

**IN THE SUPREME COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL APPELLATE JURISDICTION**

**PETITION FOR SPECIAL LEAVE TO  
APPEAL NO: CAV 0016/2015**

**IN THE MATTER OF AN APPEAL** from the  
decision of the Court of Appeal of Fiji in  
Criminal Appeal No: AAU0132/2013.  
[High Court Crim. Misc. No: 358/2013]

**BETWEEN:**            **ERONI VAQEWA**

**Petitioner**

**AND:**                **THE STATE**

**Respondent**

**Coram:**            **The Hon. Chief Justice Anthony Gates**  
                         **President of the Supreme Court**  
**The Hon. Mr. Justice Brian Keith**  
                         **Judge of the Supreme Court**  
**The Hon Mr. Justice William Calanchini**  
                         **Judge of the Supreme Court**

**Counsel:**            **Petitioner in person**  
                         **Mr. M. Delaney for the Respondent**

**Date of Hearing:**    **Friday 9<sup>th</sup> October 2015**

**Date of Judgment:** **Friday 22<sup>nd</sup> April 2016**

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**JUDGMENT**

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**Gates P**

- [1]    The Petitioner is not represented before this court. He had made a timely appeal to the single judge of the Court of Appeal on 14 January 2015. That judge refused leave

to proceed with a second tier appeal from the High Court. The single judge upheld the High Court judge's orders refusing an enlargement of time for appeal from the Magistrate's Court [3 years 2 months late]. His lordship found that the sentence appeal did not come within the requirements for appeal, namely that the ground should impugn the sentence as an unlawful one or one passed in consequence of an error of law [section 22(1A) Court of Appeal Act]. The petitioner had said his sentencer had failed to pay heed to the totality principle and that his sentence should not have been made consecutive to another sentence.

### **The Magistrate's Court**

- [2] On 28<sup>th</sup> May 2010 the petitioner was convicted after trial in the Lautoka Magistrate's Court on a charge of robbery with violence contrary to section 293(1)(b) of the Penal Code. On 4<sup>th</sup> June 2010 he was sentenced to a term of 5 years and 6 months imprisonment, with a non-parole period of 40 months [3 years 4 months]. The Magistrate in the court record [SCR p74] had stated the sentence was ordered to run consecutively to the sentence in Case No. 889/08.
  
- [3] Understandably, if not correctly, this is the part that the petitioner seeks to have changed. He does not believe that his term of imprisonment should have been made consecutive to an existing term that he was already serving.
  
- [4] In the instant case the robbery was committed in broad daylight. The victim was going from her house to her car to return to her office after lunch. She was about to go overseas on a holiday and for that reason had 8,700 dollars in her bag. The Magistrate in his sentencing remarks said:

“During the struggle to grab her hand bag she had fallen down on the road. Then you have put your foot on her chest and pinned her down and have grabbed the hand bag. She has received injuries according to the medical report. She has received cuts on her lips, abrasions on both knees, bruises on right hand and a cut on her small left finger. It's clearly evident that you have used so much of force on her to grab her bag. It is difficult even to imagine the trauma and fear the victims go through in this kind of situations apart from the physical injuries they receive.”

- [5] The Magistrate referred to the need for personal security on the streets so that members of the public could go about their business without feeling vulnerable. He held the degree of force, the injuries inflicted, and the total loss of the contents of the bag and the sum of money was never recovered, to be aggravating factors for which he enhanced sentence by 12 months from his starting point of 5 years. He took off 6 months for the petitioner's young age and for the time already spent on remand.
- [6] But he had this to say on the petitioner's conduct of his case, which is perhaps partially explanatory of the way this lengthy appeal has progressed:

"You did not say anything in mitigation. The court explained to you as to why you should make submissions for mitigation. But it should be noted that you have ignored to exercise your right in a very stubborn way. Once before the court on its own motion referred you to the legal aid despite the fact that you have waived right to counsel at the beginning. Yet you did not take any steps to obtain legal aid. Again on the 29<sup>th</sup> December 2009 you waived right to counsel. The court has granted you all the opportunities despite your offensive conduct. It appears that not only you do not consider your actions to be serious in nature but also that you are not remorseful of your actions."

