

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CRIMINAL JURISDICTION**

**Criminal Misc. No: HAM 030 of 2013**

**Criminal Misc. No: HAM 031 of 2013**

**BETWEEN:**

**DHARSHIK MEHAL RAJU**

*The Applicant*

**AND:**

**THE STATE**

*The Respondent*

Counsel: Applicant in person  
Mr. S. Vodokisolomone for the Respondent

Date of Hearing: 18 July 2013

Date of Judgment: 22 July 2013

**RULING**

[1] This is an application for an extension of time to appeal against sentence.

[2] On 8 October 2012, the applicant was sentenced in two separate files after he pleaded guilty to the following offences:

## Case No. 536/2012

Burglary - 6 months imprisonment  
Theft - 6 months imprisonment

## Case No. 537/2012

Burglary - 6 months imprisonment  
Theft - 6 months imprisonment

- 3] All terms were made consecutive. The total sentence was 2 years' imprisonment.
- [4] The facts were that on two separate occasions, the applicant broke into St. Augustine School and stole computers used for teaching the students. Following his arrest, the applicant confessed to the offences and provided information that led to the recovery of the stolen items.
- [5] In his sentencing remarks, the learned Magistrate referred to the tariff for simple burglary and theft and after adjusting for the mitigating and aggravating factors, imposed 6 months imprisonment for each offence.
- [6] In mitigation, the applicant told the learned Magistrate that he was 20 years old, single and unemployed. Furthermore, he was a first offender and most of the stolen items were recovered.

- [7] While the individual terms of 6 months for simple burglary and theft is within the tariff for these offences, it is unclear why the learned Magistrate made all the terms consecutive.
- [8] In determining whether to extend time to appeal, appellate courts give due regard to the following factors:
- (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; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012))
- [9] The length of delay is 10 months. The applicant informs this Court that he was not familiar with the appeal procedures and that his initial application to appeal against sentence was misplaced by the Department of Corrections.
- [10] The ultimate test for an extension of time is to correct an error that might cause grave injustice. In *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009(24 April 2013), the Supreme Court confirmed this principle and said at paragraph [21]:

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.

[11] The applicant's main complaint is that the learned Magistrate failed to direct his mind to the totality principle when ordering all the terms to be served consecutively. He submits that the end result is an excessive sentence for a young and a first time offender, and where most stolen items have been recovered.

[12] In *Vulawalu v State* [2011] FJSC 6; CAV0006.2010 (8 April 2011) the Supreme Court adopted what was said in *Waqasaqa v The State* [2006] FJSC 6; CAV0009U.2005S (8 June 2006) at paragraph [34]:

Of course, the sentencing judge or magistrate is always required to consider the totality of the aggregate sentence in order to ensure that it is just and appropriate. Sentencing is never a mere matter of arithmetic. The court must always step back and take a last look at the total just to see if it looks wrong.

[14] Further, the Court of Appeal in *Philip Fong Toy v The State* AAU0099/08 said at paragraph [12]:

The effect of the totality principle is to require a sentencer when ordering a series of sentences to run consecutively to consider whether the total sentence is too much and will have a crushing effect on the offender. If a sentencer concludes that making a series of sentences cumulative will have a

crushing effect on the offender, then the sentences should be made concurrent. That is how the totality principle operates.

[12] In the present case, although the learned Magistrate did not expressly refer to the totality principle in his sentencing remarks, the total sentence of 2 years' imprisonment for two separate incidents of breaking in and stealing from a school fairly reflects the criminality involved.

[13] The delay of 10 months is significant, the reasons for the delay are not compelling and the ground of appeal fails to meet the stringent test of grave injustice.

[14] The application for an extension of time is refused.

**Daniel Goundar**  
**Judge**

At Labasa  
Monday 22 July 2013

Solicitors:

Applicant in Person

Office of the Director of Public Prosecutions, Labasa for Respondent