

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE MAGISTRATES COURT
Exercising extended jurisdiction

CRIMINAL APPEAL AAU 32 OF 2016
(Magistrates Court No.388 of 2015 at Lautoka)

BETWEEN : **BAINIVALU TUIMATAVESI**
Appellant

AND : **THE STATE**
Respondent

Coram : **Calanchini P**

Counsel : **Mr T Lee with Ms L David for the Appellant**
Mr S Babitu for the Respondent

Date of Hearing : **20 November 2018**

Date of Ruling : **18 December 2018**

RULING

[1] The appellant was convicted on his plea of guilty in the Magistrates Court at Lautoka exercising extended jurisdiction on one count of aggravated robbery, one count of theft, one count of abduction, one count of driving without a licence and one count of driving a vehicle without third party insurance. In addition the appellant together with Lemeki

Tupati was convicted on his plea of guilty on one count of escaping from lawful custody. On 21 March 2016 the appellant was sentenced to 10 years imprisonment with a non-parole term of 9 years in respect of all the offences for which the appellant was convicted.

[2] This is his timely application for leave to appeal against conviction and sentence pursuant to section 21(1) (b) and (c) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives single judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable and the test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion: Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.

[3] The grounds of appeal against conviction are:

“That the guilty plea was equivocal in that:-

- (i) the guilty plea was taken without any legal advice and assistance;*
- (ii) the lack of knowledge to understand the consequences of pleading guilty;*
- (iii) the guilty plea was not voluntarily made or given.”*

[4] The grounds of appeal against sentence are:

- “(i) That the learned sentencing Magistrate erred in law to enhance the sentence by 5 years to reflect aggravating features;*
- (ii) That the learned sentencing Magistrate erred in law by discounting the sentence by one third for the early guilty plea;*
- (iii) That the learned sentencing Magistrate erred in law in choosing a non-parole period that is close to the head sentence.”*

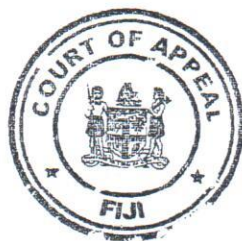
[5] The one ground of appeal against conviction relates to the guilty plea entered by the appellant. He was certainly unrepresented in the Magistrates Court. Whether the procedure concerning the right to Counsel and the procedure for a guilty plea were

explained so as to ensure fairness to the appellant can only be determined by reference to the appeal record. The issue is arguable and leave is granted.

- [6] As for the sentence appeal, it is arguable that the learned Magistrate has not explained adequately what factors he considered in enhancing the sentence for aggravating robbery by 5 years. It is also arguable that the discount for the plea of guilty was not an appropriate discount. However the issue of the non-parole period is not a proper ground of appeal against sentence, see **Turagakece -v- The State** [2018] FJCA 142, AAU 85 of 2014, 4 October 2018.

Orders:

1. *Leave to appeal against conviction is granted*
2. *Leave to appeal against sentence on grounds 1 and 2 is granted.*
3. *Appeal against sentence on ground 3 is dismissed under section 35(2) of the Act.*



W. Calanchini

Hon Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL