

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO: 413 OF 2013

BETWEEN : SAULA LALAGAVESI

Applicant

AND :

STATE

Respondent

Counsel : Applicant in Person
Ms S. Kiran for Respondent

Date of Hearing: 27 November 2013

Date of Ruling : 5 December 2013

RULING

1. This is a leave to appeal against sentence application filed out of time.
2. The applicant was charged before Lautoka Magistrate Court with one count of robbery with violence contrary to Section 293(1) (b) of the Penal Code, Cap 17.
3. The particulars of the offence was that applicant with another on the 14th August 2008 at Lautoka in the Western Division robbed Nalin Kumar of a bunch of keys and a Samsung brand flip-on camera phone valued \$850.00 and at the time of such robbery did use personal violence on the said Nalin Kumar.
4. The co- accused pleaded guilty and the applicant pleaded not guilty and went for trial.
5. The applicant was convicted and sentenced for period of 6 years and 3 months on 19.10.2010.
6. Applicant had appealed against the said conviction in HAM 027 of 2010 seven days out of time and was granted leave to appeal. The appeal against the conviction was dismissed on 17 March 2011 by Hon. Mr Justice Paul Madigan.
7. Applicant had filed this application for leave to appeal against the sentence on 3rd October 2013. Thus the application is 2 years 11 months out of time.

8. The only ground of appeal against the sentence is that the co-accused was given a sentence of 4 years imprisonment and therefore there is breach of parity sentencing principle.

9. Section 248 of the Criminal Procedure Decree provides:

(1) Every appeal shall in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against-

- (a) it shall be presented to the Magistrates Court from the decision of which the appeal is lodged;
- (b) a copy of the petition shall be filed at the registry of the High Court; and
- (c) a copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.

(2) The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.

(3) For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include-

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

10. The principles for an extension of time to appeal are settled. The Supreme Court in *Kumar v State; Sinu v State* [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

"Appellate courts examine five factors by way of a principled approach to such applications. These 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 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?

11. More recently, in *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), the Supreme Court confirmed the above principles 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 endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court.

12. Only reason given by the applicant for such a long delay is that he was unrepresented at the trial and as a lay unskilled litigant, he is incompetent to prepare a petition against the sentence. He had filed an appeal against the conviction and he should have known the procedure by that time. He is not a novice to legal justice system as he has 43 previous convictions. The delay in this matter is 2 years and 11 months. It is long delay.
13. The only ground submitted by the applicant is parity between his sentence and the sentence of the co-accused. The co-accused had pleaded guilty and applicant was sentenced after trial. Therefore there is no merit in that ground.
14. For the reasons given above the application for leave to appeal against sentence out of time is refused.

Sudharshana De Silva
JUDGE

**At Lautoka
05th December 2013**

**Solicitors: Applicant in Person
 Office of the Director of Public Prosecution for the Respondent**