

IN THE HIGH COURT OF FIJI
AT LAUTOKA
IN THE WESTERN DIVISION
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO. HAM 102 OF 2016

BETWEEN : **BINESH CHAND**
Applicant

AND : **STATE**
Respondent

Counsels : **Mr Fesaitu for the Applicant**
: **Mr Niudamu for the Respondent**

Date of Ruling : **28th September, 2016**

RULING

1. On 29th February 2016, the Applicant was convicted of one count of Assault Causing Actual Bodily Harm contrary to Section 275 and one count of Criminal Intimidation contrary to Section 375 (1) (a) (i) (iv) of the Crimes Decree 2009 at the Lautoka Magistrates' Court.
2. On the 12th of April 2016, the Applicant was sentenced to 4 months imprisonment for the first count and 12 months imprisonment for the second count. The learned Magistrate then ordered the Applicant to serve a total of 12 months imprisonment to be served concurrently.

3. The Applicant filed his grounds of appeal on 27th May, 2016 which is seventeen days out of time.

THE 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 –

It shall be presented to the Magistrates Court from the decision of which the appeal is lodged.

*A copy of the petition shall be filed at the registry of the High Court; and
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 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;

any case in which a question of law of unusual difficulty is involved;

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;

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:

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. 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.”

Reasons for the Delay

7. The Applicant has asserted in his affidavit that he had handed his grounds of appeal over to the Prison Authorities within time but the Prison Authorities had filed it late in the High Court Registry. Consequently, he claims that, for the good cause he has shown, he should be permitted to file his appeal out of time.
8. At the hearing, the Applicant was represented by a Counsel from the Legal Aid Commission. The Counsel would have been aware that Applicant should have filed his appeal within time. The learned Magistrate has indicated in his sentencing ruling that Applicant has 28 days to appeal against his sentence. Applicant is not a first offender. He is currently serving a prison sentence. He is not new to the criminal justice system and should be aware of his right to appeal and the time within which his appeal should be filed.
9. The reason advanced by the Applicant for delay does not show a good case warranting an enlargement of time.

Whether the appeal has any prospects

10. The Applicant has filed his petition of appeal on number of grounds. However, in his application to file his appeal out of time, Applicant has stated that he will only pursue one ground of appeal; namely:

That the learned Magistrate erred in law by not ordering that the Applicant to serve his current sentence concurrent to his existing sentence.


11. Section 22 (2) of the Sentencing and Penalties Decree clearly states that every term of imprisonment imposed on a person by a court must, unless otherwise directed by the Court, be served concurrently with any uncompleted sentence or sentence of imprisonment.

Section 22 (1) states:

Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.....

12. The learned Magistrate has not stated anything about the existing prison term and whether the prison term he had imposed should be concurrent or consecutive to the existing prison term. However, by operation of law, prison term imposed by the learned Magistrate should run concurrent to the existing prison term pursuant to Section 22 (1).
13. Therefore, the Applicant and the Prison Authority are entitled to treat the sentence imposed by the learned Magistrate as one having the concurrent effect to the existing prison term.
14. For reasons given, application for leave to appeal out of time is refused.




Aruna Aluthge
Judge

AT LAUTOKA
On 28th of September, 2016

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