

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 72 OF 2014
(High Court No. HAM 2 of 2014)

BETWEEN : **JOSHUA BENJAMIN ROGERS**
Appellant

AND : **THE STATE**
Respondent

Coram : Basnayake JA
Almeida Guneratne JA
Prematilaka JA

Counsel : The Appellant in person
Mr. A. Jack for the Respondent

Date of Hearing : 11 September 2019

Date of Judgment : 3 October 2019

JUDGMENT

Basnayake JA

[1] This appeal is pursuant to an order made by a single Judge of the Court of Appeal on 5 December 2014 granting an extension of time to appeal. An extension of time was required due to the delay in filing this appeal.

- [2] The accused appellant (appellant) was charged *inter alia* in the Magistrate's Court of Nasinu (Case No. 395/2009) under section 293 (1) (b) of the Penal Code for the offence of robbery with violence. The appellant having consented to be tried in the Magistrate's Court, pleaded guilty on 23 July 2010. He was sentenced on 03 September 2010 for a term of seven (7) years imprisonment with a non-parole period of five (5) years.
- [3] The appellant appealed against the sentence to the High Court on a petition dated 21 November 2013 and received by court on 02 December 2013. The appellant admits that his petition of appeal to the High Court was late by 02 years, 2 months and 16 days. The learned High Court Judge on 30 January 2014 summarily dismissed this appeal without considering the merits on the ground of the delay in filing the appeal. The appellant filed an appeal in the Court of Appeal against the dismissal on 13 June 2014. The Court of Appeal on 05 December 2014 having observed that this appeal is based on a question of law, pursuant to section 22 of the Court of Appeal Act granted the appellant an extension of time. The question of law is whether the High Court has power to summarily dismiss an appeal without giving the appellant an opportunity to be heard.
- [4] The summary dismissal of appeal is laid down in section 251 of the Criminal Procedure Act (Cap 21) 2009.

Section 251 (1) When the High Court has received the petition of appeal and the record of the proceedings, a judge shall consider the petition.

(2) Where an appeal is brought on the grounds that-

(a) the decision is unreasonable; or

(b) the decision cannot be supported having regard to the evidence; or

(c) the sentence is excessive-

And it appears to the judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead to the opinion that the sentence ought to be reduced, the appeal may be summarily dismissed by an order of the judge certifying that the judge has perused the

record and is satisfied that the appeal has been lodged without any sufficient ground of complaint. (3) Whenever an appeal is summarily dismissed, notice of the dismissal shall be given by the Chief Registrar of the High Court to the appellant or the appellant's lawyer.

- [5] The appellant prays that this appeal be remitted to the High Court for a proper assessment to be done and the procedure to be followed according to law. The learned counsel appearing for the respondent too concedes that the learned High Court Judge has erred in law by purporting to summarily dismiss the appellant's appeal on the first call. The learned counsel submitted that the power to summarily dismiss the appeal pursuant to section 251 of the Criminal Procedure Act ends, once the appeal has been "*entered for appeal*" under section 252 of the same Act. In this case the appeal had already been 'entered for appeal' and listed for its first call and therefore it was no longer open to the learned High Court Judge to summarily dismiss the appeal. The learned counsel moves to remit this case to the High Court to properly determine the appellant's appeal in terms of section 256 of the Criminal Procedure Act.
- [6] A single Judge of this court has already granted an extension of time having considered the merits of this case and the fact that the question involved is one of law. Considering section 251 of the Criminal Procedure Act, I am of the view that the learned High Court Judge has erred in summarily dismissing this appeal. Therefore I set aside the order of dismissal dated 30 January 2014 and allow this appeal. Pursuant to section 22 (3) the Court of Appeal Act, I am of the view that this case should be remitted to the High Court.
- [7] As pointed out earlier, there was a delay of 02 years, 2 months and 16 days in the appellant's appeal to the High Court. Therefore, the High Court has to first consider whether it should enlarge the period of limitation prescribed by section 248(1) of the Criminal Procedure Code *i.e.* 28 days. For that the High Court has to consider whether there is a good cause shown by the appellant for the delay in terms of section 248(2) of the Criminal Procedure Code. Helpful guidelines for enlargement of time are given in

