

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

CRIMINAL APPEAL NO. AAU 0101 OF 2018
(High Court HAC 47 of 2018 at Lautoka)

BETWEEN : DEEPAK VINSAN KRISHNA

Appellant

AND : THE STATE

Respondent

Coram : Calanchini, President
Chandra, JA
Rajasinghe, JA

Counsel : Ms. S. Nasedra for the Appellant
Mr. S. Vodokisolomone for the Respondent

Date of Hearing : 4 December 2018

Date of Judgment : 1 February 2019

J U D G M E N T

Calanchini, P

[1] I have read the draft judgment of Rajasinghe JA and agree that an enlargement of time should be granted. I also agree that the appeal should be dismissed.

Chandra, JA

[2] I agree with the reasons and conclusions in the draft judgment of Rajasinghe JA.

Rajasinghe, JA

Introduction

- [3] The Appellant had been charged in the Magistrates' Court with one count of Act with Intent to Cause Grievous Harm, contrary to Section 255 (a) of the Crimes Act. The Appellant was charged as a juvenile as he was seventeen years old at that time. The Appellant was represented by a counsel from the Legal Aid Commission during the proceedings in the Magistrates' Court. The Appellant pleaded guilty to the offence and admitted the summary of facts. Subsequently, the learned Magistrate in his Order dated 24th of August 2018, punished the Appellant to a detainment term of one year. The learned Magistrate has further ordered that the Appellant to serve six months of the said detainment period at the Juvenile Detainment Facility and remaining six months was suspended for two years. Moreover, the learned Magistrate had ordered that the Appellant to be given vocational training and education during the period of his detainment.
- [4] Aggrieved with the said punishment, the Appellant filed this Notice of Motion seeking following orders, *inter alia*;
- i) *An extension of time within which to appeal be granted to the Appellant,*
 - ii) *Leave to appeal be granted to the Appellant to appeal against his sentence/punishment,*
 - iii) *Bail be granted to the Appellant pending appeal on any such conditions that the court deems just,*
 - iv) *Any other orders that the Honorable Court deems just in the circumstances of this Application,*

- [5] The Notice of Motion is being accompanied by the Notice of Appeal against the sentence and an affidavit of the Appellant stating the grounds of this application of extension of time to file the Notice of Appeal. The ground of appeal against the sentence as stated in the Notice of Appeal is that:

“The learned Magistrate erred in law and fact when he failed to give due consideration to the education circumstances of the juvenile when considering the suitability of the punishment given hence resulting in a punishment that is harsh and excessive,

- [6] On the 22nd of October 2018, the learned counsel for the Appellant and the Respondent agreed to have the hearing of leave and the substantive appeal simultaneously. Accordingly, the hearing was fixed on the 4th of December 2018. Meanwhile, the parties were directed to file their respective written submissions, which they filed as per the directions. During the course of the hearing, the learned counsel for the Appellant and the Respondent made their respective oral arguments and submissions. Having carefully considered the respective written and oral submissions of the parties, I now proceed to pronounce the judgment as follows.

Extension of Time

- [7] The Appellant in his affidavit deposed that he was not able to file the Notice of Appeal within the stipulated period, as he had difficulties in communicating with his family and the lawyers of the Legal Aid Commission. Moreover, they were not certain about the correct forum of the Appeal. The Appellant states that these reasons caused this delay of two weeks in filing this application.
- [8] The learned counsel for the Appellant, in her submissions, submitted that the delay of two weeks is not a substantial delay. Moreover, the learned counsel stated that the Appellant has an arguable ground of appeal; therefore, the court should grant the Appellant the leave to file his appeal out of time.

[9] The learned counsel for the Respondent, in his written submissions, has not specifically stated whether he objects to this application to extend the time to file the notice of appeal. However, the learned counsel submitted that the excuses that the Appellant relies on for the delay is not valid. During the course of the hearing on the 4th of December 2018, the learned counsel for the Respondent conceded that the delay of two weeks is not a substantive delay.

[10] The Supreme Court of Fiji in Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012) found that the court should consider five factors in order to determine whether to extend the time to file an appeal, where Hon Chief Justice Gates held that:

“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?*

[11] The Appellant claims that he was brought to Suva for the detainment, where he had no opportunities to consult his lawyers. His family was in Ba and it was difficult for them to liaise with the lawyers. Moreover, they were confused about the correct forum of the appeal. Therefore, the Appellant failed to file his appeal on time. The delay is two weeks.