#### **Appeal to High Court**

- [7] Because he was 3 years 2 months late in making the appeal, the petitioner had to apply for leave to appeal out of time. In doing so, it was necessary for the petitioner to explain to the High Court why there had been so much delay.
- [8] The petitioner said:
- (i) No-one had assisted him in making the appeal;
  - (ii) He was new to the Criminal Justice System.
- [9] The judge found no merit in these explanations. His lordship referred to the fact that the petitioner was not new to the system. He had 13 previous convictions. His lordship said "and therefore (he) cannot be considered as a novice in the Criminal

Justice system.” He had served terms of imprisonment before, including for an offence of robbery with violence.

- [10] It is unlikely that no-one assisted him in preparing the appeal papers. Judges of the Supreme Court and Court of Appeal are often impressed by the standard of appeal papers and submissions filed through the prisons. It would appear to those who wish to pursue appeals that there are persons within the system prepared to guide and assist unrepresented appellants in framing Notices of Appeal, Bail applications and submissions in order to commence or continue an application in any of the appeal courts.
- [11] The High Court judge went on to examine the grounds of appeal and to see whether they had merit and whether any of them would probably succeed. His lordship considered the principles for enlargement applications and referred to the two relevant authorities: *Kumar v The State; Sinu v The State* [2012] FJSC 17; CAV0001.2009 21<sup>st</sup> August 2012 and *Raratabu v The State* [2013] FJSC 4; CAV0009 24<sup>th</sup> April 2013.
- [12] The grounds against conviction were wholly lacking in merit. The grounds against sentence raised the question of consecutive sentences and consideration of the totality principle. Another ground said the sentence was harsh and excessive.
- [13] The judge referred to section 22(1) of the Sentencing and Penalties Decree 2009 which stated:

“Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.

(2) Sub-section (1) does not apply to a term of imprisonment imposed –

- (a) in default of payment of a fine or sum of money;
- (b) on a prisoner in respect of a prison offence or as a result of an escape from custody;

- (c) on a habitual offender under Part III;
- (d) on any person for an offence committed while released on parole; or
- (e) on any person for an offence committed while released on bail in relation to another offence.”

[14] His lordship went on to deal with the question of whether the Petitioner was an habitual offender [section 22(2)(c)] and thus excluded from the new requirement that subsequent sentences will be imposed concurrently with those of uncompleted sentences.

[15] Part III of the Sentencing and Penalties Decree provides for enhanced sentencing in cases where a judge has ordered an offender to be declared an “habitual offender.”

[16] The relevant sections are sections 10 and 11:

“10. This Part applies to a court when sentencing a person determined under section 11 to be a habitual offender for –

- (a) a sexual offence;
- (b) offences involving violence;
- (c) offences involving robbery or housebreaking;
- (d) a serious drug offence; or
- (e) an arson offence.

11. (1) A judge may determine that an offender is a habitual offender for the purposes of this Part –

- (a) when sentencing the offender for an offence or offences of the nature described in section 10;
- (b) having regard to the offender’s previous convictions for offences of a like nature committed inside or outside Fiji; and
- (c) if the court is satisfied that the offender constitutes a threat to the community.

(2) The powers under this Part may be exercised by the Court of Appeal and the Supreme Court when hearing an appeal against sentence.”

[17] In these cases, sentences of imprisonment, unless ordered otherwise by the court, will be served consecutively to any uncompleted sentences the offender may be serving [section 13 of the Sentencing and Penalties Decree].

[18] The judge referred to the powers granted to the Court of Appeal and to the Supreme Court when hearing an appeal against sentence [section 11(2)]. He referred to the 13 previous convictions of the petitioner and said all of them could be considered as offences involving robbery or house-breaking. He concluded:

“Therefore the Magistrate is justified in ordering the sentence to run consecutively although he had failed to mention also the provisions. There is no merit in this ground as well.”

[19] It is correct that sentencing powers in so far as the determination of the status of habitual offender is concerned are granted by section 11(2) to the two superior appeal courts. However the power had not been granted to the Magistrate’s Court. The Magistrate had no jurisdiction to determine such status. Therefore the High Court could not increase the powers of sentencing of the Magistrate in this way in order to justify the consecutive sentence. The High Court could only approve or disapprove the Magistrate’s sentence within the jurisdiction and powers of the Magistrate.

[20] In considering whether the sentence was harsh and excessive, his lordship referred to a term for robbery with violence of 7-10 years, a tariff applicable at the time of the appeal before the High Court: *Baleinakeba v The State* [2010] FJHC 207; HAA008.2010. In that decision Madigan J had observed:

“A tariff of 4-8 years may have at one time been appropriate tariff, but it is certainly no longer. In adopting the dicta of the Fiji Court of Appeal in *Basa’s* case CA AAU 24 of 2005 the Fiji Courts are now following the English line of cases for robbery with violence and not more lenient New Zealand authorities. In the High Court, the tariff is more within the range of 10 to 15 years. Considering, and given the jurisdictional restraints of the Magistrates Court, I would venture that the proper tariff there now should be 7 to 10 years.”

[21] His lordship examined the Magistrate’s calculation of the sentence, starting at 5 years, increasing it by 12 months for the aggravating factors and deducting 6 months for the

mitigating factors. He ordered that there was no merit in the ground that the sentence was harsh and excessive. There is nothing in that aspect of the handling of the appeal that need detain this court.

### **The Court of Appeal**

[22] The petitioner filed a timely appeal to the Court of Appeal against the refusal of the High Court judge to enlarge time.

[23] To the single judge the petitioner brought the following ground of appeal against that refusal:

“The Learned Appellate Judge erred in law when he upheld the consecutive sentencing of the Learned Trial Magistrate which was contrary to:

(a) Sections 11 and 22 of the Sentencing and Penalties Decree; and

(b) The Totality Principle.”

[24] As in many such appeals the appellant or petitioner has not understood that the appeal must focus on why that appeal was refused, not on the issues of the trial. For without the exercise of a discretion in the petitioner’s favour to enlarge a late appeal, and here the appeal to the High Court was 3 years 2 months late, there would be no appeal afoot.

[25] In explaining why the discretion had been exercised correctly by the High Court the single judge said:

“[5] The learned High Court judge gave written reasons for refusing an extension of time to appeal. He referred to the factors enunciated by the Supreme Court in **Kumar v. State; Sinu v. State** (unreported Criminal Appeal No. CAV0001 of 2009, 21 August 2012) and concluded the appellant’s appeal against sentence lacked merit. The appellant had a long string of convictions for robbery or house breaking. The consecutive sentence was justified to protect the community.

[6] It is clear that without an extension of time, the appeal to the High Court was incompetent. Any further appeal to this Court can only be brought on the ground that the High Court made an error of law in refusing the appellant an extension of time. The High Court applied the correct principles in refusing the application. For these reasons, I conclude that no point of law alone arises from the High Court's refusal to grant the appellant an extension of time to appeal. I am satisfied that this appeal is bound to fail because the appellant has no right of appeal under section 22 of the Court of Appeal Act."

### **Appeal to the Supreme Court**

[26] The petition lodged with this court was within time.

[27] Ground (iv) seeks to re-open the question of his conviction. He raises an issue, not urged by his counsel before the Court of Appeal, namely lack of representation. This appears to have been a situation of the petitioner's own making. The learned Magistrate made this observation in his sentencing remarks:

"10. You did not say anything in mitigation. The court explained to you as to why you should make submissions for mitigation. But it should be noted that you have ignored to exercise your right in a very stubborn way. Once before the court on its own motion referred you to the legal aid despite the fact that you have waived right to counsel at the beginning. Yet you did not take any steps to obtain legal aid. Again on the 29<sup>th</sup> December 2009 you waived right to counsel. The court has granted you all the opportunities despite your offensive conduct. It appears that not only you do not consider your actions to be serious in nature but also that you are not remorseful of your actions."

