

**IN THE COURT OF APPEAL**  
**AT SUVA**

**MISCELLANEOUS ACTION NO. 11 OF 2012**  
**(High Court Criminal Action No. HAC 15 of 2009)**

**BETWEEN** : **SALENDRA SEN SINHA**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Chandra RJA**

**Counsel** : **Appellant in person**  
**Mr. V. Perera for the Respondent**

**Date of Hearing** : **26 February 2014**

**Date of Ruling** : **26 March 2014**

**RULING**

1. This is an application for leave to appeal against sentence from a judgment of the High Court at Lautoka.
2. The Appellant was charged with 61 counts namely Larceny contrary to Sections 259(1) and 22(2), Forgery contrary to Section 341(1)(c), Obtaining Money by False Pretence contrary to Section 309(9), Uttering Forged Document contrary to Section 343(1), Obtaining Money on Forged Document contrary to Section 345(9) and Causing Payment

of Funds by virtue of a Forged document contrary to Section 345(9) being offences under the Penal Code.

3. The Appellant pleaded guilty to all 61 counts and was convicted and sentenced on 10 December 2010 to 5 years and 2 months imprisonment with a non-parole period of 4 years to be served consecutively with a sentence of imprisonment of 2 years with a non-parole period of 18 months given on 29 October 2010.
4. On 1 April 2011 the Appellant lodged a notice of motion seeking leave for enlargement of time to file notice of appeal in the Court of Appeal.
5. On 1<sup>st</sup> August 2011 the Appellant had filed amended grounds of conviction although he had pleaded guilty to the charges against him and had sought an enlargement of time to file notice of appeal against sentence.
6. On 17<sup>th</sup> May 2012 the Appellant had made an application for bail pending appeal.
7. When the case had been mentioned in Court on 25<sup>th</sup> July 2012 the Appellant who was represented by Counsel had stated that he was pursuing only the application for enlargement of time against sentence only. In respect of his application for bail pending appeal, he was required to serve the application within 7 days and to file written submissions. The Respondent too was required to file written submissions.
8. Written submissions were filed by the Appellant and the Respondent regarding the application for enlargement of time to file notice of appeal against sentence as well as the application for bail pending appeal.

***Application for enlargement of time to file notice of appeal against sentence***

9. Section 21 of the Court of Appeals Act provides that an application seeking leave from the Court of Appeal has to be filed within 30 days from the decision appealed against. An application seeking enlargement of time to file notice of appeal can be made to a single Judge in terms of Section 35(1)(b) of the Court of Appeal Act.
10. The application seeking enlargement of time has been made by the Appellant on 1 April 2011 which is after 3 months and 21 days after the sentencing judgment. The grounds of appeal against sentence are:
  - (1) That the sentence offends the totality principle.
  - (2) Concurrent and Consecutive Sentences.
  - (3) Time in custody before trial to be deducted.
11. The principles governing an application for extension of time to appeal as set out by the Supreme Court in **Sinu –v- State** [2012] FJSC 17; CAV0001.2009 (21 August 2012) 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?

12. The Appellant in his affidavit supporting his application has set out reasons relating to his inability to find sufficient funding to retain Counsel and that his relations are overseas and that he could not contact them in time to get their assistance. The explanations given do not seem to be substantial enough to grant his application and it would be necessary to consider whether there is any merit in the grounds of appeal. Further, it has been stated by the Court of Appeal in **Opeti Delana Koro –v- The State** Crim App. No.AAU0028 of 2008 that the general approach of the Court of Appeal has been to extend latitude up to three months beyond the 30 day appeal period. The delay in this case is about two and half months after the appealable period.
13. In **Gabriel Waqa –v- The State** Crim App. No.AAU 0062 of 2011 (18 January 2013) the Court of Appeal expressed the view that where there were arguable grounds of appeal enlargement of time can be granted where no prejudice is caused to the Respondent.
14. In **Kim Nam Bae –v- The State** 4 Criminal Appeal No.AAU015 of 1998S (26 February 1999) the Full Court stated:
- “It is well established law that before this Court can disturb the sentence, the Appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself.”*  
**(House –v- The King** (1936)55CLR 4990).
15. The first ground of appeal is that the sentence handed down to the Appellant offended the totality principle. The Appellant was charged with a multiplicity of offences numbering 61. In **Asaeli Vukitoga –v- State**, Criminal Appeal No.AAU 0049 of 2008 the totality principle was discussed in detail and according to that judgment where there is a

multiplicity of offences, and there are specific punishments in respect of them, it is necessary to take a last look at the total to see whether it looks wrong. The learned trial Judge has considered this aspect when sentencing the Appellant and therefore this ground lacks merit.

16. The second ground of appeal is regarding the concurrent and consecutive sentences as the learned trial Judge made the running of the sentence handed down to run consecutively to the sentence he was already serving. In Asaeli Vukitoga (Supra), the effect of Section 22(1) of the Sentencing and Penalties Decree, 2009 was considered and stated that in making a sentence consecutive to a sentence which is being currently served, the Court must make a reasoned justification for not making such sentences to run concurrently. The learned trial Judge has not made such a justification although he has mentioned the said provision in handing down the sentence. This would bring about an error of law for which leave is not required and would therefore justify the granting of enlargement of time.
17. The third ground is as regards the time spent in custody before trial to be deducted. The learned trial Judge stated that the appropriate discount had been given to the Appellant when he was sentenced in a prior case. The Appellant argues that the learned trial Judge erred in failing to consider the time that he spent in custody pending trial should have been taken into account by the learned trial Judge as it would apply to distinct matters also, for which time was spent in custody before trial. This is an arguable ground and therefore leave is granted.
18. As the Respondent in their written submissions have conceded that the second and third grounds are arguable no prejudice is caused by allowing enlargement of time for the Appellant to appeal against the sentence.

***Bail pending appeal***

19. Section 17(3) of the Bail Act lays down the guidelines regarding granting of bail to an Appellant and the considerations are:
20. (a) the likelihood of success in the appeal;
- (b) The likely time before the appeal hearing;
- (c) The proportion of the original sentence which will have been served by the applicant when the appeal is heard.

As stated in **Monika Arora –v- State** Criminal Appeal No.0001 of 2012 an Appellant seeking bail pending appeal faces a high threshold and would be granted bail only rarely and that too where there are exceptional circumstances.

21. The Appellant in the present case pleaded guilty to the charges and was convicted and sentenced thereafter. His appeal is against the sentence and specially regarding the question whether the sentences should have been consecutive to the sentence that he was already serving and the period he was in custody pending trial. The Appellant is not challenging the sentence on the basis of they being harsh and excessive so that the individual sentences for the various offences that he had been convicted of would remain.
22. The Appellant has further time to serve for him to be considered as being eligible for parole. The Court takes into account the fact that the Appellant was charged with 61 offences which involved taking money from quite a number of persons by giving false promises and the fact that he had pleaded guilty to all the offences. As stated above the likelihood of the success of his appeal is only as regards the question of whether the

sentences should be consecutive and the consideration of the time that he was in custody pending trial and not regarding the sentences imposed for the separate offences that he has been convicted of.

23. In view of the above position of these being no exceptional circumstances, the Appellant has not met the threshold required, and the application for bail pending appeal is refused.
24. In view of the possibility of his becoming eligible for parole in a short time, this appeal should be listed before the Full Court at the earliest possible session of the Court of Appeal.

#### **Orders of Court**

1. The application for enlargement of time to file notice of appeal against sentence is allowed.
2. The application for bail pending appeal is refused.
3. The appeal of the Appellant is to be listed before the Full Court of the Court of Appeal as early as possible.

Hon. Justice S. Chandra  
**Resident Justice of Appeal**