The Ground of Appeal

- [12] Having considered the reasons and the length of the delay, I now proceed to take into consideration the ground of appeal. The Appellant relies on one ground of appeal, which is based upon the contention that the sentence is harsh and excessive. This contention of harsh and excessive sentence is founded on the ground that the learned Magistrate failed to give due consideration to the educational circumstances of the Appellant.
- [13] The Fiji Court of Appeal in Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998 found that:
- “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 of the relevant considerations, then the appellate court may impose a different sentence.”*
- [14] The learned counsel for the Appellant submitted that the Appellant was preparing to sit for the Fiji Year 12 Certificate Examination that was scheduled to commence from the 29th of October 2018. Due to this punishment, the Appellant had to change the school and was unable to sit for the exam.
- [15] According to the order of the learned Magistrate the Appellant had stuck the victim, who was also a juvenile, with a razor blade and injured her neck. The injuries were serious.
- [16] Section 41 (1) (e) of the Constitution states that the detention of the child must be the last resort, where it states that:

i) *Every child has the right-*

e) *not to be detained, except as a measure of last resort and when detained, to be held-*

(i) *only for such period of time as is necessary; and*

(ii) *separate from adults, and in conditions that take account of the child's sex and age,*

[17] Section 31 (1) of the Juvenile Act has given the jurisdiction to the court to make an order of detainment on certain offences. Section 31 (1) of the Juvenile Act states that:

"Whereas juvenile is found of murder, or attempted murder, or of manslaughter, or of wounding with intent to do grievous bodily harm and the court is of the option that none of the other methods by which the case may legally be dealt with is suitable, the court may order the offender to be detained for such period as may be specified in the order, and where such an order has been made, the juvenile shall notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and on such conditions as the Minister may direct."

[18] Accordingly, the court can order a juvenile offender to be detained only to the offences of murder, attempted murder, manslaughter and wounding with intent to do grievous bodily harm. In order to issue such a detainment order, the court must have satisfied that other methods of the dealing with the juvenile offender in respect of the offence that he is found guilty are not suitable. In order to form such an opinion, the court has to take into consideration all the circumstances of the offending and also the interest of the juvenile offender.

[19] The offence that Appellant was charged in the Magistrates' Court is one of the four offences that has been stipulated under Section 31 (1) of the Juvenile Act. The learned Magistrate has properly taken into consideration the offending circumstances, including aggravating and mitigating factors. Having done that the learned Magistrate has

concluded that the offence was a serious offence and a specific and general deterrence is required in the punishment in order to protect the public interest and also the interest of justice. The learned Magistrate in paragraph 9 of his ruling states that:

"In my respectful opinion, the offending is serious and both a specific and general deterrent is required in the public interest. In light of Section 31 of the Juvenile Act, a detainment order would be appropriate in the circumstances of the case. I don't think the interest of justice would be met if the court adopts a lenient approach.

- [20] In view of the above paragraph, the learned Magistrate has taken into consideration all the circumstances of the offending and section 31 of the Juvenile Act, in order to reach his conclusion that a detainment order would be appropriate for this offending.
- [21] The main contention of the Appellant is that the learned Magistrate has failed to give due consideration to the educational circumstances of the juvenile.
- [22] In paragraph 18 of the Ruling, the learned Magistrate has taken into consideration the education circumstances of the Appellant and ordered that Appellant to be given vocational training and education during the period of detainment.
- [23] In view of these reasons, I do not find that the learned Magistrate has acted upon on wrong principle in the ruling. The learned Magistrate has taken into consideration all relevant facts and the provisions of the Juvenile Act, in reaching his conclusion.
- [24] Accordingly, I do not find any merit in the ground of appeal.
- [25] In conclusion, I grant leave to file the petition of appeal and dismiss the appeal.

[26] *The orders of the court are:*

1. *The leave is granted to file the notice of appeal out of time.*
2. *The Appeal is dismissed.*



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Hon. Mr. Justice W. Calanchini
PRESIDENT COURT OF APPEAL



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Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL



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Hon. Mr. Justice T. Rajasinghe
JUSTICE OF APPEAL