

- (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, and for that reason requires further time for the preparation of the petition;
 - (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 of 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.
7. 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?"

8. 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. "

9. The applicant was not represented at the trial or at the time he filed this application. Further state had conceded that there is a ground which has merit to be considered by this Court. Therefore leave to appeal out of time is granted and this application is considered as an appeal against the sentence.

10. The grounds of appeal against the sentence are:

- (i) That the learned Magistrate erred in law and in principle when he sentenced the applicant to a term of imprisonment which is harsh and excessive for the following reasons:
- a) Failed to consider Section 18 of the Sentencing and Penalties Decree 2009
 - b) In adopting 12 months for aggravating factors
 - c) Not providing appropriate deductions towards the mitigation and took a higher tariff into consideration.

11. In **Bae v State** [1999] FJCA 21; AAU 0015u.98s (26 February 1999) the Court of Appeal held 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 facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself. (**House v The King** [1936] HCA 40; (1936) 55 CLR 499)*

12. The learned Magistrate had correctly identified the maximum penalty for the 1st count as 2 years.

13. Then he followed the case of Josua Nasigaya & Isei Turagakula v State Criminal Appeal No. HAA 015 of 2011 where Hon. Mr. Justice Paul Madigan has held:

'There is no tariff laid down for damaging property and various sentences have been handed down ranging from six months to eighteen months.'

14. In **State v Baleinabodua** [2012] FJHC 981; HAC 145.2010 (21 March 2012) Hon. Mr. Justice S. Temo:

'Damaging property is a summary offence, and it carries a maximum sentence of 2 years imprisonment. No tariff was supplied to the court by the parties. However, in my view, a suitable tariff would be a sentence between 3 months prison to 12 months prison. Serious cases should attract penalties in the upper range, while less serious cases attract the sentences at the lower end of the scale, including a non-custodial sentence.'

15. He had selected a starting point of 6 months.

16. Then he had added 12 months for the following aggravating factors:

'The aggravating factors against you are your disrespect to the property rights of the complainant company, your disrespect to a 50 year old bus driver providing a driving service to the community and the company having to incur monetary expenses in repairing its damaged bus windscreen.'

17. The following had been identified as mitigating factors:

- (i) 26 years old
- (ii) Employed-casual worker
- (iii) Earns \$26 a day
- (iv) Asks for forgiveness
- (v) Promise not to reoffend
- (vi) Sole breadwinner

Three months were deducted for the above mitigating factors.

18. Further 5 months were deducted for the early guilty plea. The final sentence for the 1st charge was 10 months imprisonment.

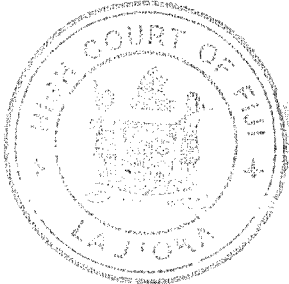
19. The learned Magistrate acting under Section 28 (4) of the Sentencing and Penalties Decree had activated the full term of 4 months imprisonment.

20. The two sentences were to run concurrently.

21. The Section 22 (1) of the Sentencing and Penalties Decree provides that every term of imprisonment must be made concurrent unless otherwise directed by Court.
22. The situation here is different and Section 28 (5) provides that any order for an offender to serve a term of imprisonment under sub-section (4) must be served-
- (a) Immediately; and
 - (b) Unless the Court orders otherwise, consecutively on any other term of imprisonment previously imposed on the offender by that Court or any other Court.
23. Therefore, the learned Magistrate was correct in ordering these sentences to run consecutively.
24. The applicant had failed to satisfy this Court that the learned Magistrate had fell into error in exercising his sentencing discretion. There is no material that he acted upon a wrong principle, he allowed extraneous or irrelevant matters to guide or affect him, he mistook facts or he did not take into account some of the relevant considerations.
25. The learned Magistrate had then ordered that *'You are to serve 12 months imprisonment before you are eligible for parole.'*
26. The Section 18 of the Sentencing and Penalties Decree is as follows:
- (1) Subject to sub-section (2), when a Court sentences an offender to be imprisoned for life or for a term of 2 years or more the Court must fix a period during which the offender is not eligible to be released on parole.
 - (2) If the Court considers that the nature of the offence, or the past history of the offender, make the fixing a non-parole period inappropriate, the Court may decline to fix a non-parole period under sub-section (1).
 - (3) If a court sentences an offender to be imprisoned for term of less than 2 years but not less than 1 year, court may fix a period during which the offender is not eligible to release on parole.
 - (4) **Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.**
27. The learned Magistrate fell into error when he ordered that 12 months of the sentence to be served before the applicant is eligible for parole.
28. This background warrants this Court to exercise its powers in terms of Section 256 (2) (a) of the Criminal Procedure Decree to vary the operation of the sentence passed by the Magistrate.

29. Accordingly the non-parole period of 12 months set a side.

30. Application is allowed, treated as an appeal against the sentence. Operation of the sentence is varied.




Sudharshana De Silva
JUDGE

At Lautoka
11th November 2014

Solicitor: Legal Aid Commission for the Applicant
Office of the Director of Public Prosecutions for Respondent