

4. On the 21st April, 2016 Applicant filed a notice of motion at the Registry of this Court applying for enlargement of time. Applicant's application is approximately **five months out of time.**

Law

5. 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 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.*

6. 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?”*

7. 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.”

Grounds of Appeal

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

- (i) That at the time the learned Magistrate gave the sentence, the Applicant and the Complainant were not married and thus they did not have a domestic relationship.
- (ii) That the learned Magistrate did not consider Section 2 (a) of the definition of domestic relationship.
- (iii) That the learned Magistrate should have considered that the Applicant and the complainant were not in a domestic relationship since the Applicant and the complainant were divorced on 5th day of November 2012 and the sentence of the learned Magistrate indicated that the Complainant was the Applicant's "ex-wife".

Analysis

Length of Delay

- 9. The Applicant was sentenced on the 27th November, 2015. This application was filed on the 21st of April, 2016. Therefore, the delay is approximately five months which is considerable.

Cause of Delay

- 10. The Applicant asserts that he could not afford to pay for the solicitor who appeared in the Magistrates Court to file appeal papers in time and, therefore, he had to engage the services of the Legal Aid Commission to assist him to file his grounds. The applicant further states he could not get leave from work in order to give instructions to his lawyer and also, due to cyclone Winston, his instruction was delayed. He further submits that the delay was due to unfortunate circumstances.
- 11. The Applicant was represented by a Counsel in the Tavua Magistrates Court and his Counsel would have informed him about his right to appeal and the time within which the appeal should have been filed. Appellant would have been aware of his right to appeal when he received his sentence at the Tavua Magistrates Court.

12. The hurricane Winston hit Tavua on 20th-21st of February, 2015. His sentence is dated 27th November, 2015. Consequently, the reason advanced by the Applicant for the delay which he claims that shows good cause is unreasonable. Failure to give instruction in time to the Legal Aid Commission is not a good cause to enlarge the appeal period under section 248 of the Criminal Procedure Decree.

Likely Success on Appeal

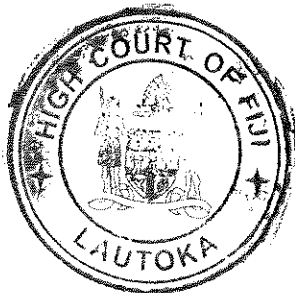
13. The Applicant says that, by the time the sentence was passed, he had obtained a divorce from the complainant and, therefore, he did not have a domestic relationship with his 'ex-wife' falling within the ambit of Section (2) (a)(b) of the Domestic Violence Decree 2009.
14. Domestic Violence Decree defines "family or domestic relationship" as a relationship existing between the respondent and - (a) spouse; (b) other family member; (c) person who normally or regularly resides in the household or residential facility; (d) boyfriend or girlfriend; (e) person who is wholly or partly dependent on ongoing paid or unpaid care or a person who provides such care.
15. It is clear that an 'ex-wife' has not been included in the list. However, under the heading 'grounds for making a domestic violence restraining order', Section 23.-(1) provides as follows:


"A Court may make a domestic violence restraining order for the safety and wellbeing of a person if satisfied that the person is, or has been, in a family or domestic relationship with the respondent,
16. Therefore, a Court has the discretion to issue a Domestic Violence Restraining Order even against a respondent 'ex-husband', if it is satisfied that such an order is necessary to ensure safety and wellbeing of an 'ex-wife'.

17. Even though a sentence should be considered as a final order, sentencing Magistrate has stated in his ruling that the DVRO issued 'can be amended, suspended or discharged by further orders of the court'. In the intending appeal, Applicant seeks an order to have the Domestic Violence Restraining Order issued against him vacated. He can file a motion in the Tavua Magistrates Court requesting the Magistrate to vacate the DVRO rather than appealing this issue in the High Court.

Conclusion

18. There is no right of appeal when the time limit stipulated by the Criminal Procedure Decree has expired. The delay is unreasonable and also there is no merit in the grounds advanced by the Applicant that they will most probably be successful in appeal. Therefore, application for leave to appeal out of time in respect of Criminal Case No. 57/2011 from the Tavua Magistrates Court is refused.




Aruna Aluthge
Judge

AT LAUTOKA

On 29th July, 2016

Solicitors: Office of the Legal Aid Commission for Applicant
Office of the Director of Public Prosecution for the State (Respondent)