IN THE COURT OF APPEAL, FIJI
[On Appeal from the Magistrates Court]

CRIMINAL APPEAL NO.AAU 001 of 2017
[In the Magistrate's Court at Nausori Case No. CF462 of 2016]

BETWEEN	:	**THE STATE**
		Appellant
AND	:	**KAVNEEL KISHANT LAL**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. Y. Prasad for the Appellant**
		Mr. M. Fesaitu for the Respondent
Date of Hearing	:	**23 April 2020**
Date of Ruling	:	**28 April 2020**

RULING

[1] The respondent with another had been arraigned in the Magistrates Court of Labasa exercising extended jurisdiction on a single count of 'Act intended to Cause Grievous Harm' contrary to section 255 (a) of the Crimes Decree, 2009 committed on 06 July 2016 upon one Subramani unlawfully wounding him with a piece of timber at Lakena Hill, No.1, Nausori in the Central Division.

[2] The respondent had pleaded guilty to the charge, been convicted and sentenced on 22 September 2016 to 18 months of imprisonments (01 years and 06 months) suspended for 02 years.

[3] The appellant being dissatisfied with the sentence imposed on the respondent had filed an untimely notice of appeal containing four grounds of appeal on 03 January 2017 seeking to have the sentence quashed and another sentence ought to have been passed substituted therefor in terms of section 23(3) of the Court of Appeal Act along with a notice of application for extension of time within which to appeal and an affidavit explaining the delay of 03 months and 12 days.

[4] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. Therefore, the matter had been taken up for hearing on leave to appeal on 04 February 2020. However, due to the demise of Suresh Chandra RCJ the ruling could not be delivered. When the matter was called in court on 23 April 2020 both counsel agreed to have a ruling delivered by me on the written submissions already filed.

[5] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State**; **Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[6] In ***Kumar*** the Supreme Court held

> *'[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?*

[7] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

The length of the delay

[8] The delay of 03 months and 12 days is *per se* not enough to defeat the appellant's application.

The reason for the failure to file within time

[9] The reason given for the delay is that the Office of the DPP had to analyse the sentence and the sanction of the DPP had to be taken. The advice of the DPP had been completed on 06 October 2016 and his sanction had been obtained on 25 October (after a lapse of almost 20 days). The papers necessary for the appeal had been eventually filed on 03 January 2017. As pointed out by the respondent 70 days had passed since the DPP had granted sanction to appeal for the appeal papers to be filed in court and the explanation that it took since 25 October 70 days to take those steps to bring the appeal to this Court is unacceptable and in my view, reasonable diligence had not been shown by whoever was responsible in this regard. I conclude that there is no justifiable reason for the delay.

[10] The observations of Byrne J. in **Julien Miller v The State** AAU0076/07 (23 October 2007) that *'that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'* are equally applicable to the State as well. This court is not hesitant to take a similar view in appropriate cases to ensure that the process of court is not abused and judicial time is not wasted by unmeritorious and belated appeals, be they by the convicts or the State where due diligence in prosecuting an appeal had been demonstrably lacking.

Merits of the appeal

[11] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see ***R v Miller*** *[2002] QCA 56 (1 March 2002) on any of the grounds of appeal.....'*

[12] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

Grounds of appeal

1. *'THAT the learned Magistrate did not consider aggravating circumstances of the case such as the use of a timber as a weapon in the sentence, including the injuries suffered by the victim in this case, which was noted in the Medical Report of the victim and the manner in which the victim was attacked by the Respondent.*

2. *'That there were no proper and lawful reasons in the sentence for the learned Magistrate to suspend the sentence of the Respondent.'*

3. *'That the learned Magistrate incorrectly arrived at the final sentence after a starting point of 24 months and deducting 08 months for mitigating factors. The sentence was supposed to be 16 months imprisonment instead of 18 months imprisonment.'*

4. *That the aforesaid sentence passed on the Respondent is manifestly lenient having regards to all the circumstances of the case.'*

[13] However, when filing written submissions the appellant had stated only the first, second and fourth grounds of appeal and in the body of the written submissions, the counsel for the appellant had dealt with only the second ground of appeal.

01st ground of appeal

[14] In **State v Mokubula** [2003] FJHC 164; HAA0052J.2003S (23 December 2003) Shameem J. examined previous cases and declared as follows regarding applicable tariff for sentences under section 224 of the Penal Code which is similar to section 255 of the Crimes Act, 2009.