[28] In waiving rights to counsel or in rejecting advice from Magistrates or judges to apply for Legal Aid, or in simply doing nothing about legal representation, petitioners do not thereby create a ground of appeal for later arguing that they have been done an injustice and been deprived of counsel. The petitioner did have the advantage of very able counsel before the single judge. This ground was not raised in the High Court or in the Court of Appeal. In such circumstances this court would not entertain a fresh ground of appeal unless its significance upon the special leave criteria was compelling. It does not meet that standard and must fail.

- [29] Ground (i) alleges an excess of jurisdiction in that the Sentencing Magistrate ordered the petitioner's sentence to run consecutive "to the sentence in case 889/08." The order that it should run consecutively was noted in the Magistrate's own notes [SCR p74]. It was not contained within the sentencing judgment. It should have been.
- [30] It is not clear whether the sentence in the other case 889/08, also for robbery with violence in which the petitioner was sentenced 2 weeks earlier, was known at the time the Magistrate had compiled his sentencing judgment or whether this came to light after pronouncing and reading out his sentencing judgment. The petitioner or his counsel have not alleged that the order that the petitioner should serve the instant sentence consecutively to the existing term was not pronounced as part of the order on the same occasion. Had such a position been adopted, we should have required the record to be supplemented by affidavit, and the procedure set out in **Practice Direction No. 2 of 1982** by Tuivaga CJ to have been followed.
- [31] I have set out earlier section 22(1) of the Sentencing and Penalties Decree. In deciding to direct otherwise from the purport of that section, a court ought to state its reasons for doing so. That at least would be the best practice approach, if not a requirement under the section. Here the single judge found reason enough in that "the consecutive sentence was justified to protect the community."
- [32] Ground (ii) raises the question of the totality principle. This aspect of the case was not weighed in the sentencing judgment of the learned Magistrate. It is an important consideration not least when considering whether to depart from the new norm of ordering concurrent sentences under section 22 unless there are reasons to do otherwise.
- [33] In **Jioji Waqasaga v The State** Cr. App. No. CAV0009 of 2005S, though dealing with the now repealed Penal Code, the court had this to say on totality:

"[34] Of course, the sentencing judge or magistrate is always required to consider the totality of the aggregate sentence in order to ensure that it is just and appropriate. Sentencing is never a mere matter of arithmetic.

The court must always step back and take a last look at the total just to see if it looks wrong (R v Bradley [1979] 1 NZLR 262, Mill v The Queen (1988) 166 CLR 59, Wong Kam Hong v The State Criminal Appeal No. CAV0002 of 2003S, Supreme Court, 23 October 2003).

- [34] Because it was not written into the sentencing remarks, we cannot be sure whether this experienced Magistrate did actually go through that thought process prior to concluding his judgment.
- [35] But that is not the end of the matter. The question for this court, as it was for the single judge, is whether the sentence was wrong in law. Applying the totality principle, it would appear the total sentence for this offender for the current offence and the previous offence, when he had committed a string of serious offences – robbery with violence and housebreaking – was correct and this ground was bound to fail.
- [36] The focus of the single judge had been on the correctness or otherwise of the High Court judge's refusal to enlarge time for appeal. The principles for deciding enlargement applications were applied by the High Court judge in the exercise of his discretion. Though his lordship was incorrect in treating the petitioner as an habitual offender, he could not be faulted in his reasons for refusing enlargement of time. That was the issue for decision, and that was the issue for decision and consideration by the single judge in the Court of Appeal which this petitioner seeks to appeal from.
- [37] There was no satisfactory explanation for the considerable delay in filing an appeal from the Magistrate's Court decision. The delay of 3 years 2 months was excessive and the grounds are not such that might compel this court to intervene, nor would they meet the strict criteria for leave to this court.
- [38] In the result, the orders of the Court are:
1. Special leave to appeal is refused.

2. The decision of the single judge of the Court of Appeal dismissing the appeal under section 35(2) of the Court of Appeal Act is affirmed.
3. The sentence of the learned Magistrate that the petitioner serve a term of imprisonment of 5½ years with a non-parole period of 40 months, consecutive to the sentence on Case No. 889/08, is confirmed.

**Keith J**

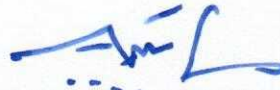
- [39] I agree that this application for special leave to appeal against sentence should be refused for the reasons given by the Chief Justice. I only wish to add a few words of my own to explain why the troubling features about this case took some time for us to resolve.
- [40] The first problem was the mismatch between the Magistrate's sentencing remarks in the document prepared by him prior to the sentencing of Vaqewa and the court record of the sentence he passed. As the Chief Justice noted in para 29 of his judgment, the Magistrate's sentencing remarks did not refer to the fact that the sentence he was passing on Vaqewa had to be served consecutively to the sentence he was already serving, whereas the court record *did* refer to that. It might be said that what could have happened was that the Magistrate did not say anything about the sentences having to be served consecutively when Vaqewa was in court, and that the Magistrate only decided to order that afterwards – perhaps because he was told or reminded that Vaqewa was a serving prisoner. But that would have involved the magistrate entering something on the court record which had not been said, and then ignoring the requirement in Practice Direction No. 2 of 1982 of applying to the High Court for leave to supplement the record. Since Vaqewa has never alleged that he was not told, at the time of his sentencing, that the sentence being passed on him would have to be served consecutively to the sentence he was then serving, we can safely assume that he *was* told that at the time, even though it had not been referred to in the sentencing remarks prepared beforehand.

[41] The second problem relates to the Magistrate's power to order the sentences to be served consecutively to each other. The Chief Justice has set out sections 22(1) and 22(2) of the Sentencing and Penalties Decree in para 13 of his judgment. In my opinion, the proper construction of these provisions is as follows. The default position is that any term of imprisonment passed on someone by a court has to be served concurrently with any sentence of imprisonment he is currently serving. There are two situations in which the default position must or may be disapplied. It *must* be disapplied in any of the five circumstances set out in section 22(2). That is the effect of the opening words of section 22(1) – "Subject to sub-section (2) ..." – and the opening words of section 22(2) – "Sub-section (1) does not apply ..." In addition, though, even in a case which does not come within any of the five circumstances set out in section 22(2), the default position *may* be disapplied. That is the effect of the words "unless otherwise directed by the Court" in section 22(1).

[42] Applying that to the present case, section 22(2) did not require the magistrate to disapply the default position. The only relevant circumstance of those set out in section 22(2) would have been that Vaqewa was a habitual offender. But the magistrate did not have the power to declare him to be a habitual offender because only a judge can do that: see, for example, **Alik Harry v The State** [2014] HAA 5 of 2014 which was referred to in Vaqewa's counsel's written submissions to the Court of Appeal. Accordingly, the Magistrate must have decided to disapply the default position pursuant to his power to do so in section 22(1). As the Chief Justice noted in para 30 of his judgment, the magistrate did not give any reasons for doing that. I agree with the Chief Justice that there was no legal requirement on him to do that, but best practice makes the giving of reasons highly desirable, and I hope that magistrates will do so in every case.

### **Calanchini J**

[43] I have read in draft the judgment and proposed orders of Gates P and the concurring judgment with further observations of Keith J. With both I am in agreement.



.....  
Hon. Justice Anthony Gates  
**President of the Supreme Court**



.....  
Hon. Justice Brian Keith  
**Justice of the Supreme Court**



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Hon. Justice William Calanchini  
**Justice of the Supreme Court**

Solicitors for the Petitioner:  
Solicitors for the Respondent:

In Person  
Office of the Director of Public Prosecutions

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