

**IN THE COURT OF APPEAL
AT SUVA**

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU 0057 OF 2011

BETWEEN : **IOWANE SALACAKAU**

APPLICANT

AND : **THE STATE**

RESPONDENT

COUNSEL : **Applicant in Person**

Mr. M. Korovou for Respondent

Date of Hearing : **25 June 2013**

Date of Ruling : **1 July 2013**

RULING

[1] This is an application for an extension of time for leave to appeal against sentence.

[2] The principles for an extension of time to appeal are settled. The Supreme Court in *Kumar v State; Sinu v State* [2012] FJSC 17;

CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

“Appellate courts examine five factors by way of a principled approach to such applications. These factors are:

- (i) The reason for the failure to file within time.
- (ii) The length of the delay.
- (iii) Whether there is a ground of merit justifying the appellate courts consideration.
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will the respondent be unfairly prejudiced?

[3] More recently, in *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009(24 April 2013), the Supreme Court confirmed the above principles and said at paragraph [21]:

These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.

[4] On 11 November 2010, the applicant was sentenced to a total term of 7 years’ imprisonment for 3 counts of robbery with violence and 1

count of unlawful use of motor vehicle, after he pleaded guilty to the charges in the High Court at Suva. The applicant was represented by counsel in the High Court.

[5] The applicant's notice for leave to appeal against sentence was received by the Court of Appeal Registry on 31 May 2011. Section 26(1) required the applicant to file his notice for leave within 30 days from 11 November 2010. The notice for leave to appeal is out of time by 5 ½ months. The applicant told this Court that he was unaware of the appeal period because he was a first time and a juvenile offender. He filed his notice without legal assistance.

[6] The applicant's main complaint is that his sentence is harsh and excessive for the following reasons:

1. He entered an early guilty plea;
2. He was a juvenile at the time he committed the offence;
3. He was a first time offender;
4. He had been in custody on remand for 10 months.

[7] The learned Judge approached sentencing as follows:-

8. The mitigating factors in your case were as follows:
 - (i) You pleaded guilty to the charges, four months after first call, and as result, you saved the court's time;
 - (ii) You are 18 years old, and this is your first conviction. However, this mitigation factor is somewhat "watered down" by the fact that you have five pending cases in the Magistrates Courts, that

is, Case File No. 1579/09 (robbery with violence etc.); Case File No. 974/09 (store room breaking, entering and larceny); Case File No. 1989/08 (burglary) and two other cases in the Juvenile Court.

- (iii) Your parents separated when you were 5 years old, and you reached Form 4 level education only;
- (iv) You have been remanded in custody since 11th January 2010, that is, 10 months;
- (v) None of the three “robbery with violence” complaints were seriously injured during the offence, although Stephen John Paul was bruised in the wrist and received cuts to his forearm and neck.

9. The aggravating factors were as follows:

- (i) You committed three “robbery with violence” within 24 hours, one in Stephen John Paul’s home, and two at different service stations in Walu Bay and Vivrass Plaza;
- (ii) By robbing 64 year old Stephen John Paul in his own home, at 8.45 pm, you showed utter disregard to his personal safety and his right to peaceful enjoyment of his home;
- (iii) By robbing the two service stations, you showed utter disregard for people’s right to earn their living honestly, and to serve the public peacefully;
- (iv) By offending in a group, you intimidated the complainants, and in the case of the two service stations, other members of the public;
- (v) Most of the stolen properties had not being recovered;
- (vi) You committed these offences, while you were on bail on five pending cases in the Magistrates Court [see mitigating factor (ii) in paragraph 8(ii) hereof];

(vii) By committing these serious offences, you have demonstrated your inability to live peacefully in the community, and your continued desire to take a free ride on the hard work of others.

10. On Count No.1, I start with a sentence of 6 years imprisonment. For the aggravating factors, I add 4 years, making a total of 10 years imprisonment. For the mitigating factors, I deduct 3 years, leaving a balance of 7 years imprisonment.

[8] The offences were committed on 6th and 7th January 2010. The applicant told the police in his caution interview and this court during the hearing that at the time of the offending, he was 17 years and 7 months old; his date of birth being 13 July 1992. At the time of the offending, section 2 of the Juveniles Act defined a juvenile as "a person who has not attained the age of seventeen years".

[9] However, on 18 March 2011, the Attorney General by Legal Notice appointed 27 June 2008 as the commencement date of the Prisons and Corrections Act 2006. Section 57 of the Prisons and Corrections Act contained an amendment to the Juveniles Act. Section 57 states:

(a) by deleting the definition of "juvenile" means a person who has not attained the age of 18 years, and includes a child and a young person; and

(b) by deleting the definition of "young person" and replacing it with the following : "young person" means a person who has attained the age of 14 years, but who has not attained the age of 18 years.

[10] The applicant's age was caught by the retrospective operation of the Prisons and Corrections Act 2006. But there are practical problems

with the retrospective application of the new juvenile age. At the time the applicant committed the offences, he was not a juvenile under the law. When the applicant was sentenced on 11 November 2010, he could not have been considered a juvenile because the new definition had not come into effect. However, if the applicant had been sentenced after 11 March 2011, the new definition would have applied to him.

- [11] Due to these practical problems Fernando J refused to give a retrospective operation to the new definition of a juvenile in a *voir dire* ruling delivered in *Joveci Naika v The State*; Criminal Case No. HAC 10 of 2010 (13 July 2011) at paragraph 10:

By 8th January 2010, on the date the caution interview was recorded and by 11/01/2010 on the date where the charge statement was recorded, as far as the Police Officers and general public were concerned, the age of a Juvenile was below 17 years of age, as the Commencement Notice backdating the commencement date was signed only on 18/3/2011 as stated above.

- [12] Whether or not the applicant was a juvenile at the time of the offending is an arguable point of law and fact. Furthermore, the manner in which the learned judge dealt with some of the mitigating factors and aggravating factors is arguable as well. However, for the purpose of an extension of time, it is not sufficient that the grounds of appeal are arguable. The grounds must be as such as to give rise to grave injustice if the appeal is not heard. Even if the grounds of appeal are upheld, it is not necessary the sentence will be reduced. The court has power to dismiss an appeal if satisfied that a correct

exercise of discretion would have yielded the same result as that reached by the sentencing court (*Saurara v State* [2008] FJSC 43; CAV0020.2007 (26 February 2008)). It is clear that the applicant went on a spree and robbed one victim in his home and two service stations in the company of others over a period of two days. A total sentence of 7 years' imprisonment for three separate incidents of robbery with violence fairly reflects the criminality involved. Since these were violent offences, the need to protect the community clearly outweighed the personal need for rehabilitation for the applicant who is a young and a first time offender.

[13] The grounds for an extension of time have not been made out.

The application is refused.

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DANIEL GOUNDAR

JUDGE

Solicitor:

Applicant in Person
Office of the Director of Public Prosecutions for Respondent.