> *'On the basis of these authorities,* ***the tariff for sentences under section 224 of the Penal Code, is between 6 months imprisonment to 5 years imprisonment****. In a case of an attack by a weapon, the starting point should range from 2 years imprisonment to 5 years, depending on the nature of the weapon. Aggravating factors would be:*
>
> *1.Seriousness of the injuries;*
> *2.Evidence of premeditation or planning;*
> *3.Length and nature of the attack;*
> *4.Special vulnerability of the victim;*
>
> *Mitigating factors would be:*
>
> *1.Previous good character;*
> *2.Guilty plea;*
> *3.Provocation by the victim;*
> *4.Apology, reparation or compensation.*

[15] Gounder J in **State v Kumar** [2011] FJHC 379; HAC039.2011 (12 July 2011) affirmed ***Mokubula*** guidelines in the following terms.

> *'[12] The most helpful guideline case for the offence of intent to cause grievous harm is the decision of Shameem J in* ***State v Mokubula*** *[2003] FJHC 164. In that case, Shameem J held that the tariff for act with intent to cause grievous harm is between 6 months to 5 years imprisonment, and that in case of an attack by a weapon, the starting point should range from 2 years imprisonment to 5 years, depending on the nature of the weapon.*

[16] In **State v Vakalaca** HAC027 of 2018: 31 May 2018 [2018] FJHC 455 Gounder J once again said

> *'[13] The offence of Act with Intent to Cause Grievous Harm is punishable by discretionary life imprisonment. The tariff for this offence is between 6 months imprisonment to 5 years imprisonment, and in cases where a weapon is used, the starting point should range from 2 years imprisonment to 5 years, depending on the nature of the weapon (State v Mokubula* [2003] FJHC 164; *HAA0052J.2003S (23 December 2003).'*

[17] Thus, ***Mokubula*** provide general sentencing guidance that tariff for cases under section 255 of the Crimes Act, 2009 committed by any means other than a weapon, is between 6 months to 5 years of imprisonment but if the attack is by a weapon the starting point should range from 02 to 05 years which means that the final sentence could be over 05 years depending on the nature of the weapon and other aggravating circumstances. As stated by the Court of Appeal in **Vosa v State** [2019] FJCA 89; AAU0084.2015 (6 June 2019) the list aggravating and mitigating circumstances set out in ***Mokubula*** is not exhaustive.

[18] In **State v Rabia** HAC074 of 2011: 22 February 2012 [2012] FJHC 877 the nature of the injuries to the first complainant was very serious and his hand was severed as a result of the accused striking with the cane knife when the victim was 3 months pregnant. Her head was also injured where large amount of tissues were cut. The trial judge referred to ***Mokubula*** but imposed a sentence of 06 ½ years with a non-parole period of 05 years after taking 05 years as the starting point.

[19] In **State v Tuigulagula** HAC031of 2010: 15 March 2011 [2011] FJHC 163 where the offence under section 255(a) involved domestic violence in which the victim was left with only a thumb on each hand, had injuries to her scalp and had been traumatized by the attack and the High Court started with a starting point of 06 years and imposed 06 years of imprisonment on the accused and stated as follows. (The Court of Appeal refused leave to appeal against the sentence in **Tuigulagula v State** AAU0070 of 2011: 21 March 2012 [2012] FJCA 18.)

[20] In **State v Nalulu** [2013] FJHC 358; HAC 155.2010 (23 July 2013) is another example where a starting point of 06 years of imprisonment was taken ending up with a final sentence of 08 years given the seriousness of the circumstances surrounding the offence. It was held in ***Nalulu***

> *'[19] The maximum penalty for act with intent to cause grievous harm contrary to Section 255(a) of the Crimes Decree 2009 is life imprisonment. Despite the accepted tariff being between 6 months and 5 years (as set by Shameem J in Mokubula (2003) FJHC 164) much higher sentences have been passed when the circumstances dictate. In Tuigulagula HAC 81 of 2010 this Court passed a sentence of six years on a husband who did very serious harm to his wife. The penalty being life imprisonment, it is to be regarded as a very serious offence indeed and sentences of up to 8 years would not be out of order.'*

[21] Thus, it appears that while ***Mokubula*** still holds true as standard guidelines, a starting point above 05 years resulting in a final sentence of 5 years of imprisonment or more would be in order and may indeed be necessary where the gravity of an offence under section 255 of the Crimes Act so warrants. Similarly, in my view, there can be situations where no weapon is used in the attack but the other aggravating circumstances are so serious as to depart from the usual tariff of 6 months to 5 years of imprisonment. The converse also may be true if the mitigating circumstances are so compelling as to demand and justify a lenient sentence. This is mainly due to the fact that the discretionary range in the matter of sentence for an offence under section 255 of the Crimes Act is very wide stretching up to imprisonment of life.

[22] Be that as it may, the law as it stands at present any sentence could be suspended in appropriate circumstances in terms of section 26 (1) of the Sentencing and Penalties Act 2009 subject only to the limitations set out in section 26 (2).

[23] In **State v Khan** [2019] FJCA 181; AAU139.2017 (3 October 2019) Calanchini PA said of suspended sentences currently applicable as follows

> "[5] The power of the court to suspend a sentence of imprisonment is found in section 26(1) of the Sentencing and Penalties Act 2009 (the Sentencing Act) which states:

"On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances."

"[6] The discretion to impose a suspended is wide in its terms and there are no further guidelines in the section to assist a court to determine under what circumstances it may be appropriate to suspend a sentence. The only assistance that is provided in the legislation is section 26(2) which states that:

"A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceedings for more than one offence:-

"(a) Does not exceed 3 years in the case of the High Court; or

(b) Does not exceed 2 years in the case of the Magistrates Court."

[24] The appellant argues that the Magistrate had not considered the aggravating circumstances including the weapon *i.e.* a piece of timber and the injuries suffered by the victim including the medical report and the manner in which the respondent had attacked the victim.

[25] It is true that the learned Magistrate had not specifically referred to aggravating circumstances in the sentencing order. Nevertheless, he had referred to the statement of facts admitted by the respondent. He had cited the tariff range from suspended sentences to 4-5 years of imprisonment by quoting the following passage from **State v Chand** [2011] FJHC 19; HAC07.2011 (27 January 2011)

*'[12] The maximum penalty for the offence of act with intent to cause grievous harm is imprisonment for life. This is an offence relatively new to the jurisdiction, introduced by the Crimes Decree 2009 on February 1st, 2010. Until a body of sentencing authorities is secured, it is helpful to rely on the analogous section 224 of the old Penal Code, the offence of an act intended to cause grievous harm. It was established in **Viliame Cavubati** – HAA 80 of 2001 by Shameem J. that the accepted tariff for this offence should range from a suspended sentence through to 2 ½ years. This Court said in **Amasi Korovata** – HAC 11 of 2009 that the range now should extend up to 4 to 5 years.'*

[26] However, the learned trial judge does not appear to have been mindful of ***Mokubula*** and subsequent decisions affirming ***Mokubula***. Yet, the starting point of 02 years is in accord with ***Mokubula*** tariff guidelines. The learned Magistrate had taken 24 months (02 years) of imprisonment as the starting point and allowed discounts for the earliest guilty plea, the fact that the respondent had been a first offender and remorseful and reduced 08 months. He had specifically referred to the fact that the respondent had reacted after catching the victim peeping at the respondent's mother inside the house.

[27] Having been obviously under the impression that the tariff range was from suspended sentences to 4-5 years of imprisonment, the Magistrate had selected 02 years as the starting point and it can be safely assumed that he had done so having considered aggravating circumstances set out in the statement of facts submitted by the prosecution.

[28] Thus, the first ground of appeal does not reach the threshold of 'real prospect of success'.

02nd ground of appeal

[29] Then, he had stated as follows in suspending the sentence of 18 months (it should have been 16 months) for 02 years.

> *'The Court has carefully weighed all the information that is before it and the situation leading to the action of the accused person. It has noted the guilty plea of the accused person, previous good character and the circumstances of the offending and for this reason the court will suspend the sentence of the accused person. The 18 months imprisonment term is suspended for 02 years. The accused is explained the meaning of suspended sentence in open Court.'*

[30] Therefore, the learned Magistrate has given reason why he is satisfied that it is appropriate to suspend the custodial sentence in the circumstances enumerated above as permitted by section 26 (1) of the Sentencing and Penalties Act 2009. Thus, there is no real prospect of success in this ground as well.

04rd ground of appeal

[31] The appellant also contends that the sentence is manifestly lenient having regard to all the circumstances of the case.

[32] The appellate courts have taken the view that in the matter of sentence appeals it would not necessarily interfere merely because there is a perceived inadequacy in the sentence unless it is manifestly lenient as to warrant its intervention (see **Drotini v The State** AAU0001 of 2005S:24 March 2006 [2006] FJCA 26 and **State v Din** [2019] FJCA 200: AAU41.2012 (3 October 2019) and the quantum of the sentence alone can rarely be a ground for an intervention in appeal (see **Raj v State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12 and **State v Laveta** [2019] FJCA 258; AAU65.2013 (28 November 2019)]. Similarly the appellate courts would not interfere with a sentence because it is at a high level but not so excessive as to justify its reduction [vide **Buli v State** [2001] FJLawRp 43; [2001] 1 FLR 202 (24 May 2001].

[33] The sentence of 18 months cannot be considered to be so manifestly lenient as to warrant the intervention of this court in all the circumstances of this case. Therefore, I conclude that there is no real prospect of success in the 04th ground of appeal too.

[34] The counsel for the respondent submitted that the period of suspension of the custodial sentence imposed on the respondent has lapsed and there is nothing to indicate that the appellant has reoffended since then.

[35] Accordingly, enlargement of time to appeal against sentence is refused.

Order

1. Enlargement of time to appeal against sentence is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL