

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

CRIMINAL APPEAL NO. AAU 081 of 2023
[Suva High Court Case No. HAC 237 of 2022]

BETWEEN : **BHARTI ARCHANA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Qetaki, RJA**

Counsel : **Mr M. Tuifagalele for the Appellant**
: **Ms. B. Kantharia for the Respondent**

Date of Hearing : **24th January, 2025**

Date of Ruling : **28th February, 2025**

RULING

Background

[1] The Appellant filed a Notice of Motion for leave to appeal out time with a supporting affidavit on 9th October 2023, seeking the following orders:

1. *An extension of time within which to appeal against sentence be granted to the Applicant;*
2. *Leave be granted to the Applicant to file her amended application for leave to appeal against her sentence;*

3. *Any other orders the Honourable Court deems just in the circumstances of this application.*

[2] The Appellant was convicted with two others by the High Court on a charge of Aggravated Robbery contrary to section 311(1) (a) of the Crimes Act 2009 on 31st January 2023. She was sentenced to four (4) years and six (6) months imprisonment, with a non-parole period of 4 years on 28th July 2023. The Appellant was given thirty (30) days to appeal the decision to this Court, but she was late.

[3] The Appellant filed her application out of time on 9th October 2023 which was nearly one (1) month and three (3) days over the 30 days out of time.

[4] In her Affidavit in Support, the Appellant states:

- “5. *I have given instructions to one of my family friends to hire a solicitor which he did, and I would like to apologise for my late appeal.*
6. *I was represented at the High Court by Ms. Prakash but now I have instructed Tuifagalele Legal and also indicated to them that I wanted to file an appeal against my conviction.*
7. *In fact, all my disclosures as well as my sentence were also kept by my former lawyer and a timely conviction appeal could have been filed on time had my current solicitor have my file with them.*
8. *I know that I am more than (20) late in lodging my appeal against conviction, but I still desire to appeal against my conviction.*
9. *My present solicitor after perusing my file has drafted my grounds of appeal.....*
10. *I am verily informed that the grounds of appeal are meritorious and probably succeed in the Court of Appeal.*
11. *I would like to state that if I am allowed leave to appeal out of time to file this application, there will be no prejudice caused to the State hence it will not be affected in the prosecution of this case.”*

Grounds of Appeal

[5] The Appellants proposed grounds of appeal are:

- i. *That the learned Judge erred in law and in facts by imposing a harsh and excessive sentence as the Applicant played a minor role in the execution of the offence.*
- ii. *That the learned Judge erred in law and in facts by imposing a harsh sentence given the Applicant's role in the execution of the crime and the starting sentencing point should have commenced from the floor margin at least around 4 years.*
- iii. *That the learned Judge erred in law and in fact by giving less weight and consideration to the Applicant in her mitigation as a mother of a 4 months old child.*

The Law

[6] The law on appeals out of time is governed by the following factors set out in **Kumar v State, Sinu v The State** [2012] FJSC 17 Criminal Appeal No. 0001 of 2009 (21st August 2012):

- (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) *Whether 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] In considering the merits of the appeal, the test is whether the ground is arguable or has merit.

Case for the Appellant

[8] The Appellant had earlier submitted written submissions filed on 16 April 2024, which Counsel relied on at the hearing. She argues that the discretion whether to grant

enlargement of time usually applies where the date of filing is less than three months late. However, when it is more than three months, the Appellant has to convince the court that the grounds of appeal have merit and a reasonable chance of success.

[9] The Appellant submits that the 30 day time limit to a High Court appeal is indirectly discriminatory against a prisoner who is incarcerated and does not have access to facilities to assist him in seeking an appeal, as opposed to those who are not imprisoned. This point was commented upon in Tubuitamana v State (unreported), Criminal Appeal No.AAU001/08, where Justice Scutt, at paragraph 4.10 on page 7 of the judgment stated:

“Indirect discrimination would or could apply as follows. Section 26 (Court of Appeal Act Cap 12) is neutral on its face: It does not identify any particular group or characteristic; rather the 30 day time limit applies to ‘all comers’ wishing to appeal. However, it impacts differentially or disparately against persons who are incarcerated, because (as noted) they do not have the same freedom as persons outside prison in obtaining writing materials, obtaining stamps, gaining access to mailing boxes, or gaining access to roadways, taxis, buses or other vehicles to travel in person to the Registry of the Court of Appeal to deliver an appeal document or an application, or being able to call up another person of their choice to undertake delivery for them. Persons in prison are, unlike persons outside prison, dependent on others to carry out their wish to have a document (in this case, an application or appeal notice) transmitted to the relevant authority.”

[10] At paragraph 4.20 of the same judgment, Justice Scutt goes on to say:

“At the same time, subjecting a person who is imprisoned to a time limit identical with the time limit imposed upon persons who are “out” in the free world may be said to be unreasonable. No doubt it may be argued that the Court of Appeal’s capacity to extend time under section 35 deals with the problem adequately. That is, the Court of Appeal would take into account the fact that the person making the application is a prisoner, or was at the time the application or appeal was sought to be filed. Hence, the 30 day time limit does not discriminate against incarcerated people. (Although this does not address the problem earlier adverted to of rights being dependent upon the exercise of discretion.”

[11] The Appellant submitted that further guidance for the determination of an application for leave to appeal may be filed, is given in decisions in Rasaku v State CAV0009,0013 of 2009; 24 April 2013[2013] FJSC and Kumar v State; Sinu v State CAV0001 of 2009; 21 August 2012 [2012] FJSC. The major factors to be considered for enlargement of time are as follows:

- (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) *Whether 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?*

[12] On Sentencing, the Appellant relied on the written submissions filed on 30th July 2024. It is submitted that 7 years was the appropriate starting point for the Appellant which was the high range of the applicable tariff for committing aggravated robbery with others.

[13] That the Appellant's cognizance is that the learned judge had considered that 2 and half years was the appropriate discount given for her mitigating factors. The Appellant alternatively submits that the early guilty plea and no previous conviction ought to be separately and clearly discounted for. That in Ourai v State [2015] FJSC 15; CAV24.2014 (20 August 2015), the Court was of the view that it was good practise to specify clearly the value of each discount as per the following:

“[53] Although section 4 (2) (j) of the Sentencing and Penalties Act require the High Court Judge to have regard to the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence, there is no requirement that in any case where there are several mitigating circumstances, each one of them should be dealt with separately. While therefore, the failure to separately deal with each of the mitigating circumstances would not nullify the sentence, it goes without saying that it is a good sentencing practice to specify clearly the value of each discount when allowing for such matters as pleas of guilty, clear record, time and remand and the like, without clamping together all the mitigating factors and specifying one discount, as it happened in this case. The victim, the convict, counsel, appellate courts as well as the public can then readily comprehend the various

components of a sentence and sentence appeals and public criticism of judicial process could be prevented.”(Underlining is the Appellant’s).

[14] The Appellant submits that she had pleaded guilty at the earliest stage thus showing to be genuinely remorseful. Therefore, a more appropriate discount specifically for this fact should have been considered by the learned judge.

[15] The appellant has no previous conviction, and submits that the learned trial judge should consider reducing her sentence further. The appellant’s contention is that this is her first case in the offence of aggravated robbery and therefore, the learned judge erred in principle by not giving any discount to this fact.

Case for the Respondent

[16] The Respondent submits that the Appellant failed to provide cogent reasons for the delay and in fact the Appellant’s reasons are contradictory. In the Affidavit In Support filed on 9 October 2023, at paragraph 7, the Appellant said that should her former counsel (LAC) had given her file on time to her current counsel, the appeal would have been filed on time. In the Affidavit in Support filed on 16/4/ 24, at paragraphs 4 and 6 the Appellant said that the late submission was due to her engaging the services of a private counsel which she could not do on time and that she instructed her family to hire a solicitor for her. The reasons provided by the Appellant are not plausible, and “*lack a sufficiently satisfactory explanation*”.

[17] The Respondent states that though the delay was not substantial, the reasons for the delay provided by the Appellant is simply inadequate and the grounds are not meritorious.

[18] Enlargement of time must be reserved for those who show genuine “*good cause*” and have merits in their appeal. The appeal grounds have no merit. Despite the late submission of the leave to appeal application, the court must also consider if there is a ground of appeal that will probably succeed.

- [19] On the merits, and in response to grounds (i) and (ii), which are interrelated, the Respondent says that the sentence was very lenient. The trial judge had applied **Wise v State** [2015] FJSC 7; CAV0004.2015 where the sentencing tariff was set at 8-16 years imprisonment for aggravated robbery in a situation where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery.
- [20] That the trial judge erred by “*acting upon a wrong principle*” in sentencing the Appellant: **Kim Nam Bae** (supra). He was lenient compared to the sentence given to the co-accused who were in joint enterprise with the Appellant. Both of them were sentenced to 5 years and 4 months and 4 years and 6 months respectively. The starting point for the accused was 7 years imprisonment. It is submitted that since all the accused participated in planning and executing the robbery together, under the principle of joint enterprise, they should be equally treated, and the starting point should be the same.
- [21] That the Appellant’s sentence, if **Wise** is followed, should have been harsher than the current sentence, as in this case, one of the victims was elderly aged 61 years, and the other vulnerable, a young girl of 19 years, both of whom were defenceless from the attack committed upon co-accused. Although the injuries received were not grievous as in **Wise’s** case, the fear instilled on the inmates and the manner in which the victims were dragged and handled by the intruders were similar..
- [22] With respect to ground (iii), the Respondent submits that the trial Judge had taken into consideration the fact that the Appellant was a mother of a 4 months old child. In paragraph 9 of the sentence, the trial Judge stated:

“In mitigation for Bharti Archana, your counsel informs this court that you are a primary caregiver to your 4 months old child. In recognising the need of the presence of the mother for the growth of a very young child, I reduce your sentence by one (01) year.”

[23] The Respondent concludes by submitting that there is no prospect of success in the ground of appeal.

Analysis

[24] I have carefully analysed and considered the submissions by the Appellant and the Respondent. Both parties agree that the application for leave to appeal was late. The Respondent's contention is that the reasons for the delay are unsatisfactory and confusing. The Appellant, it appears, has attempted to rely on the principle of equal treatment before the law, to support his case, by raising the possible different treatment of a prisoner who is incarcerated and who does not have access to facilities to assist him/her in seeking an appeal, as opposed to those who are not imprisoned, in the context of **Tubuitamana v State** (supra). This is an appeal under section 22 of the Court of Appeal Act, where Scutt, JA determined, on the facts, that the application is wrongly characterised as an application for leave out of time. She stated at paragraph 8

“.....In my opinion the fact that he wrote his letter or petition well within time and its delivery in the ordinary course would have brought it well within the 30 days' time limit means that he has an appeal to the Court of Appeal as of right under section 22 of the Court of Appeal Act.”

[25] In oral submissions, counsel for the Appellant had emphasised the difficulties and practical issues that the Appellant faced, in trying to contain relevant materials a, record and information, in order that she may file her application for leave to appeal, and which has led to the delay. However, the facts and circumstances of the present appeal and the situation that was presented before Scutt, JA appear to be different in some respects, especially, on the reasons stated by the Appellant in this case as the cause of the delay. In that case, the Appellant had done his part, within time and the prison authorities were held responsible for not communicating or transmitting the appeal papers to the Court within time.

[26] Whether there is a ground of merit justifying the appellate court's consideration and whether there has been a substantial delay, nonetheless there is a ground of appeal that will probably succeed? In relation to grounds (i) and (ii), the Respondent has tried to demonstrate that the sentence given the Appellant is not harsh and excessive. Indeed it is argued that the sentence is lenient, given the facts and circumstances of the case. The Respondent went further, and submits that the trial Judge had erred in law, and had "*acted upon a wrong principle*": **Kim Nam Bae**.

[27] On the other hand, the Appellant had specifically raised the ground of harshness and excessive sentence in the context of the trial Judge's consideration of the mitigating factors and in the itemisation and allocation of reduction of the Head sentence to properly reflect each mitigating factor/item. For instance, the Appellant submits that:

- (a) The Appellant had pleaded guilty at the earliest stage, showing genuine remorse, and there could be "*a more appropriate discount specifically for this fact*".
- (b) The Appellant has no previous conviction, that the sentence could have been reduced further as the Appellant contends, "*this was Appellant's first case in the offence of aggravated robbery and therefore, the learned judge erred in principle by not giving any discount to this fact*".
- (c) the 1 year reduction could be reviewed, "*In recognizing the need of the presence of the mother for the growth of a very young child*"

[28] The appellant relies on the principles of sentencing proposed in paragraph 53, in **Qurai v State** (supra), however, it is noteworthy that the ground (1) in that appeal to the Supreme Court is that the Court of Appeal erred in law in affirming the quantum of sentence imposed on the Petitioner by the High Court which did not consider the early guilty plea of the Petitioner as a mitigating factor. This was a mistaken view as pointed out in paragraph [43] of the Judgement as the High Court Judge did consider the early guilty plea as a mitigating factor with other mitigating factors (at paragraph [44] of judgment. The trial Judge in this present appeal had taken account of the gravity of the offence that the Appellant committed, which the maximum sentence prescribed by law is 20 years.

Imprisonment. He took account of the degree of culpability of the appellant, and the manner in which the offence was committed. Due cognizance was given to the sentencing guidelines stipulated in section 4 of the Sentencing and Penalties Act 2009. The High Court Judge also considered the Supreme Court's updated guideline in **Eparama Tawake**. The Appellant's sentence was reduced by (1) year in recognition of "*the need of the presence of the mother for the growth of a very young child.*"; a reduction of one third of the sentence for entering an early guilty plea and 52 days is deducted separately for the time the Appellant has been in custody.

[29] It is not that the trial Judge had not taken account of the relevant mitigating factors. The Appellant is saying that, the deductions already made are not sufficient for each of the items. The Grounds of appeal against sentence are not arguable.

Conclusion

[30] In consideration of the foregoing, it appears that the test has not been satisfied or met.

Order of Court:

1. *Application for Enlargement of Time for leave to appeal sentence is refused.*



A handwritten signature in blue ink, appearing to be "Alipate Qetaki", is written over a horizontal line.

Hon. Justice Alipate Qetaki

RESIDENT JUSTICE OF APPEAL