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IN THE FIJI COURT OF APPEAL
AT SUVA

Criminal Appeal No: AAU0120/07
High Court Action No. HAA 114 of 2007

BETWEEN:

VILIAME DAUNABUNA

Appellant/Applicant

AND

THE STATE

Respondent

Appearances:
Appellant/Applicant: In Person
Respondent: Ms A. Prasad

Date of Hearing: 6 October 2008
Date of Judgment: 14 October 2008

Coram: Scutt, JA

JUDGMENT

Headnote

Court of Appeal Act (Cap 12), ss. 20, 22, 26, 28, 35; ***Court of Appeal (Amendment) (No. 2) Act*** 1998, s. 6: Court of Appeal Rules, Rules 5, 36, 37, 57(1)(2)(6); Larceny – ***Penal Code Act*** (Cap 17), ss. 259(1), 262(2); House breaking, entering and larceny – ***Penal Code Act*** (Cap 17), s. 300(1); Appeal on sentence as harsh and excessive; Consecutive and concurrent sentences; Notice of Appeal; Amendment of Notice of Appeal; Powers of Court of Appeal re new grounds; Leave to amend grounds; Power of single Judge to grant leave to amend grounds; Leave to extend time; Referral of question of law to Full Court; Application to call witness; Relevance of witness' evidence; Power of single Judge to call witness; Limitations on powers of single Judges of Appeal; ***Constitution (Amendment) Act*** 1997, s. 38(1)(2)(3)(4); 30-day time limit for appeal discriminatory in circumstance of incarceration; Late guilty plea – non-appearance due to wrong dates & circumstance of incarceration; Discrimination re 'late' guilty plea; Appellate discretion re reconciliation

Hadmor Productions Ltd and Ors v. Hamilton and Anor [1982] 2 WLR 322
Joselyn Deo v. The State (CrimApp No. AAU0025 of 2005S, High Ct Crim Action No. HAA 008 of 2005S, 11 November 2005)
Koro v. State [2008] FJCA 17; AAU0028.2008 (14 May 2008)
Satterthwaite v. Satterthwaite (1948) 1 All ER 343
Sesoni Volau v. The State (CrimApp No: AAU0079/2008, HCA No. HAA 59 of 2008, 13 October 2008)
Tubuitamana v. State [2008] FJCA 14; AAU001.2008 (14 May 2008)

1. SENTENCE & HIGH COURT APPEAL

On 19 July 2007, having been convicted of one count of larceny and one of housebreaking, entering and larceny, Mr Viliame Daunabuna was sentenced at Suva Magistrates Court to 2½ years imprisonment.[1] This sentence was set to run consecutive to a term of 3 years imprisonment Mr Daunibuna was then serving, in consequence of his conviction in 2006 for a number of burglary and larceny offences.

1.1 Mr Daunabuna appealed first to the High Court.

1.2 On 2 November 2007 the High Court dismissed his appeal, observing amongst other matters that upon being arrested and having confessed under caution, Mr Daunabuna 'admitted 51 previous convictions':

> The learned Magistrate took into account the guilty plea but said ... it had not been entered at the first opportunity..., that [Mr Daunibuna] was a recidivist [with] most of his convictions ... for home invasions. [The Magistrate] commenced at 3½ years and reduced it to 2½ years imprisonment on Count 1, and 12 months imprisonment on Count 2. The sentences are concurrent to each other, but consecutive to the existing term being served: at 2

1.3 The High Court concluded that there could 'be no doubt at all' that the 2½ year sentence for breaking and entering was consistent with the tariff range, and the 12 month term for larceny, Mr Daunabuna having previous convictions for that offence, was 'entirely appropriate'. Her Ladyship considered further that as the offences were committed on the same day, the concurrent terms order was appropriate, meaning that the 'only real issue in this appeal is whether the total term he is now serving is excessive and disproportionate': at 3

1.4 In coming to the conclusion that Mr Daunabuna's sentence was not excessive and disproportionate, the High Court said:

> In 2006 [Mr Daunabuna] was sentenced for a series of burglary and larceny offences which resulted in a 3 year term of imprisonment. The 2½ year term effectively lengthens his imprisonment ... so he will now be released in 2011.
>
> In 2004/5 [Mr Daunabuna] committed a total of 12 burglary and larceny offences. In 2004, he had committed two such offences. In 2006 he committed further such offences. He is clearly an habitual offender who has learnt nothing from his terms of imprisonment. People who make a living from breaking into the homes of others cannot expect leniency. Whether or not statistics show an increase in such crimes, offenders cannot commit home invasion offences with impunity. The order that the sentences be served consecutively was correct in principle and does not offend the totality principle: at 3

2. APPEAL TO COURT OF APPEAL

Those appealing against sentence to the Court of Appeal are obliged to meet a number of criteria. One relates to time limits, the other as to the grounds of appeal.

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[1] Mr Daunabuna is titled 'Daunibuna' in the charges, the Magistrates Court Record and in the High Court proceeding. His name is correctly spellt 'Daunabuna' as it appears in the Court of Appeal record and is so spellt throughout this judgment, except where it is (incorrectly) spellt 'Daunibuna' in the Magistrates and High Court Records and in the charges.

2.1 *(a)* ***Timelimit – 30 Day Rule:*** As noted, Mr Daunabuna's sentencing in the Magistrates Court occurred on 19 July 2007 and the High Court decision dismissing his appeal was delivered on 2 November 2007. Mr Daunabuna's Notice of Appeal to this Court was written on 27 November 2007. A covering Memorandum written by the Officer in Charge, Suva Prison and addressed to the Chief Registrar Fiji Court of Appeal, is dated 4 December 2007. It bears a date stamp 'Received 27 Dec 2007' by the High Court Registry and on that day was forwarded to this Court, indicated by its being further stamped 'Received 27 Dec 2007 Fiji Court of Appeal'.

2.2 Section 26 of the ***Court of Appeal Act*** (Cap 12) sets the time limit at 30 days.[2] In ***Koro v. State*** [2008] FJCA 17; AAU0028.2008 (14 May 2008) and ***Tubuitamana v. State*** [2008] FJCA 14; AAU001.2008 (14 May 2008) this Court referred to the discrimination inherent in the 30 day rule where a person is incarcerated by the State, by reference to section 38 (1), (2), (3) and (4) of the ***Constitution (Amendment) Act*** 1997. The delay between Mr Daunabuna's writing and submission of his petition within the prison system, and its arrival within the court system – as well is its first going to the High Court Registry rather than to that of the Court of Appeal, is indicative of the disability (the circumstance of incarceration) which affects imprisoned persons seeking to exercise their access to the courts.

2.3 The State raises no issue of time in respect of Mr Daunabuna's appeal. However, were there to be any issue as to Mr Daunabuna's appeal being within time, then in accordance with section 35 of the Court of Appeal Act time is extended. This follows also in relation to the new or amended grounds filed by Mr Daunabuna on 6 October 2008 (see below).

2.4 *(b)* ***Matter of Law Required:*** As to the basis of an appeal to the Court of Appeal, Mr Daunabuna's having first appealed to the High Court means that under section 22(1) of the Court of Appeal Act Mr Daunibuna must identify in his grounds a question of law. If his petition does so, then Mr Daunabuna's appeal is as of right. If not, his petition must be dismissed.

2.5 *(c)* ***Leave re Additional Grounds & Submissions:*** Upon the second mention date – 24 September 2008 - Mr Daunabuna sought to provide to the Court further grounds (entitled 'further submission'). He was given leave to do so. The State did not object and at the hearing addressed each of Mr Daunabuna's grounds, those of 24 September 2008 and those provided 6 October 2008 (albeit dated 2 October 2008).

2.6 In light of section 35 of the Court of Appeal Act, which does not empower a single Judge of the Court of Appeal to grant leave for this purpose, I grant Mr Daunabuna an extension of time to lodge the new grounds, consistent with the powers of a single Judge: s. 35 (1)

2.7 Rule 37 recognises, in any event, the power of the Full Court to amend the Notice of Appeal:

Amendment of 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;

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[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*** [2008] FJCA 17; AAU0028.2008 (14 May 2008); ***Tubuitamana v. State*** [2008] FJCA 14; AAU001.2008 (14 May 2008)

(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.

2.8 The apparent oversight in the drafting of section 35 in this regard (particularly as a single Judge in the Court of Appeal's civil jurisdiction has that power: s. 20(c)) arose in ***Sesoni Volau v. The State*** (CrimApp No: AAU0079/2008, HCA No. HAA 59 of 2008, 13 October 2008). There, I referred to the Full Court the question whether a single Judge was entitled to address the problem through extending time:

> 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 relating to amendment of Grounds, to extend the time of appeal so as to enable an Appellant/Applicant to incorporate into his appeal new Grounds: ***Sesoni Volau v. The State*** (CrimApp No: AAU0079/2008, HCA No. HAA 59 of 2008, 13 October 2008), Order 3

2.9 As the same question arises Mr Daunabuna's appeal, here the same referral is made to the Full Court.

2.10 ***(d) Additional Matter – Request for Calling of Evidence:*** Mr Daunabuna requests that this Court call before it a witness, namely the complainant, to give evidence of reconciliation. Mr Daunabuna wishes evidence to be given of the complainant's supporting him in his rehabilitation art programme during his incarceration. The State says that this is not relevant to the matter before this Court nor would it have been to the sentencing by the Magistrate. Indeed, it could not have been before him. This is because it is post-sentencing and any facts to which the witness may attest in this regard are not relevant to sentence (as occurring later) but would be matters to be considered by the prison authorities in granting remissions and other aspects of imprisonment – early release, release on conditions, transfer within the prison system, etc.

2.11 A question, in any event, is whether the Court has the power to do so. Section 28 of the Court of Appeal Act provides this power to the Court:

> *Supplemental powers of Court*
>
> **28.** In the exercise of their jurisdiction under [Part IV – Appeals in Criminal Cases] the Court of Appeal may, if they think it necessary or expedient in the interests of justice –
>
> a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and
>
> b) order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in a manner provided by rules of Court, or in the absence of rules of Court making provision that behalf, as they may

direct, before any judge of the Court or before any officer of the Court or magistrate or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and

c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness ...
d) ...
e) ...
f) ...:

Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

2.12 Rule 57(1) of the Court of Appeal Rules provides for the making of orders specifying time and place to attend, where the Court of Appeal has ordered any witness to attend and be examined before the Court under section 28(b) of the Court of Appeal Act. Rule 57(2) provides:

Application to Court to hear witnesses

(2) Such order may be made on the application at any time of the appellant or respondent, but if the appellant is in custody and not legally represented application shall be made by him in form 8 in the Second Schedule.

2.13 Under Rule 57(6), the appellant and respondent, or barrister and solicitor on their behalf, are entitled to be present and examine any witness called under section 28(b).

2.14 The problem in procedural terms for Mr Daunabuna at this stage is, however, that a single Judge of the Court of Appeal does not have the power to call witnesses. Section 35, providing as it does the powers a single Judge of the Court is entitled to exercise in the criminal jurisdiction, sets limits:

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.

2.15 There being no reference to the power to call witnesses or the calling of witnesses or evidence in any regard, then it must be taken that a single Judge is precluded from doing so. However, because Mr Daunabuna has raised the matter with this Court, and taking into account the State's submissions on the witness and his evidence, the nature of the evidence sought from the witness and hence the purpose in calling the witness is addressed later.

2.16 *(e)* ***'In Person' vs Legal Representation:*** Upon the first mention of Mr Daunabuna's appeal – on 3 September 2008 – the matter was set for further mention (24 September 2008), with Legal Aid asked to attend with Mr Daunabuna's file on that date. Mr Daunabuna was provided with a further copy of the High Court judgment of 2 November 2007: his copy was apparently provided to Legal Aid.

2.17 In the event, Mr Daunabuna's appeal proceeded in the absence of legal representation. Mr Daunabuna expressed a firm wish to proceed on 24 September 2008 hearing date, and also to provide his own written submissions, accompanied by his oral submissions then and on 6 October 2008. In the interests of Mr Daunabuna's right to have his appeal determined within a reasonable time (s. 29(3) ***Constitution***) and consistent with his clearly expressed wish to proceed, the appeal was heard in person.

3. GROUNDS OF APPEAL

Upon the second mention of this matter before the Court on 24 September 2008, Mr Daunabuna advised that he wished to provide written submissions. Orders were made for the filing and serving of submissions and the matter was adjourned for hearing on 6 October 2008. In the event Mr Daunabuna provided additional grounds and submissions, dated 2 October 2008, to the Court on 6 October and a copy was provided to Ms Prasad for the State on that day. Of assistance to the Court in effecting a speedy trial, the State was ready to address both the original and the new grounds and submissions, albeit only having now received the latter. Hence, the Court had before it both Mr Daunabuna's original and additional grounds and submissions. All are addressed in this appeal.

3.1 *(a)* ***Original Grounds:*** Mr Daunabuna's petition of 27 November 2007 states:

RE: APPLICATION TO THE FIJI COURT OF APPEAL CASE NO 945/06 SUVA MAGISTRATE AND APPELLATE HIGH COURT JURISDICTION CRIM CASE NO 114/2007

This is an appeal against the verbal refusal and judgment ... dated on 2nd November 2007 to my sentences appeal regarding [the] decision on consecutive term to serve.

The appellant intend[s] to appeal all decisions on the same ground to the Fiji Court of Appeal.

GROUNDS OF APPEAL

1. The learned magistrate or judge erred in law regarding my previous conviction and consecutive term of my sentence.

2. The learned magistrate or judge failed to consider that there were no aggravating circumstances to warrant consecutive sentencing.

3. The learned judge took into account irrelevant consideration[s] when she did not scrutinize nor hear a full submission on the matter of appeal.

4. That the consecutive term is harsh and excessive.

I ask the Fiji Court of Appeal to grant me on an appeal and that I make submission on errors of law and fact at the trial magistrate court and the appellate high court of Suva.

3.2 Mr Daunabuna's further submissions disclosing new grounds are:

FURTHER SUBMISSION OF APPEAL AGAINST MY SENTENCE
ON CR: APPEAL NO. HRA 114/07 VILIAME DAUNABUNA VS THE STATE

...

.... I do hope and pray that the few points of submission here before the Honourable Court of Law will convince the judicial system and also in noticing the amount of support that are now contributing to the rehabilitation of myself. More so on the genuine fact which is in contesting my sentence.

Hereinafter are the genuine reasons of my appeal against my sentence.

1. That the sentence of imprisonment by the Learned Magistrate is too harsh and excessive and wrong in principle in all the circumstances of the case; please refer; ***R. v. Waddingham*** [1983] 5 CrAppR (5) 66; (1983) CrimCR 492

2. That the sentencing Magistrate Judge erred in Law and in fact in taking into account my previous conviction to be contributing factors to my sentencing. Please refer to ***R. v. Galloway*** (1979) 1 CrAppR (5) 311; LSP at 2(A); ***R. v. Loosemore*** (1980) 2 CrAppR (5) – LSP at 2(A); ***R. v. Per Ginson*** (1980) 2 CrAppR (5) 63 – LSP at 2(7); ***R. v. Cockril*** (1985) 7 CrARep. R(5) 27, LSP at 2(A).

3. The Learned Magistrate erred in Law for not applying the 'Totality Principle', stating that where a Court decides to adjust a series of sentences because the aggregate is too high, it is generally preferable to do so by ordering sentence to run concurrently rather than passing a consecutive sentence, as I was a serving prisoner. Please refer: ***R. v. Simpson,*** Feb 1 – (1972) SCP 45 3 (A).

4. That the Learned Appellate Judge erred in Law and in fact, in failing to appropriately correct the errors undertaken by the Learned Sentencing Magistrate which

was apparent before him. In fact the errors undertaken by the Learned Sentencing Magistrate are that he (the Learned Sentencing Magistrate) failed to consider that we had reconciled with the complainant. Thus, in my view, the court (the Learned Sentencing Magistrate and the Learned Appellate Court) erred in Law and in fact in failing to carefully discharge or bring about reconciliation as required under the criminal procedure Code. I feel that if the Court had taken this into account, the prosecution would have withdrawn the charges against me.

Your Honour, I am firmly believing, hoping and praying that you will accept my submission for appeal on the grounds stated and the references that I've cited ...

4. OFFENCES & ORIGINAL SENTENCE

Mr Daunabuna was convicted on the following charges:

FIRST COUNT

Statement of Offence (a)

LARCENY: Contrary to section 259(1) and 262(2) of the Penal Code Act 17.

Particulars of Offence (b)

VILIAME DAUNIBUNA, on the 5th day of May 2006 at Samabula in the Central Division, stole a hedge cutter valued $22.00 the property of PRATAP SINGH s/o CHARAN SINGH.

(c)

SECOND COUNT

Statement of Offence

HOUSE BREAKING, ENTERING AND LARCENY: Contrary to Section 300(a) of the Penal Code Act 17.

Particulars of Offence

VILIAME DUNAIBUNA, on the 5th day of May 2006 at Samabula in the Central Division, broke and entered into the dwelling house of Dr Biu Sikivou and stole therein, a set of play station with 4CD games valued $700:00, a pair of 'Sacony' canvas valued $90:00, 2 silver necklace valued $20:00, a black school bag valued $20:00, a pair of shorts valued $15:00 and cash $30:000 to the total value of $875:00 the property of the said Dr BUI SIKIVOU.

4.1 His Worship's judgment is short, so is set out in full:

SENTENCE:

I take account of your guilty plea but it was 1 year later. Reconciliation is not accepted. There is no remorse on your face. I take note that the items have been recovered.

Considering your previous convictions – it appears that you are a recidivist and unlikely to rehabilitate yourself. Out of 51 Previous convictions – most of it has been invasion of houses of innocent members of public.

It appears that you have not learnt a lesson by being in prison before.

The society ought to be protected from people like you who make it their business to invade innocent private dwelling houses.

I also note you have apologized seeing the opportunity in court today but I accept the comments made by complainant and of the view that they are unable to forgive you due to your previous character.

On house breaking entering and larceny – start with a 3½ year sentence – reduce it for a late guilty plea and also for recovery of items for 1 year. Making it 2½ years imprisonment.

Larceny – Count 1:
Given 12 months imprisonment.
Counts 1 and Count 2 to be concurrent to each other but consecutive to the present terms you are serving.

28 Days to appeal ...
Items to be returned to complainants 1 and 2 ...: Court Record, pp. 14-15

5. MATTERS IN ISSUE – QUESTION OF LAW

Taking into account all the foregoing, including the Magistrates Court reasons for sentencing and the High Court reasons for dismissing Mr Daunabuna's appeal against sentence (set out earlier in this judgment), the issue before this Court 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) Error Regarding Previous Convictions and Consecutive Term:*** This ground appears both in Mr Daunabuna's original petition and in his amended grounds and submission, in the amended grounds and submission references being made to a number of authorities. Prior convictions are relevant, in the sense that their existence makes less likely mitigation in terms of the fixing of a sentence. That is, prior convictions cannot be used as a basis for increasing a subsequent sentence. However, they are relevant to whether a sentence should be decreased in mitigation or not.

5.2 The Magistrates Court may have framed it better. Nonetheless, a perusal of His Worship's judgment does not indicate that prior convictions were employed otherwise. That the High Court affirmed that the sentence was 'within range' confirms that the sentence was set by reference to factors going to the offences to which Mr Daunabuna pleaded guilty on the day. Similarly on appeal. There is, thus, no sustainable ground of appeal here.

5.3 ***(b) Failure to Consider 'No Aggravating Factors' Warranting Consecutive Sentencing:*** As in relation to the foregoing ground, both the Magistrate's sentencing remarks and the High Court judgment indicate that the question of mitigation and of aggravating factors were taken into account by both in the sentence and dismissal of the appeal. Mr Daunabuna's apology in court on the day of his sentencing was specifically noted by His Worship and taken into

account. In turn, the issue of 'community protection' or the 'protection of society' from the 'invasion' of 'innocent private dwelling houses' was emphasised: Court Record, p. 15

5.4 The penultimate paragraph of the High Court judgment addresses the prior offences – 'a total of 12 burglary and larceny offences' in 2004-2005 and in 2006 'further such offences' as well as 'two such offences' in 2004: at 3 This preceded the High Court's remarks as to Mr Daunabuna's being an 'habitual offender'. 'Making a living from breaking into ... homes' cannot lead to an expectation of leniency. All this indicates again that the problem for Mr Daunabuna was that there was no mitigation to be found in respect of his prior history. This appears to have been the view of the Magistrate in sentencing and confirmed on appeal. The High Court specifically addressed the tariff for such offences, applicable sentencing principles (in her remark about 'the principle'), and the totality principle: at 3

5.5 There is no basis for any error of law sustaining an appeal in this regard.

5.6 ***(c) Irrelevant Considerations in Failure to Scrutinize or Hear Full Submissions:*** Mr Daunabuna founds this ground in the appeal before the High Court. However, a perusal of the Court Record and most particularly the extensive notes on the High Court file along with the judgment indicate that the High Court heard full submissions and clearly scrutinised the matters put, along with the Magistrate's reasons for sentence.

5.7 The High Court Record shows that the appeal first came before the High Court on 26 October 2007. Mr Daunabuna is noted as stating he would represent himself. He then 'read submissions in support of the case', both as to sentence and conviction. Ms Lagilevu, who appeared for the State, is noted as stating that the original appeal was against sentence alone. She then says she wishes to respond to the appeal against conviction. The Court is noted as saying that was 'not necessary'. Mr Daunabuna is not disadvantaged thereby, and his full submissions were heard by the Court.

5.8 The High Court Record shows further that the State was then heard in respect of sentence. Following this, Mr Daunabuna is noted as acknowledging he understood Counsel's submissions for the State and asking if his case could be retried so that he could seek a lawyer to represent him in the retrial. Mr Daunabuna is further noted as stating he wanted a retrial as he denied committing the offence, and 'the police pressured me to plead guilty'.

5.9 The High Court Record then observes Mr Daunabuna's saying:

> I will be released in October 2010. That is for all the cases. I agree that this offence was committed while on suspended sentence.

5.10 The High Court Record ends with the observation that judgment will be delivered in open court on 2 November 2007 at 9.30am. The judgment previously referred to then appears on the High Court Record.

5.11 The High Court Record speaks for itself. This recitation indicates that Mr Daunabuna spoke first on his appeal grounds and submissions, then the State, then Mr Daunabuna in reply. The judgment indicates that the points raised in respect of sentence were taken into account together with the Magistrate's sentencing reasons.

5.12 Setting to one side 'late guilty plea' which is dealt with below, there is no question of law disclosed by Mr Daunabuna in this ground to go to the Full Court.

5.13 *(d)* ***Consecutive Term 'Harsh & Excessive':*** This ground appears in both the original petition and the new or amended grounds and submission, in the latter being accompanied by a number of authorities and the additional statement as to the sentence being 'wrong in principle in all the circumstances of the case'. Mr Daunabuna again refers to an 'error of law and fact in taking into account my previous conviction to be contributing factors to my sentencing'. Again, sentencing principles vis-à-vis prior convictions were applied according to principle. That is, prior convictions cannot be employed to *increase* a given sentence. However, a lack of prior convictions can be relevant as a factor that *lessens* a given sentence or, in other words, leads to a penalty lesser than that which may have been employed in the absence of 'no prior record'.

5.14 *(e)* ***Lack of Application of 'Totality Principle':*** Mr Daunabuna asserts an error of law in a failure by His Worship to apply the totality principle. The difficulty for Mr Daunabuna in respect of this ground is, however, that the High Court explicitly addressed it, observing that the Magistrate's Court sentence 'does not offend the totality principle'.

5.15 There is no error of law here and no basis upon which Mr Daunabuna's appeal can go forward to the Full Court.

5.16 *(f)* ***Failure to Correct Errors in Magistrates Sentence:*** Mr Daunabuna raises here , in particular, the matter of reconciliation with 'the complainant' which he says is an error of law and fact:

> ... in failing to carefully discharge or bring about reconciliation as required under the criminal procedure Code. I feel that if the Court had taken this into account, the prosecution would have withdrawn the charges against me.

5.17 Mr Daunabuna appears to be raising the matter of reconciliation in two ways: that the Magistrate's Court had a responsibility to endeavour to effect reconciliation between Mr Daunabuna and the complainants; and that the Magistrate's Court misdirected itself on the fact of reconciliation and the impact this should have had on the sentence.

5.18 However, it is apparent from the Court Record that the Magistrate granted latitude to Mr Daunabuna in this regard, and that the complainants were not in fact reconciled. This the Magistrate noted in his sentencing remarks.

5.19 The Court Record shows that each complainant attested to 'No reconciliation'. There then appears a note in the Court Record:

> Accused is (Not remorseful in action or conduct or in speech in Court): Court Record, p. 14

5.20 In ***Joselyn Deo v. The State*** (CrimApp No. AAU0025 of 2005S, High Ct Crim Action No. HAA 008 of 2005S, 11 November 2005) the Court of Appeal dealt with findings of fact that had, in a criminal appeal to the High Court, been reversed. The Court of Appeal (Ward, P., Wood and Ford, JJA) restored the original decision in both instances.

5.21 The first was the High Court finding on remorse, the second was the High Court's overturning of the Magistrate's decision to suspend the sentence:

> When passing sentence the magistrate had properly first decided that a sentence of imprisonment was correct in a case of this nature. Having reached that decision he needed to consider whether there were exceptional circumstances which could justify an order suspending that sentence. He referred to the plea of guilty, the fact [Ms Deo] was a first offender and that full restitution had been made. Those were matters possibly pointing to genuine remorse and his decision to suspend shows that he found they did so point. ***That was a finding of fact and, as such, is one an appellate court will be hesitant to change. This applies generally normally where the advantage to the lower court arises from the fact it has seen and heard witnesses***: at para **[17]** (Emphasis added)

5.22 The High Court determined there were 'no exceptional circumstances justifying a suspension' – again, a matter going to a finding of fact. The Court of Appeal said that an appellate court will interfere 'only if there is no evidence upon which the sentencing magistrate could properly have based his decision or it was based on a wrong principle or mistake of law or is plainly unreasonable': at para **[20]**, citing ***Hadmor Productions Ltd and Ors v. Hamilton and Anor*** [1982] 2 WLR 322, at 325 per Diplock, LJ; and ***Satterthwaite v. Satterthwaite*** (1948) 1 All ER 343, at 345, per Asquith, LJ

5.23 In the present case, taking into account the Court Record, there is no basis upon which the Court of Appeal could reverse His Worship's determination on (lack of) reconciliation.

5.24 As to the Magistrate's Court's responsibility vis-à-vis reconciliation, His Worship extended to Mr Daunabuna the possibility of reconciliation in providing the opportunity to have this aired before the Court and hearing from Mr Singh and Dr Sikivou. Again, there is no basis here upon which the Court of Appeal could find an error of law by Magistrate or High Court.

