

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

HAA NO. 032 OF 2016

BETWEEN : ASHNEEL SANDIP LAL

Appellant

AND : THE STATE

Respondent

Counsel : Ms. P. Chand for Appellant
Mr. S. Nath for Respondent

Date of Ruling : 17th of November 2016

RULING

1. This application is made by the Applicant pursuant to Section 248 (2) of the Criminal Procedure Decree, seeking an order to enlarge the time to file his appeal against the Sentence imposed by the learned Magistrate of the Magistrates court of Nadi on the 8th of January 2016.
2. The Applicant has brought this application by way of a Notice of Motion, supported by his Affidavit dated 22nd of September 2016 stating the ground for this application. Pursuant to the service of the Notice of Motion, the Respondent appeared in court on the 30th of September 2016 and informed the court that the State does not wish to file any affidavit in opposition. However, the learned

counsel for the State informed the court that the State preserves its right to make submissions during the hearing of this matter. Both the counsel of the Applicant and the Respondent then agreed to conduct the hearing by way of written submissions. I accordingly directed them to file their respective written submissions, which they filed as per the directions. Having carefully considered the affidavit of the Applicant, respective written submissions of the parties and the record of the proceedings of the Magistrate court I now proceed to pronounce my ruling as follows.

3. The Applicant had been charged in the Magistrate court of Nadi for one count of Conversion contrary Section 319 (c) (ii) of the Crimes Decree and one count of Theft, contrary to Section 291 (1) of Crimes Decree. He was first produced before the Magistrates court on the 15th of May 2015. The Applicant pleaded guilty for the both counts on the 1st of October 2015. He was then sentenced for two (2) years and eight (8) months imprisonment period with two (2) years of non-parole period on the 8th of January 2016. Aggrieved with the said sentence, the Applicant now wishes to appeal against the said sentence.
4. According to Section 248 (1) (a) of the Criminal Procedure Decree as amended by the Criminal Procedure (Amendment) Decree 2014, any petition of appeal against any Judgment, sentence or order of the Magistrates' court must be filed at the Registry of the High Court within 28 days of such decision. Section 248 (2) of the Criminal Procedure Decree has conferred the High Court with discretionary power to enlarge the limitation of the time of appeal on the ground of any good cause. Section 248 (3) has provided some of the factors that the court could consider in order to determine the good cause as stated under Section 248 (2). Section 248 (2) and (3) of the Criminal Procedure Decree states that,

- i) *The High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.*
- ii) *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.*

5. The Supreme Court of Fiji in **Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012)** has discussed the factors that the court should consider in an application of this nature, where it was held that;

- 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?

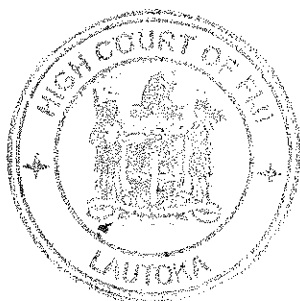
6. Having reaffirmed the above grounds as stipulated in **Kumar v State, Sinu v State (Supra)**, the Supreme Court of Fiji in **Rasaku v State [2013] FJSC 4: CAV0009, 0013.2009 (24 April 2013)** held that;

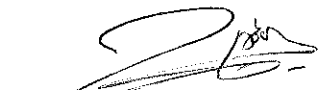
"These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavoring to avoid or redress any grave injustice that might result from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

7. In view of the observation made by the Supreme Court of Fiji in **Rasaku (supra)**, the court must always exercise the discretionary power given under Section 248 (2) of the Criminal Procedure Decree in order to ensure the fairness and justice to the proceedings and to the parties involved.
8. The Applicant in his affidavit in support has deposed the reason for the delay of making of his appeal against the sentence. He states that he had an infection on his left arm and was hospitalised from 24th of December 2015 to 1st of January 2016. It has been recorded on record of the proceedings of the Magistrates court on the 8th of January 2016 that the accused (the Applicant of this matter) was sick

and had an operation on his mouth. The Applicant states that he was taken to hospital on several time and then finally admitted to the hospital on 22nd of April 2016. He had a surgery and skin grafting. He tendered a copy of a letter issued by the CWM Hospital regarding his illness and the treatments provided by the hospital for it.

9. The Applicant has submitted his documents for appeal to the prison Authority in April 2016. However, he later found that the Prison Authority has misplaced the documents and did not properly file it at the Registry of the High Court.
10. The Respondent did not dispute the reasons given by the Applicant for the delay. The delay of filing this intended appeal is nearly five months.
11. Having considered the reasons for the delay and the length of delay, it is my opinion that the Respondent would not be prejudiced if the leave is granted to the Applicant to file his Appeal pursuant to Section 248 (2) of the Criminal Procedure Decree.
12. In conclusion, I grant the leave to the Appellant to file his petition of appeal within fourteen days of this ruling.




R. D. R. Thushara Rajasinghe
Judge

At Lautoka
17th November 2016

Solicitors : Office of Legal Aid Commission
Office of Director of Public Prosecution