau's reply were to be 'found unsatisfactory' then the \$1,000 bail recognizance 'shall be treated as his fine', citing section 27(3) of the Bail Act:

(3) Any sum ordered to be paid under this section maybe enforced as if it were a fine and as if the order were a sentence for an offence.

5.18 However, the Court Record as noted has His Worship saying that the \$1,000.00 Bail 'is forfeited in default nine months imprisonment': Court Record, p. 24

5.19 Hence albeit the sentencing judgment (Court Record, p. 32) refers to both fine of \$1,000 and imprisonment for 9 months, it appears that the actual sentence was 9 months for breach of bail and \$1,000 'forfeited inclusive'. Thus it appears that Mr Volau was not (contrary to the sentencing judgment) both fined \$1,000 and imprisoned (consecutively) for nine months in respect of the bail breach. Rather, he was imprisoned (consecutively) for nine months on the bail breach. This ambiguity or contradiction is to be regretted.

5.20 Altogether, as I have said, this is an unsatisfactory way to go about sentencing for it raises some confusion at least as between the sentencing judgment and the actual sentence. This may arise, as much as anything, from the failure to formally charge Mr Volau with breach of bail, read the charge formally to him, and provide him with a proper opportunity to answer the charge. As the Court Record shows, all the Court has done in this regard is ask Mr Volau where he was on the relevant dates, then in response to his 'I was doing farming in my village Taci' proceeded to find his bail forfeit 'in default nine months imprisonment', then per the Court Record sentence him.

5.21 As the High Court said in *Laisenia Qarase and Ors v. Josaia Voreqe Bainimarama and Ors (No. 5)* (Civil Actions HBC60.07S, HBC398.07S, 11 October 2007):

The courts must insist on fairness, a concept naturally related to orderliness. Knowing in a timely way what is the nature and extent of the complaint made against you, is a cornerstone of our system of justice: at para [9], per Gates, ACJ, Pathik and Byrne, JJ.

5.22 (c) **Grounds Dated 28 July 2008 – Legality of Six Month Breach of Bail Sentence:** Mr Volau then states in his grounds:

4. Your indigent appellant sought justice before your Honourable court and gravely invoke[s] your judicious discretion to grant leave to appeal against the legality of this six months sentence for breach of bail ...

5.23 Arguably, albeit Mr Volau here does not state he is appealing explicitly because of a failure to charge him with the breach of bail offence, nor a failure to try him properly on that offence, nor a failure to convict him of it, this ground could fairly be read as stating, in short compass, the amended grounds which Mr Volau submitted to the Court on 6 October 2008.

5.24 Mr Volau is an unrepresented person. Further, the principle of legislative interpretation is that in regard to accused persons, where ambiguity arises in a statute or regulation, etc then it should be interpreted favourably to the accused. This principle should apply to a Notice of Appeal and, here, to Mr Volau's petition, so as to accept Mr Volau's anticipation of the leave grounds which are before the Court as 'amended' grounds.

5.25 (d) **Grounds & Submission Dated 5 September 2008 – Sentence 'Too Harsh & Excessive' and 'Made Hastily':** Mr Volau relies upon *R. v. Singh (Harbax)*(1979) QB 319, 68 CrAppR 108 (CA) for the proposition that the sentence is 'too harsh and excessive'. If this ground is taken at face value, then Mr Volau has had it taken fairly into account by the High Court in the reduction of the sentence for bail breach from 9 to 6 months. On the other hand, taking it in the context of the failure to charge, provide Mr Volau with a fair trial, and (if proven beyond a reasonable doubt) to convict him, then the ground has force as a question of law.

5.26 It does, further, in the contention that the time spent in custody (after the bail breach) should have been taken into account.

5.27 Insofar as the contention that the six months' sentence was 'made hastily and with no reference to the appellant having led any opportunity at all to mitigate his behalf', rather than applicable to the 6 months sentence, this may fairly apply to the 9 month sentence imposed in the Magistrates Court. The Court Record is relevant here and albeit this is a question of fact in one regard, it is a question of law also because it goes to the procedure followed in the Magistrates Court vis-à-vis the breach of bail sentencing.