5.25 ***(g) New Evidence re Reconciliation:*** Mr Daunabuna submitted that the Court should call before it Dr Sikivou whom he said was assisting in his rehabilitation through involvement in Mr Daunabuna's art programme. In his amended grounds and submission, Mr Daunabuna said by way of introductory remarks:

> .... I do hope and pray that the few points of submission here before the Honourable Court of Law will convince the judicial system and also in noticing the amount of support that are now contributing to the rehabilitation of myself. More so on the genuine fact which is in contesting my sentence.

5.26 As already indicated, a single Judge of the Court of Appeal does not have the power to call witnesses. The Full Court does. Would this avail Mr Daunabuna? In my opinion, it would not. As Ms Prasad said for the State, this relates to evidence of what has occurred *after* the sentencing by the Magistrates Court. Hence it cannot be evidence going to any error of law in sentencing.

5.27 Rather, such evidence goes to Mr Daunabuna's time in prison, for Prison Authorities to take into account in respect of remissions and/or his classification, etc.

5.28 That Dr Sikivou has – as attested by Mr Daunabuna – involved himself in Mr Daunabuna's rehabilitation is important. Mr Daunabuna appears to be rightly appreciative of this and it may be hoped it can play a positive role in his rehabilitation, effecting or increasing in him a determination to improve his situation by reversing the conduct of the past, without further offending.

5.29 This goes to Mr Daunabuna's future. It cannot be translated back into the past to provide a ground of appeal against sentence.

6. 'HARSH & EXCESSIVE' AS RELEVANT TO 'LATE' GUILTY PLEA

The basis upon which Mr Daunabuna's appeal should go to the Full Court upon a question of law relates to the late guilty plea. In his reasons, as noted, His Worship commented:

> I take account of your guilty plea but it was 1 year later: Court Record, p. 14
>
> On house breaking entering and larceny – start with a 3½ year sentence – reduce it for a late guilty plea and also for recovery of items for 1 year. Making it 2½ years imprisonment: Court Record, p. 15

6.1 The implication here is that had Mr Daunabuna's plea of guilty not been '1 year later' then the reduction received in respect of it may have been greater. How much greater of course is in issue. However, the inference cannot be passed over.

6.2 *(a)* ***Chronology vis-à-vis Guilty Plea:*** The Court Record chronology reveals:

A. 8 May 2006

Prosecution: Insp. Suruj
Accused: Present

Charge read explained and understood: Yes

PLEA:

Count 1: Not guilty.
Count 2: Not guilty.

[Then followed submissions from Prosecution and Legal Aid as to remand vs bail, an indication from Mr Daunabuna that the police arrested him 'because I was still under suspended sentence' with the prosecution saying that the stolen items 'were found in his possession'.]

COURT: Remanded in custody in public interest.
Adjourned 22/05/06 Mention.
You seek legal representative from Legal Aid.

B. 22 May 2006

Prosecution: Insp. Suruj
Accused: Present

[Prosecution refers to previous convictions, suspended sentence. Mr Daunabuna 'remained mute' re remand in custody. Court remands in custody. Adjourns to 15 June 2006]

C. 5 June 2006

Prosecution; PC Toni
Accused: Present

[Remanded in custody, adjourned to 15 June 2006 for hearing]

D. **15 June 2006**

Prosecution: Insp. Suruj
Accused: Present

[Mr Daunabuna explains looking for solicitor, asks for another date and bail. Prosecution no objection except wants remand in custody. Court sets 29 June 2006 as mention date and remands in custody.]

E. **29 June 2008**

Prosecution: WPC Daveta
Accused: Present/Mr Naco

[Court sets hearing for 13 October 2006, remands in custody for 13 July 2006 mention. Fresh application for bail and to be considered on latter date]

F. **13 July 2006**

Prosecution: Sgt H. Chand
Accused: Present/Mr Daveta

[Prosecution objects to bail, refers to previous convictions. Mr Daveta – bail on strict conditions, etc. Court adjourns to 17 July 2006 for provision of security re bail condition and letter re employment at USP. Production Order endorsed]

G. **17 July 2006**

Prosecution: Sgt H. Chand
Accused: Present/Mr Naco

[Application for bail, various matters. Released on bail in such of $500.00 with surety. Various conditions. Adjourned for hearing 28 October 2006]

H. **30 October 2006**

Prosecution: Sgt Wilson
Accused: No appearance

[Prosecution acknowledges 'a wrong date was given to accused'. Adjourned for mention to 13 December2006, with NOAH to issue]

I. **13 December 2006**

Prosecution: Sgt Wilson
Accused: Absent – serving

[Set for mention only 28 December 2006. Production Order to issue]

J. **28 December 2006**

Prosecution: PC Ferox
Accused: Not present

[Accused serving prisoner. Production Order was served. No appearance. Mention 29 January 2007]

K. **29 January 2007**

Prosecution: Sgt Harish
Accused: No appearance

[Court orders service of Production Order 12 March 2007]

L. **12 March 2007**

Prosecution: WPC Lisi
Accused: No appearance

[Court – issue NOAH, Mention 20 April 2007]

M. **20 April 2007**

Prosecution: PC Robert
Accused: No appearance

[Mr Daunabuna serving prisoner; Production Order to be issued. NOAH cancelled. Set for mention 25 May 2007]

N. **25 May 2007**

Prosecution: PC Feroz
Accused: present

[Serving prisoner. Adjourned to 9 July 2007 for hearing. Production Order endorsed]

O. **9 July 2007**

Prosecution: Sgt H Chand
Accused: No appearance

[Prosecution says set for hearing on 19 July 2007; Mr Daunabuna is serving. Court says: 'My record says 09/07/2007. Sets for mention 19 July 2007 for Court to fix another date. Production Order extended]

P. **19 July 2007**

Prosecution: PC Dalip
Accused: Present

3/9/07 Hearing Court 6

ACCUSED: Wish to change my plea ...
COURT: Charge read and explained – understood.

