

IN THE COURT OF APPEAL
AT SUVA, FIJI

CRIMINAL JURISDICTION

[MISC. ACTION NO. 05 of 2010]

BETWEEN : **RATU INOKE TAKIVEIKATA**
APPLICANT

AND : **STATE**
RESPONDENT

COUNSEL : **A. NACO for the Applicant**
: **D. TOGANIVALU for the Respondent**

DATE OF

HEARING and RULING : 9th June 2010

**RULING ON APPLICATION FOR LEAVE
TO APPEAL OUT OF TIME**

- [1] On the 5th of March 2010 the applicant and seven others were convicted in the High Court at Suva on one count of conspiracy to murder, contrary to Section 217 of the Penal Code, Chapter 17, Laws of Fiji. The maximum sentence for this offence is fourteen years imprisonment.
- [2] The applicant was sentenced to seven years imprisonment.

[3] On the 8th of April 2010 he filed a Notice of Motion seeking an order that the time for bringing an appeal against the decision of the High Court delivered on the 5th of March 2010 be extended.

[4] The grounds on which the applicant seeks an extension of time are:

i) That Counsel for the applicant was under the mistaken belief that the time for lodging an appeal was 42 days and not 30 as required by the Court of Appeal Act.

Once he realized this he sought to immediately rectify the matter.

ii) Counsel for the applicant was already in contact with an overseas counsel and was awaiting further instructions before proceeding with the appeal application.

iii) The appeal has arguable points of law.

iv) The issue is of public importance.

v) There is no prejudice to the respondent.

[5] It is accepted by the parties, and this Court also finds, that the applicant lodged his notice five days out of time.

[6] Realistically and fairly in my judgment the application for leave to appeal out of time was not opposed by the respondent but in any event, even if it had been, I would have granted leave on the grounds that the reasons given for the late filing were reasonable and no prejudice has been suffered by the respondent.

THE GROUNDS OF APPEAL

[7] In written submissions, supported to-day by oral submissions from Mr. Naco for the applicant, it is submitted that the learned trial judge misdirected himself and the assessors on the issues of burden and standard of proof during his summing-up. It is said that there was no reference at all to the "beyond reasonable doubt" standard for the prosecution and the only reference the Trial Judge made to this was in paragraphs 10 and 11 of the Summing Up. It is submitted that in both these instances the Court referred only to the burden of proof being on the Prosecution but never made any reference to the required standard to be attained by the Prosecution.

[8] Mr. Naco directed my attention to paragraphs 10 and 11 of the summing up which I set out hereunder:

"[10]. In this case, as in every case in Fiji, the prosecution must prove that each defendant is guilty. He does not have to prove his innocence. In a criminal trial the burden of proving the defendant's guilt is on the prosecution.

[11]. How does the prosecution succeed in proving the defendant's guilt? The answer is - by making you sure of it. Nothing less will do. If after considering all the evidence you are sure that the defendant is guilty you must return a verdict of "Guilty". If you are not sure, your verdict must be "Not Guilty".

[9] In Fiji Judges in criminal trials when summing up the evidence frequently tell the assessors that the standard of proof always lies on the state and that is beyond reasonable doubt. Very often the Judge will then say to the assessors that this means that before they can convict the accused they must be sure of his guilt.

[10] I accepted this submission but since delivering my oral ruling I think it wise to refer to the remarks of Lord Goddard, C.J., speaking for the Court of Criminal Appeal consisting of himself and Ormerod and Parker J.J both the latter of whom as I recall eventually became members of the English Court of Appeal, in R. V. Summers, [1952] 1.ALL E.R. 1059 at 1060.

[11] In the last paragraph on p. 1060 Lord Goddard said this:

"I have never yet heard any court give a real definition of what is a "reasonable doubt", and it would be very much better if that expression was not used. Whenever a court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity. It is far better, instead of using the words "reasonable doubt" and then trying to say what is a reasonable doubt, to say to a jury" : "You must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed". The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt, and that it is their duty to regard the evidence and see if it satisfies them so that they can feel sure, when they give their verdict, that it is a right one."

[12] Thus it may well be argued that Mr. Justice Madigan was correct in not referring to the time-honoured phrase "beyond reasonable doubt" but simply saying as he did, that the assessors had to be sure of the defendants' guilt before they could return opinions of guilty.

[13] For these reasons and others given in paragraphs 14, 15 and 16 of the applicant's written submissions dated the 9th of June 2010 I consider that leave to appeal should be granted on these grounds also.

- [14] In paragraph 14 of the applicant's submissions, it is stated that much of the evidence given by the applicant at the trial was never challenged in cross-examination and there was no proper direction given to the assessors in respect of this unchallenged evidence.
- [15] Paragraph 15 of the submissions, refers to the training site as being right next to a cliff and creek making it impossible to train there which, it is said, was never raised by the learned trial judge in his summing up to the assessors.
- [16] Paragraph 16 of the submissions claims that the learned trial judge made reference to the impossibility of putting the plan into action as being irrelevant. It is submitted that this direction was crucial because it totally destroyed the defence that it was impossible to carry out the plan. In my view these are matters which should also go to the Full Court.
- [17] For these reasons I grant leave to appeal out of time and leave on questions of law being alleged misdirections of the trial judge.
- [18] The application is therefore granted.

Dated at Suva this 9th day of June 2010.



A handwritten signature in cursive script, reading 'John E. Byrne', is written over a dotted line.

JOHN E. BYRNE, Acting President

Fiji Court of Appeal