5.28 (e) **Grounds & Submission Dated 5 September 2008 – Mr Volau Not Charged, Contra Lapani Varani v. The State:** Mr Volau points out that Mr Varani was charged and indeed it appears from the judgment that this is so:

[Mr Varani] was charged with one count of being in breach of bail conditions ... He failed to show reasonable cause for his failure to appear and was convicted ... He appeals against conviction on the ground that the prosecution had not proven its case beyond reasonable doubt because it had not been a condition of his bail that he had to appear in court on the 22nd of November 2006: at 1

5.29 In *Christie v. Leachinsky* [1947] AC 573 the English House of Lords embraced the principle that a person who is being arrested has a right to know upon what basis he is being taken into custody. There it was said that if the person has a general knowledge by the surrounding circumstances, then the principle of explicit, spoken words announcing the basis of the arrest need not apply. Here, it is not a question of arrest (this was on Bench Warrant) but of lack of charge. It may be said that Mr Volau well knew, or ought to be taken to have known, the nature of the offence without having to be formally charged. It does not appear to me that this follows – in my view, ‘near enough is not good enough’.

5.30 As previously, Mr Volau has a question of law for the Full Court in respect of the failure to charge him with breach of bail.

5.31 (f) **Grounds & Submission Dated 5 September 2008 – Previous History:** Mr Volau says that the Court should ‘consider [his] previous history as irrelevant in that it is [his] first offence of breaching [a] bail condition’.

5.32 In the High Court, Her Ladyship in referring to *Lepani Varani v. The State* (CrimApp Case No. HAA 014 of 2007) observed that there the 9 month term ‘was too high in the tariff’:

This was particularly because [Mr Varani] had no previous convictions for offences under the Bail Act. He had 43 unrelated previous convictions. I reduced his sentence to 6 months imprisonment: at 2

5.33 Shameem, J. then specifically took into account Mr Volau’s lack of breach of bail convictions:

There is no doubt that [Mr Volau] deserved to serve a term of imprisonment for the failure to respect bail, but I consider that 9 months imprisonment is too high. He has no previous convictions for failing to observe his bail conditions. In these circumstances I agree that the term of imprisonment to be served for failing to observe his bail conditions should be reduced to 6 months imprisonment: at 3

5.34 Mr Volau has no arguable ground here.

5.35 (g) **Further Amended Ground of Appeal – Failure to Take 2 Weeks in Custody into Account, Breach of Bail & Substantive Offences:** Mr Volau submitted that the two weeks spent in custody after his Bench Warrant arrest should be credited to him and had not been, both in relation to the substantive charges and the breach of bail. This raises a question of law for the Full Court.

5.36 (h) **Further Amended Ground of Appeal – Lack of Charge as Miscarriage of Justice:** Mr Volau refers here to ‘provisions of the Constitution, Penal Code and Human Rights Act 1998’. Again, this raises a question of law for the Full Bench.

5.37 Amongst other matters, section 23(1) of the *Constitution* provides:

A person must not be deprived of personal liberty except:

(a) for the purpose of executing the sentence or order of a court, whether handed down or made in the Fiji Islands or elsewhere, in respect of an offence of which the person has been convicted;

- (b) ...
- (c) ...
- (d) for the purpose of bringing the person before a court in execution of the order of the court;
- (e) if the person is reasonably suspected of having committed an offence ...

5.38 There is no indication on the Court Record that Mr Volau was convicted of breach of bail. There is no indication on the record that he was formally charged with that offence. The Court Record shows that he did not have a trial in respect of that charge. The cursory way in which the offence was dealt would seem necessarily to raise questions under section 23.

5.39 Section 27 provides:

Arrested or detained persons

- (1) Every person who is arrested or detained has the right:
 - (a) to be informed promptly in a language that he or she understands of the reason for his or her arrest or detention and of the nature of any charge that may be brought;
 - (b) to be promptly released if not charged;
 - (c) to consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice require legal representation to be available, to be given the services of a legal practitioner under a scheme for legal aid;
 - (d) ...
 - (e) to challenge the lawfulness of his or her detention before a court of law and to be released if the detention is unlawful; and
 - (f) to be treated with humanity and with respect of his or her inherent dignity.

5.40 The way in which the breach of bail issue was dealt with raises questions as to the application of these provisions of section 27 of the *Constitution*.

5.41 Section 28 says:

Rights of charged persons

- 28.- (1) Every person charged with an offence has the right:
- (a) to be presumed innocent until proven guilty according to law;
 - (b) to be given details in legible writing, in a language that he or she understands, of the nature of and reasons for the charge;
 - (c) to be given adequate time and facilities to prepare a defence, including, if he or she so requests, a right of access to witness statements;
 - (d) to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner or his or her choice or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid;
 - (e) ...;

- (f) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;

5.42 It does not appear to me that it is sufficient to say that Mr Volau was released on bail, that he did not appear on the date he ought, that a Bench Warrant was issued and that, hence, there was no need for a formal charge or for any of the rights set out in section 28. This is not 'according to law': s. 28(1)(a)

5.43 Not having been formally charged cannot mean that Mr Volau is therefore to be deprived of the protections and provisions of section 28. This, as with the other Constitutional provisions referred to here, is a matter of law for consideration by the Full Court.

5.44 Section 29 says:

Access to courts or tribunals

- 29.- (1) Every person charged with an offence has the right to a fair trial before a court of law ...

5.45 It is a question of law whether this applies to a person in Mr Volau's position who is alleged to have breached bail. I can see no good reason for its not applying. Indeed, I can see every reason why it should. This is a question for the Full Court.

5.46 Section 38 provides:

Equality

- 38.- (1) Every person has the right to equality before the law.
- (2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:
- (a) actual or supposed personal characteristics or circumstances ...
- or on any other ground prohibited by this Constitution.
- (3) Accordingly, neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any person on a prohibited ground.

5.47 The circumstance of persons being incarcerated by the State and hence within the 'circumstances' provision of section 38 of the *Constitution* has been addressed in *Koro v. State* [2008] FJCA 17; AAU0028.2008 (14 May 2008) and *Tubuitamana v. State* [2008] FJCA 14; AAU001.2008 (14 May 2008). Mr Volau's 'actual ... circumstances ...' were, at the time he was sentenced for bail breach, that he was a person in custody. This, as it appears to me, brings Mr Volau within section 38(2) and (3). This is a matter to be determined as a question of law respecting his rights vis-à-vis section 38 and the equality principle, the provisions making discrimination unlawful, and in particular that requiring that no law or administrative action under law should 'directly or indirectly impose a disability ...' on a prohibited ground. Mr Volau is entitled to argue that the disability imposed in the present case, in respect of the matters on the Court Record and before this Court, was the deprivation of a right to a fair trial in respect of the breach of bail, and of all the other rights adumbrated here.

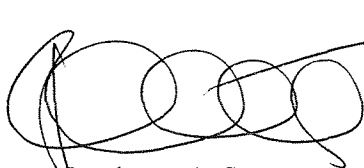
5.48 That Mr Volau was a person in custody, or a person in custody by reason of the issue of a Bench Warrant, or a person in custody by reason of having (allegedly) breached bail does not mean that the provisions of the *Constitution* do not apply to him. These circumstances or any one of them do not, or should not, mean he has no right to be formally charged with the offence of breach of bail, that he has no right to a fair trial, or that he has no right to a formal conviction before sentence. They go to the principle of equality and the right not to be discriminated against by reason of 'actual ... circumstances'. They are matters for consideration as questions of law for the Full Court.

6. CONCLUSION

Mr Volau has in his Notice of Appeal and amended grounds raised questions of law for the Full Court of the Court of Appeal. His appeal should therefore be heard by a Full Court.

ORDERS

1. This Court grants an extension of time to Mr Volau (beyond the 30 day limit), consistent with sections 26(1) and 35(1)(b), to lodge his application for appeal in terms of the all the grounds filed with the Court after 28 July 2008 and most particularly on 6 October 2008.
2. Mr Volau has raised questions of law in respect of his sentence and hence has an 'as of right' appeal to the Court of Appeal.
3. In accordance with section 37 of the Court of Appeal Act, the Court refers to the Full Court a question of law, namely whether a single Judge of Appeal has the power under section 35(1)(b), consistent with section 26(1) and taking into account the Court of Appeal Rules on amendment of Grounds, to extend the time of appeal so as to enable an Appellant/Applicant to incorporate into his appeal new Grounds.



Jocelynn A. Scutt
Judge of Appeal
Suva
13 October 2008

