

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

Criminal Appeal No: AAU0014 of 2014
[High Court Case No. HAC30/09Ltk]

BETWEEN : EPELI ULUIKAVORO DRAU *Appellant*

AND : THE STATE *Respondent*

Coram : Hon. Mr. Justice Daniel Goundar

Counsel : Mr. J. Savou for the Appellant
Mr. M. Vosawale for the State

Date of Hearing : 27 July 2016

Date of Ruling : 5 August 2016

RULING

[1] Following a trial in the High Court, the appellant was convicted and sentenced to 12 years imprisonment with a non-parole period of 10 years for manslaughter of a 50-year old man. This is an application for an enlargement of time for leave to appeal against conviction and sentence. The factors to be considered 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? (*Kumar v State* unreported Cr. App. No. CAV0001 of 2009; 21 August 2012).

- [2] The appellant was sentenced on 26 March 2012. The 30-day statutory appeal period expired on 26 April 2012. The Notice of Appeal was filed on 24 April 2014. The appeal is late by 2 years. The length of the delay is substantial. The reasons for the delay are explained in the appellant's affidavit dated 16 March 2016. He states that he handed a timely Notice of Appeal to the Department of Corrections, but that Notice was inadvertently misplaced by the Department and not filed at the Court of Appeal Registry. In a letter to the Court of Appeal Registry, the Department of Corrections accepts that the appellant had handed a timely Notice of Appeal, which was misplaced by them. When the appellant learnt that his initial Notice was misplaced by the Department of Corrections, he filed the present application. I accept the reasons advanced by the appellant for the delay and I find that the appellant is not at fault for the delay. The question is whether the appeal is arguable.
- [3] The initial grounds of appeal were filed by the appellant in person. After he obtained legal representation, his counsel made no attempt to redraft the grounds with better clarity. However, at the leave hearing, three complaints were made against conviction and one against sentence.
- [4] The appellant was charged with one count each of manslaughter, robbery with violence and resisting arrest. At the close of the prosecution case, the appellant was acquitted on the robbery with violence and resisting arrest charges. The trial continued on the manslaughter charge. Counsel for the appellant submits that in paragraph 31 of the summing up, the learned trial judge made impermissible use of the evidence of robbery with violence to prove manslaughter, when the appellant had been acquitted of robbery with violence. Apart from using the evidence of robbery with violence in the summing up, the learned trial judge also sentenced the appellant on the basis that the victim was killed in the course of a robbery with violence. This issue regarding the use of evidence relating to an acquitted charge by the learned trial judge in his summing up and in his sentencing remarks is an arguable ground.

- [5] The second complaint relates to the inconsistency in the evidence of the alleged assault on the victim. I have read the summing up. I am not convinced that there was inconsistency in the evidence of the alleged assault. The issue was not inconsistency but credibility, that is, whether the witnesses told the truth when they said they saw the appellant assault the victim. The question of credibility was for the assessors and the trial judge. This ground is unarguable.
- [6] The third complaint relates to the conduct of the appellant's trial counsel and his failure to lead post mortem photographs of the deceased in evidence. The photographs did not exist. So there was no obligation to lead evidence that did not exist. After hearing the arguments, I am not satisfied that there is an arguable ground to suggest that the appellant's trial counsel acted contrary to the appellant's interests.
- [7] The sentence imposed on the appellant is on the higher end of the tariff for manslaughter. As I have said earlier, there is an arguable error in the sentencing discretion when the learned trial judge took into account an acquitted offence to punish the appellant for manslaughter. The State concedes the sentence appeal is arguable.

Result

- [8] Enlargement of time granted.
Leave granted.



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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