

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 62 OF 2017**

**BETWEEN** : **THE STATE**

**APPLICANT**

**A N D** : **ASAELI DRIU SERUVATU**

**RESPONDENT**

**Counsel** : Mr. J. B. Niudamu and Ms. L. Latu for the  
State.

: Mr. E. Maopa for the Respondent.

**Dates of Hearing** : 29 August and 20 September, 2017

**Date of Ruling** : 22 September, 2017

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**RULING**

[Application for leave to appeal out of time]

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**BACKGROUND INFORMATION**

- [1] The Respondent was charged in the Magistrate's Court for one count of Rape contrary to section 207 of the Crimes Act. The alleged offending took place on the 4<sup>th</sup> day of February, 2011. At the time of the allegation the Respondent was a juvenile.

- [2] From the court record the trial dates were vacated 5 times, three times due to the unavailability of the Resident Magistrate, on one occasion each at the request of the prosecution and the defence. On 9 May, 2016 the matter was fixed for hearing on 8 November, 2016.
- [3] On 8 November, 2016 the day of the trial State Counsel sought an adjournment since witnesses were not served and that counsel in carriage of the matter was in the High Court defence objected to the application. The learned Magistrate refused adjournment and ordered the prosecution to proceed. The State Counsel was unable to call any witness acting under section 178 of the Criminal Procedure Act the learned Magistrate acquitted the Respondent.
- [4] The State aggrieved by the decision of the Magistrate's Court filed a Notice of Motion and supporting affidavit of Alvin Singh sworn on 15 May, 2017 seeking an enlargement of time to appeal the decision of the Magistrate's Court.
- [5] The application is opposed by the Respondent who has opted not to file any affidavit in reply but relies on the submissions of his counsel.
- [6] Both counsel have filed written submissions and also made oral submissions during the hearing for which the court is grateful.

### **LAW**

- [7] According to section 248 (1) (a) of the Criminal Procedure Act 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 Act 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 good cause as stated under section 248 (2). Section 248 (2) and (3) of the Criminal Procedure Act states that:

*“(2) ... 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.”*

[8] The Supreme Court in *Kamlesh Kumar vs. The State, Criminal Appeal No. CAV 0001 of 2009 (21 August, 2012)* mentioned the following five factors by way of a principled approach which the Appellate Courts examine in

respect of an application for the grant of an extension of time to appeal. These factors were:

- [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 had 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?
- [9] 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)* at paragraph 21 stated 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 endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court"*
- [10] In view of the above observations made by the Supreme Court of Fiji in *Rasaku's case (supra)*, the court must always exercise the discretionary power given under section 248 (2) of the Criminal Procedure Act in ensuring that fairness and justice is achieved.
- [11] The Court of Appeal in *State vs. Ramesh Patel, criminal appeal no. AAU 0002 of 2002 (15 November, 2002)* stated that good cause for a late

appeal was not the only factor to be considered in such applications. The merits of the appeal, the practicality of the remedy sought and the prejudice to the opponent are other relevant factors to be considered.

### **DETERMINATION**

#### **REASON FOR THE FAILURE TO FILE APPEAL WITHIN TIME**

- [12] The State submits that no written ruling was provided by the learned Magistrate and this was also compounded by internal delay within the office of the Director of Public Prosecutions which led to the delay in filing a timely appeal.
- [13] From the copy record State Counsel had appeared in the Magistrate's Court hence he was fully aware of the orders made. The State could have made a request to the Magistrate's Court for a copy of the ruling to be provided if the ruling was required for the preparation of the Petition of Appeal. The affidavit in support does not suggest such a course was taken.
- [14] The reasons given for the delay in lodging the appeal is not satisfactory.

#### **LENGTH OF DELAY**

- [15] The Respondent was acquitted by the Magistrates Court on 8 November, 2016 and the application for extension of time was filed on 19 May 2017, the State's application is out of time by about six months. The delay is considerable.

#### **WHETHER THERE IS A MERITORIOUS GROUND JUSTIFYING THE APPELLATE COURT'S CONSIDERATION**

[16] State Counsel submits that the granting of an adjournment is a matter of discretion which must be exercised judicially so that no injustice is caused to any of the parties.

[17] The proposed ground of appeal relied upon by the State is:

*“The learned Resident Magistrate erred in law and in fact in failing to properly exercise his discretion on granting an adjournment of trial in this matter with regards to all the circumstances of the case.”*

[18] For completeness it is important to reproduce what happened in the Magistrate’s Court resulting in the acquittal of the Respondent:

“08/11/2016

*Prosecution - Corporal Ana*

*Accused - Not present Mr. Maopa*

*- Prosecution seeks to stand down the matter for hearing at 12.00 noon.*

*- Stood down for Hearing at 12.00 noon.*

Later at 12.00pm

*Prosecution - Mr. Niudamu*

*Accused - Present Mr. Maopa*

*- This is fixed for Hearing.*

*- No witness is served for this case.*

*- The State counsel seeks for an adjournment.*

*- The Defence objects- the adjournment and seeks for acquittal if no evidence.*

*- This has been pending from 2011. The juvenile has been appearing for this case.*

- *The trial had been set in May this year – 06 months back. Therefore, the reasons that, the state counsel is appearing in High Court can't be accepted.*
- *I can see a letter from the state counsel that, he is in High Court. For the above reasons I don't accept the said letter.*
- *Considering all the circumstances of the case and the interest of justice, I am unable to grant adjournment.*
- *Prosecution is ordered to proceed.*
- *The state counsel informs that, state is unable to call any witness and close the case.*
- *Hence acting under Section 178 I acquit the juvenile.”*

[19] When refusing the application for an adjournment the learned Magistrate took into consideration the following:

- (a) Witnesses not summoned;
- (b) Matter has been pending from 2011;
- (c) The Respondent has been appearing in court;
- (d) The trial date was assigned some six months ago, so the reason State Counsel was appearing in the High Court was not acceptable.

[20] From the above it is obvious to me that the learned Magistrate had failed to properly direct his mind to the issue whether the refusal to grant an adjournment would cause injustice to the State. The charge of rape was a serious charge involving a child victim and there was a strong public interest factor that the charge be determined after hearing evidence. The victim's interest was also not taken into account when the learned Magistrate refused adjournment. The fact that the matter had dragged for so long being a 2011 matter was in my view not a ground to refuse an adjournment.

- [21] The learned Magistrate ought to have borne in mind that the main contributor of the delay was the unavailability of a Resident Magistrate to hear the matter. In any event this was the first time the office of the Director of Public Prosecutions had appeared and it was the second time the prosecution had asked for an adjournment (first time it was the police prosecution).
- [22] The learned Magistrate had discretion to grant or refuse an adjournment, however, the discretion must be exercised judicially so that the rights of the parties are not defeated and no injustice is caused to any of the parties. When a criminal charge is laid the complainant is only a witness in the complaint in actual fact the alleged offence is against the State and therefore a court when confronted with an application for an adjournment should bear this aspect in mind as well. Here the State has been shut out completely from prosecuting a serious charge which is unjust. The learned Magistrate erred when he failed to exercise his discretion properly.
- [23] In *The State –v- Agape Fishing Enterprises, Criminal Appeal Case No. HAA 011 of 2008 (15 February, 2008)* Goundar J. made a pertinent comment about the exercise of discretion in respect of whether adjournments are granted or not at paragraph 6 as follows:

*“The granting of an adjournment is a matter of discretion. The discretion must be exercised judicially so that the rights of the parties are not defeated and that no injustice are done to one or other of the parties (see McCahill v State, Criminal Appeal No. 43 of 1980; Chand v State, Criminal Appeal No AAU 0056 of 1999S).”*

- [24] I am satisfied there are merits in the proposed ground of appeal.

## PREJUDICE TO THE RESPONDENT

- [25] The Respondent has not filed an affidavit in reply hence this court is unable to accept the facts mentioned in the written submissions of the Respondent.
- [26] There is no evidence before this court to show how the Respondent will be prejudiced in his defence. I note that the alleged offence is dated 2011, however, in the interest of justice and in the absence of any evidence of prejudice to the Respondent I am of the view that there will be no prejudice caused to the Respondent if an extension of time to appeal is granted to the State.

## CONCLUSION

- [27] Bearing in mind that the allegation arose in the year 2011 and taking into account the concerns raised by Mr. Maopa about the delay caused there is an urgent need for a speedy determination of the substantive matter. It is in the interest of justice that the substantive appeal should not be delayed any further. I therefore pronounce a final determination in this ruling to avoid any further delay or potential prejudice to the Respondent.
- [28] I am satisfied that the ground of appeal proposed has merits and in the absence of any prejudice to the Respondent it is in the interest of justice that leave be granted to the State in respect of extension of time.

## ORDERS

1. The State is granted leave to appeal out of time.
2. The acquittal of 8 November, 2016 is hereby quashed.

3. This case is remitted to the Magistrate's Court at Nadi to be tried before another Magistrate.
4. Since this is a 2011 matter a priority hearing date is to be assigned.
5. The Respondent is granted bail under the usual terms and conditions of bail in the sum of \$1000.00 non-cash bond of the like sum to be signed by the Respondent's father or next of kin as a surety within 5 days from today. The Magistrate's Court is at liberty to vary the bail conditions upon application.
6. This matter is to be called on 29 September, 2017 for mention at the Nadi Magistrate's Court.
7. A copy of this ruling is to be forwarded to the Chief Magistrate for his attention and necessary action.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

22 September 2017

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Messrs. Babu Singh & Associates, Nadi for the Respondent.**