Kumar v State; Sinu v State CAV0001 of 2009; 21 August 2012 [2012] FJSC 17. The Supreme Court said in **Kumar; Sinu**

‘[4] *Appellate courts examine five factors by way of a principled approach to such applications. Those 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 court's 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?’*

[8] Shameem J said in **Beuka v The State** HAA0013D of 2002S: 14 May 2002 [2002] FJHC 110 “*that under section 310(1) of the Criminal Procedure Code, the High Court may enlarge the 28 day appeal period for good cause. Good cause includes a case where a question of law of unusual difficulty is involved, and where the Appellant has been unable to obtain a copy of the court record and in considering an application for leave to appeal out of time, a court generally considers the length of the delay, the reasons for the delay, whether the appeal has any prospects of success and whether an injustice will arise if leave is refused.*”

[9] Gounder J in **Nasigava v State** AAU039 of 2012; 6 June 2014 [2014] FJCA 103 held that

‘[3] *The right of appeal from the Magistrates' Court to the High Court is governed by the Criminal Procedure Decree. Section 246(1) provides for a right of appeal against conviction and sentence. Section 247 restricts appeals from guilty pleas to the extent, appropriateness or legality of the sentence. Section 248(1) states that the appeal should be filed in writing and within 28 days of the date of the decision appealed against. Section 248(2) gives the High Court discretion to extend the 28-day appeal period for good cause. Without imposing limitations, 'good cause' includes –*

- (a) *a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;*

(b) any case in which a question of law of unusual difficulty is involved;

(c) a case in which the sanction of the Director of Public Prosecutions or of the Commissioner of the Fiji Independent Commission Against Corruption is required by any law;

(d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents."

[4] For an enlargement of time to appeal, the courts further consider:

- the length and reasons for the delay,*
- any prejudice to the respondent, and*
- the merits of appeal.*

[5] The ultimate test for an enlargement of time is whether the appellant will suffer injustice if the appeal is not heard.'

[10] If the appellant passes the section 248(2) threshold in obtaining enlargement of time to appeal, then the High Court should act in terms of sections 252 to 255, as the case may be, and exercise powers vested in it by section 256 of the Criminal Procedure Code and any sections that follow in finally disposing of the appeal.

[11] It is clear that both the orders regarding the enlargement of time under section 248(2) and the final judgment in appeal under section 256 involve questions of fact and law and therefore the Court of Appeal has no jurisdiction to act under section 22(3) read with section 22(1) of the Court of Appeal Act on the issue of enlargement of time and the judgment in appeal. Therefore, this Court is left with the only alternative of remitting the case to the High Court under section 22(3) of the Court of Appeal Act for the determination of the said two matters.

Almeida Guneratne JA

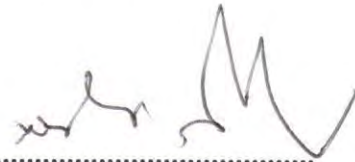
[12] I agree with Basnayake JA that, this case be sent back to the High Court for a hearing as set out in the Orders of Court.

Prematilaka JA

[13] I have read in draft the judgment of Basnayake JA and agree with reasons and orders proposed.

Orders of Court


1. *Appeal is allowed.*
2. *Order of dismissal dated 30 January 2014 of the High Court is set aside.*
3. *The case is remitted to the High Court*
 - (i) *to make a determination for enlargement of time under 248(2) of the Criminal Procedure Code and*
 - (ii) *to hear and dispose of the appeal under section 256 of the Criminal Procedure Code, if enlargement of time is granted.*
4. *The learned High Court Judge is directed to hear and conclude this case on priority basis.*



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Hon. Justice E. Basnayake
JUSTICE OF APPEAL



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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL



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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL