IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO.: HAM 16 OF 2016

BETWEEN: **STATE**

APPLICANT

AND: **ANJESH ARVINDRA LAL**

RESPONDENT

Counsel : **Ms. P. Chand for Applicant**

: **Ms. J. Fatiaki for Respondent**

Date of Hearing : **5th May, 2016**

Date of Ruling : **19th May, 2016**

RULING

1. Applicant applies for enlargement of time within which to bring his petition of appeal against sentence.

2. Applicant pleaded guilty to one count of Burglary contrary to Section 312(1) of the Crimes Decree 2009 and Theft contrary to Section 291(1) of the Crimes Decree 2009. Upon his conviction, he was sentenced, on the 13th of November 2015, to 24 months' imprisonment with a non- parole period of 18 months.

3. He filed his petition of appeal in the Lautoka High Court on the 20th of January, 2016, with a letter seeking an extension of time.

Law

4. Section 248 of the Criminal Procedure Decree lays down the procedure to be followed in filing appeals in the high Court:

> *248.-(1) Every appeal shall be 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 in 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 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?"*

6. 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."*

Appeal against sentence

7. The Applicant intends to file his appeal on following grounds:

(1) That the learned Magistrate erred in law and in fact by imposing a 24 months term of imprisonment which is harsh and excessive in all aspects of the case. Whereby in ***State vs. Buliruarua*** (2010) FJHC 384 HAC 157 of 2010 (6 September 2010)

Justice Daniel Goundar in his Judgment upheld a 12 months sentence and suspended six months from the 12 months initially imposed.

(II) That the learned Magistrate fell into error by not giving proper consideration to the appellants previous good character and also being a first offender in passing sentence.

(III) That the learned Magistrate fell into error by not giving proper deduction for the early guilty plea of the appellant. Whereby as cited in ***Gonerogo vs. State*** (2013) FJHC 163; HAA 22 of 2012 (5th April 2015) in which Justice P. K. Madigan clearly outlined in which manner the reduction of a guilty plea is deducted which was not followed by the sentencing magistrate.

Analysis

Length of Delay

8. This application was filed on the 20th of January, 2016. The Respondent was sentenced 13th November 2015. He should have filed his petition within 28 days. The delay is approximately 40 days which is considerable.

Cause of Delay

9. The Applicant is a serving prisoner and submits that he could not have access to a lawyer from the Legal Aid Commission whilst in the correction facility. He also blames the prison authorities for the delay in filing his petition. However, he has not provided any evidence to substantiate his claim. Applicant has not advanced a reasonable explanation for the delay.

10. In ***Edwin Rhodes*** 5 Cr. App. R 35 at 36 (12 May 1910) it was said:

"A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons."

11. In ***The Queen v Brown*** (1963) SASR 190 at 191:

"The practice is that, if any reasonable explanation is forthcoming, and if the delay is, relatively, slight, say for a few days or even a week or two, the Court will readily extend the time, provided that there is a question which justifies serious consideration."

12. These authorities indicate that where the delay is considerable, there has to be a justifiable reason for the delay and also the grounds of appeal advanced must justify a serious consideration in appeal.

Whether Grounds Meritorious?

Ground 1

13. The Applicant contends that the term of imprisonment of 24 months imposed by the learned Magistrate for the count of Burglary is harsh and excessive. To support his contention he cites **State v Buliruarua** (2010 FJHC 384 HAC 157 of 2010 (6th September, 2010) where Justice Gounder handed down a sentence of twelve months' imprisonment. (of which period of six months was suspended for a term of two years). In that case, accused was 18 years old young offender with five siblings. He was remorseful and entered an early guilty plea. Stolen property had been recovered. There was no pre planning involved in the offending. It was not a serious case of burglary. His Lordship had imposed a sentence that was proportionate to the factual matrix of that case and not formulated a guideline for universal application.

14. Factual scenario of the Applicant's case is quite different. Applicant had been entrusted to look after the Complainant's (his land lord's) house whilst he was away in New Zealand. He broke in causing considerable damage to the wall that separated the two housing units. Learned Magistrate considered the significant degree of pre planning as a factor indicating the higher culpability. He also considered the damage to property as a factor indicating the greater harm. The Learned Magistrate's selection of a higher starting point at the zenith of the tariff is justified under these circumstances.

Ground II

15. Applicant submits that the learned Magistrate fell into error by not giving proper consideration to his previous good character and, also being a first offender, in passing the sentence. At the time of the sentence, Applicant was a first offender. The learned Magistrate in paragraph 20 of his sentencing ruling took applicant's previous character into consideration. Considering all the mitigating factors he gave a discount of two years.

Ground III –

16. Applicant submits that the learned Magistrate fell into error by not giving proper and separate deduction for the early guilty plea.

17. Justice Madigan in **Gonerogo vs. State** (2013) FJHC 163; HAA 22 of 2012 (5th April 2015) observed:

"When casting a sentence, the Court should first deal with aggravating features, then mitigating features arriving at an interim final figure. Only then should the Court as a final act reduce the sentence in recognition of the plea of guilty. To do otherwise distorts the sentence"

18. As a matter of good practice it is desirable to deal with each mitigating factor separately in mitigation. However, there is no requirement that in any case where there are several mitigating circumstances, each one of them should be dealt with separately.

19. In **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015) it was stated:

> *"Although section 4(2)(j) of the Sentencing and Penalties Decree requires 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 on 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 the judicial process could be prevented. [53]"*

20. Madigan JA in his concurring opinion in ***Rainima v The State*** [2015] FJCA 17; AAU0022.2012 (27 February 2015) at paragraph [46] where his Lordship was constrained to observe as follows:-

> *"Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authorative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This Court now adopts that principle to be valid and to be applied in all future proceedings at first instance."(Emphasis added)*

21. Having said that, his Lordship agreed with the other Justices of Appeal of the Court of Appeal (Calanchini P and Jayasuriya JA) that, given the very lenient sentence already passed on the appellant in that case, the appeal against sentence should be dismissed.

22. Therefore, above stated observation of Justice Madigan in ***Gonerogo vs. State*** (2013) FJHC 163; HAA 22 of 2012 (5th April 2015) should not be used to set aside a sentence when in all the circumstances of the case it is justifiable and not harsh.

23. In **Sharma v. State** (unreported Cr. App. No. AAU0065 of 2012; 2 June 2014) the Fiji Court of Appeal discussed the approach to be taken in exercising appellate jurisdiction when a sentencing discretion of a court below is called into question. The Court observed:

> *"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust".*

24. It is clear that an appellate court will interfere with a sentence imposed by a court below only where it is harsh, excessive and unreasonable in all the circumstances of the case.

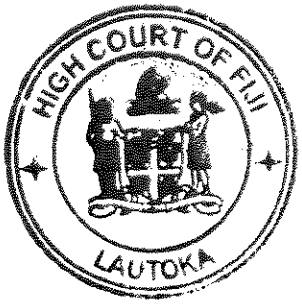
25. I do not find any merit in this appeal ground in all the circumstances of this case, particularly in view of the fact that the head sentence of 2 years' imprisonment adopted by the learned Magistrate in computing the sentence to be imposed on the Applicant is in the middle range of the tariff of 18 months to 3 years imprisonment applicable for the offence of burglary which carries a maximum sentence of 13 years' imprisonment.

26. Hence, I hold that the approach adopted by the learned Magistrate of considering the early guilty plea together with other mitigating factors listed by the trial judge, did not occasion any substantial and grave injustice to the Applicant.

Prejudice to Respondent

27. Clearly the prejudice to the State if time for appeal were enlarged would be considerable. There is no evidence of meritorious grounds demanding consideration in appeal. Application for enlargement of time lacks merit and must be refused.

28. There is no right to appeal when the time limit stipulated by the Criminal Procedure Decree has expired. Delay is unreasonable. And, also, there is no merit in the grounds raised by the Applicant that will most probably be successful in appeal. Therefore, application for leave to appeal out of time in respect of Criminal Case No. 1238 of 2013 from the Nadi Magistrates Court is refused.



Aruna Aluthge
Judge

AT LAUTOKA
On 19th May, 2016

Solicitors: **Office of the Legal Aid Commission for Applicant**
Office of the Director of Public Prosecution for Respondent