Count 1: Guilty
Count 2: Guilty ...: Court Record, pp. 7-14

6.3 ***(b)*** ***Sentence & Guilty Plea:*** As noted, the Magistrate took into account Mr Daunabuna's guilty plea, referring however to it as a 'late guilty plea' without any reference to the circumstances in which it was 'late'. The High Court noted that the Magistrate 'took into account the guilty plea but said that it had not been entered at the first opportunity', earlier having observed Mr Daunabuna's failure to appear on bail, his appearances later being impeded by his

imprisonment: at 2 Again, the inference must be that had it been earlier, the guilty plea would have warranted some better reduction in sentence.

6.4 *(c) **Opportunity/ies to Plead Guilty?*** Certainly, the Court Record shows a lagging on the part of Mr Daunabuna in his guilty plea. But is it 'one year late' in consequence of Mr Daunabuna's actions or control?

6.5 From **8 May 2006** to **17 July 2006** through six appearances, Mr Daunabuna had an opportunity to plead guilty but did not. Through from **17 July 2006** (released on bail) to **30 October 2006** (no court dates in between) he does not plead guilty – however on the latter day, he is not present so could not do so in any event. This is not Mr Daunabuna's doing – for the correct date was **28 October 2006** not **30 October 2006.**

6.6 At the next appearance date, **13 December 2006** Mr Daunabuna has no opportunity to plead guilty: he is absent – serving time in prison, apparently with no Production Order. On the next occasion, **28 December 1006** Mr Daunabuna again cannot avail himself of the opportunity to plead guilty: he is not present, albeit the Production Order was served. Again, no fault on Mr Daunabuna's part. Similarly for **29 January 2007**, when – being in prison, Mr Daunabuna does not appear. So too on **12 March 2007** – Production Order, Mr Daunabuna in prison, no appearance, no opportunity and no plea of guilty. So too for **20 April 2007.**

6.7 There were six *apparent* opportunities for Mr Daunabuna to change his plea, none of them real· Mr Daunabuna could not avail himself of them due to imprisonment and/or wrong advice as to dates.

6.8 On **25 May 2007** (one year after Mr Daunabuna's original appearance and plea of 'not guilty') Mr Daunabuna appears. He does not then change his plea. It may be argued that at that point he should have done so for his plea of 'guilty' to be seen as (relatively) prompt – if the non-appearances through no fault on his part are to be taken into account as not providing any opportunity for change of plea. Can the 25 May appearance 'wipe out' the dates he could not so plead due to his non-appearance through imprisonment and/or wrong dates?

6.9 The next date is **9 July 2007** – the next opportunity for Mr Daunabuna to plead guilty, again denied him as he is not present: the Prosecution says the matter 'is for Hearing on **19 July 2007**' (rather than 9 July 2008). Again, through this mix-up of dates Mr Daunabuna is not responsible for his absence. His lack of a guilty plea then (on 9 July 2007) cannot fairly be ascribed to him, either. This is another 'opportunity' which is not real.

6.10 On **19 July 2007**, being present, Mr Daunabuna changes his plea to 'guilty'.

6.11 *(d) **Evaluating 'Late' in the Context of non-Appearance Through Incarceration and/or Wrong Dates:*** In these circumstances, it appears arguable that the '1 year later' assessment by His Worship in the sentencing does not accurately or fairly reflect the circumstances of the not guilty vs guilty plea. True, there is a period from May 2006 to mid July 2006 of no plea of guilty – some two months and a period of May 2007 to early July 2007 of no plea of guilty – two months (total some four months). Sixteen or seventeen weeks is very different from fifty-two.

6.12 In the circumstances, I do not consider that it is appropriate for a single Judge of Appeal to dismiss Mr Daunabuna's appeal when 'one year later' (rather than an earlier plea) is a factor in

the Magistrate's sentencing without any reference to the circumstances preventing Mr Daunabuna from changing his plea to guilty at an earlier date.

6.13 Albeit, as I have said, Mr Daunabuna had an opportunity to change his plea on **27 May 2006** and did not do so, in the light of all the administrative factors dogging the proceedings should his failure on that date mean his plea of guilty on 19 July 2007 is to be credited only as a plea 'one year later'?

6.14 The High Court referred to the wrong dates and imprisonment in respect of Mr Daunabuna's (lack of) appearances in Court before the plea of guilty and sentence. However, these impediments to Mr Daunabuna's opportunity to change his plea earlier do not appear to have been reflected in the original sentence.

6.15 Mr Daunabuna's situation is not the same as that of the person who could have appeared on all those intervening dates making up the year and did so without changing his/her plea, or simply failed to appear, hence through his/her own action depriving him/herself of the opportunity to change the plea.

6.16 There is a fundamental difference, it appears to me, between the situation of a person who:

- Appears on many occasions in court and fails to change his/her plea to 'guilty' until later; or
- Fails to appear through his/her own refusal to appear, or lackadaisical approach to the court system, or absconding, etc so does not change his/her plea to 'guilty' until later;

and the person who:

- Is listed for appearances, yet through no fault or action of his/her own does not appear so cannot avail her/himself of the opportunity to change his/her plea to 'guilty' until later;
- Through incarceration cannot take opportunities otherwise s/he would be able to take of changing the plea to 'guilty';
- By reason of mix-up (not his/hers) as to dates of appearances, cannot take opportunities that otherwise s/he would be able to take of changing the plea to 'guilty'.

6.17 ***(e) Equality and Non-Discrimination Principle:*** In this regard, section 38 of the ***Constitution*** is noted:

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.

6.18 As noted, that incarcerated persons are 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) in the context of the 30 day rule: s. 26

6.19 Mr Daunabuna's 'actual ... circumstances ...' were, over the period he did not plead guilty (excluding the time on bail)[3] that he was a person in custody who was not produced to the Court was without these opportunities to change his plea, opportunities which would have been his had he been free. This raises the question of his being within section 38(2) (3) and (4), further confirming there is a matter for determination as a question of law. Mr Daunabuna over the whole of the period of incarceration when he was prevented from appearing before the Court was under a disability which, because of his circumstances, meant he was not in a position of equality vis-à-vis changing his plea with persons not imprisoned.

6.20 ***(f) Further Note:*** It is, however, emphasised that Mr Daunabuna should not harbour unrealistic expectations.

6.21 First, when he appeared before the High Court on his appeal, his submissions dated 26 October 2007 said that his plea of guilty was made 'under pressure'. He also said as to the Magistrate's statement 'there is no remorse on your face' that he 'wasn't remorseful because I didn't commit this offence as I was persuaded by the Prosecutor to plead guilty ...' Undoubtedly, this may challenge the genuine nature of his change of plea from 'not guilty' to 'guilty' bringing any 'discount' for it, at whatever date, into question.[4]

6.22 Secondly, the Court of Appeal could dismiss his appeal outright.

6.23 Thirdly, were the Court of Appeal to consider Mr Daunabuna's ground as having merit, it could still be dismissed on the basis that nonetheless the sentence is appropriate.

6.24 Fourthly, even if the Court of Appeal were to consider there is merit, and thereby to consider it warrants some reduction in sentence, Mr Duanabuna should not expect any significant reduction.

6.25 However, the question of principle arising in the appeal vis-à-vis 'late plea of guilty' goes beyond Mr Daunabuna to the system of justice as a whole. A systemic issue arises that should not stand unresolved. As I have said, I am unable to dismiss the appeal, now knowing that a person can be within the system for 10 months without appearing in court despite dates for appearances being set and Production Orders being issued.[5] For an accused person to be in the prison system for almost a year, with dates set for court appearances and Production Orders issued (or not issued), and not to appear surely raises a question to be considered by the Full Court.

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[3] And on that occasion a wrong date meant he had no opportunity to change, or consider changing, his plea.
[4] The Magistrate accepted the plea as genuine (despite a 'lack of remorse' in Mr Daunabuna's expression as observed by the Court) and his reununciation in the High Court is in that regard not germane to the Magistrate's sentencing.
[5] Or not being issued – a question in itself.

6.26 This having occurred in Mr Daunabuna's case, in how many other instances has an incarcerated person not attended at court for the same reason, and in how many instances has a change of plea been recorded as 'late' in consequence.

6.27 It remains the case that the classification of Mr Daunabuna's plea as a 'late' plea of guilty and the impact (or lack of reductive impact) on the sentence through that characterisation is an issue for the Court of Appeal.

7. CONCLUSION

Mr Daunabuna in his Notice of Appeal and amended grounds has raised a question of law for the Full Court of the Court of Appeal. This is whether the sentence/s imposed by the Magistrates Court on 19 July 2007 was 'harsh and excessive' in that albeit Mr Daunabuna's guilty plea was taken into account, it was taken into account as '1 year late' and:

- Mr Daunabuna did not plead guilty at his first opportunity, namely upon his first appearance before the Magistrates Court;

- His change of plea to 'guilty' was delayed in part because he appeared and maintained his 'not guilty' plea (**some eight or nine weeks: early May 2006-mid July 2006**);

- ***However*** the change of his plea to 'guilty' was delayed in substantial part because he was imprisoned, non-appearances for which he was not responsible, by non-issue of Production Orders or non-action upon one, or through wrong dates. A wrong date was also provided to him at the conclusion of his bail period. Hence at that date he was also deprived of the opportunity to change his plea (**over 10 months: mid July 2006-late May 2007**).[6]

7.1 This raises a question of law in respect of the taking into account of the plea of guilty and how its timeliness should in these circumstances be assessed, and the 'harsh and excessive' ground advanced by Mr Daunabuna, to be heard by a Full Court.

7.2 The Court thanks both Mr Daunabuna and Ms Prasad for the State for their submissions and assistance in addressing the issues in the appeal.

ORDERS

1. This Court grants an extension of time to Mr Daunabuna (beyond the 30 day limit), consistent with sections 26(1) and 35(1)(b) of the Court of Appeal Act (Cap 12), to lodge his application for appeal in terms of the all the grounds filed with the Court after 27 November 2007 and most particularly on 6 October 2008.

2. Mr Daunabuna has raised a question of law in respect of his sentence and hence has an 'as of right' appeal to the Court of Appeal, solely on the question of credit for a guilty plea where 'lateness' not within his control was attributed to him.

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[6] Then from late May to mid July (one appearance in May 2007, one non-appearance in early July 2007 through non-production of Mr Daunabuna on a Production Order), then appearance on 19 July and guilty plea.

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 aforesaid Rules relating to amendment of Grounds, to extend the time of appeal so as to enable an Appellant/Applicant to incorporate into his appeal new Grounds.

Jocelynne A. Scutt
Judge of Appeal
Suva
14 October 2008