

IN THE COURT OF APPEAL OF FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO. AAU002 OF 2014
(High Court Criminal Case No. HAM083 of 2011)

BETWEEN : **KELEMEDI TURAGA** *Appellant*

AND : **THE STATE** *Respondent*

Before : The Hon. Justice Daniel Goundar

Counsel : Mr. M. Yunus for the Appellant
Mr. S. Babitu for the Respondent

Date of Hearing : 4 July 2016

Date of Ruling : 15 July 2016

RULING

[1] This is a second tier appeal pursuant to section 22 of the Court of Appeal Act, Cap. 12. Section 22 provides:

- (1) Any party to an appeal from a Magistrate's court to the High Court may appeal, under this Part, against the decision of the High court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only:
(Amended by 38 of 1998)

Provided that no appeal shall lie against the confirmation by the High Court of a verdict of acquittal by a Magistrate's court.

- (1A) No appeal under subsection (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground

- (a) That the sentence was an unlawful one or was passed in consequence of an error of law; or

- (b) That the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence.(Added by 38 of 1998)

[2] The appellant was sentenced to a total term of 10 years' imprisonment with a non-parole of 7 years for numerous burglary offences in the Magistrates' Court. He applied for an enlargement of time to appeal against that sentence in the High Court. The appeal to the High Court was late by 8 months. On 11 August 2011, the High Court refused an enlargement of time to appeal. It is from that refusal that this untimely appeal originates. This appeal is late by 2 years and 4 months. The length of the delay is considerable. The appellant explains the delay in paragraph [10] of his affidavit as follows:

- a) I am not a very educated person having studied up to class Form 5;
- b) I have had to seek assistance from my other inmates to write my appeal;
- c) The High Court had not given me any written ruling as a result I was not aware of what my next step would be which led to my filing of another appeal until the Judge informed me that I should appeal to the Court of Appeal and I was provided with the court minutes which is exhibited as "KT 1" at paragraph 7 of this affidavit;
- d) With the assistance of my fellow inmates I was able to get the written grounds of appeal drafted and forwarded it to the Corrections Reception Officer but later it was discovered that my document was lost so I was told to have it re written;
- e) Finally, I was able to get my grounds of appeal sent to the Court of Appeal Registry, however, by this time any lateness had exceeded 2 years.

[3] The court records confirm that the High Court dismissed the appellant's application for an enlargement of time to appeal against sentence without giving the appellant an opportunity to be heard and without reasons for the dismissal. As far as the current application is concerned, the issue is whether there is a question of law alone that will probably succeed?

[4] The grounds of appeal are as follows:

- 1) The Learned Appellate Judge erred in law when he dismissed the Applicant's application without hearing the Applicant contrary to Section 26(1) (a) of the Criminal Procedure Decree.
- 2) The Learned Appellate Judge erred in law when he failed to give a written ruling stating the reasons for the dismissal of the Applicant's application seeking leave to appeal out of time

contrary to Section 27 of the High Court Act Cap.13 (formerly Supreme Court Act Cap.13).

- 3) The Learned Trial Magistrate passed a sentence in consequence of an error of law after he failed to:
 - a) give appropriate discount for the Applicant's guilty plea although late in time;
 - b) given any discount for mitigation when it was obvious that the guilty plea by the Applicant was a show of remorse and that items worth \$8,000.00 had been recovered.
- 4) The Learned Trial Magistrate erred in law when he added the deprivation of stolen property by the victim as an aggravating factor.
- 5) The Learned Trial Magistrate passed a sentence in consequence of an error of law since the totality principle of sentencing has not been properly taken into account.


[5] I think grounds 1 and 2 raise a question of law alone that will probably succeed. The grounds concern construction of section 256 (1) (a) of the Criminal Procedure Decree and the legal requirement to give reasons for rulings and judgments in criminal matters.

[6] Grounds 3-5 concern merits of the appeal to the High Court. If the Full Court allows this appeal, the application for an enlargement of time to appeal against sentence will be remitted to the High Court for re-hearing.

Result

[7] Enlargement of time granted on grounds 1 and 2 only.




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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for Appellant
Office of the Director of Public Prosecutions for State