

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 4 of 2018

BETWEEN : **JONE MAQA**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. M. Yunus for the Applicant.
: Mr. A. Singh for the Respondent.

Date of Hearing : 25 April, 2018

Date of Ruling : 27 April, 2018

RULING

[Application for leave to appeal out of time]

BACKGROUND INFORMATION

1. The applicant was charged in the Magistrate's Court at Lautoka as follows:

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Act No. 44 of 2009.

Particulars of Offence

JONE MAQA on the 5th day of November, 2016 at Lautoka in the Western Division assaulted JOAPE RIBA thereby causing him actual bodily harm.

2. On 14 November, 2016 the applicant pleaded guilty after the charge was read and explained to him, thereafter the summary of facts was also admitted by the applicant.

SUMMARY OF FACTS

3. The summary of facts admitted by the applicant was as follows:

“On the 5th of November, 2016 at about 1300hrs at the Vitogo District School, Vitogo, Lautoka Joape Riba (A-1), 16yrs, student of Vitogo was assaulted by Jone Maqa (B-1), 43 yrs, Police Officer also of Vitogo village.

On the above date, time and place (A-1) was playing with other children when he was approached by (B-1) grabbed his shirt collar, punched the right side of his face twice and he pushed him to the drain.

A report was lodged at the Lautoka Police Station whereby (A-1) was sent for medical examination, Cpl 3194 Rusiate was appointed the Investigation Officer. (B-1) was arrested on 11/11/16, interviewed and charged for the offence of Assault Causing Actual Bodily Harm contrary to section 275 of the Crimes [Act] No. 44 of 2009. (B-1) in custody for court.”

4. Upon being satisfied that the applicant had entered an unequivocal plea the learned Magistrate convicted the applicant as charged.

5. After hearing mitigation, the applicant was sentenced on 2 December, 2016 to 2 months imprisonment suspended for 2 years with a permanent non-molestation Domestic Violence Restraining Order.
6. The applicant being dissatisfied with the sentence filed his application seeking leave to appeal out of time by Notice of Motion dated 17 January, 2018. The applicant relies on his own affidavit sworn on 13 January, 2018.
7. The application is opposed by the State, however, no affidavit in reply has been filed, the State relies on the submissions of State Counsel.
8. Both counsel have filed written submissions and also made oral submissions during the hearing for which the court is grateful.

LAW

9. Section 248 (2) of the Criminal Procedure Act gives this court powers to enlarge the time within which an applicant can file an appeal. Section 248 (2) states:

“... the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.”

10. The Supreme Court in *Kamlesh Kumar vs. The State, Criminal Appeal No. CAV 0001 of 2009* 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 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?

DETERMINATION

REASON FOR THE FAILURE TO FILE APPEAL WITHIN TIME

11. The reason for the failure by the applicant to file his appeal within time is stated at paragraphs 10 to 12 of his affidavit. Essentially the applicant states that after being sentenced he went to the Legal Aid Commission for advice since he was not happy with the advice given he went to some Senior Police Officers for advice but to no avail. Thereafter he did his own research whereby he came to know that the Domestic Violence Act did not recognize village relationship as domestic relationship unless the complainant had resided with him.
12. It was on 11 January, 2018 that the applicant finally visited his current solicitors upon whose advice the applicant filed this application.
13. It is noted from the affidavit of the applicant that he has been a police officer for the past 24 years with tertiary education. It is noted the applicant knew about his right of appeal which is also mentioned in the sentence yet he did not do anything expeditiously to further his cause.

14. The reason given by the applicant is unacceptable and unsatisfactory.

LENGTH OF DELAY

15. The applicant was sentenced on 2 December, 2016 the Petition of Appeal ought to have been filed by 30 December, 2016. The applicant is late by 1 year 17 days.
16. The length of delay is substantial and inordinate which cannot be excused.

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

17. The applicant has advanced two proposed grounds of appeal against sentence:

GROUND ONE

18. *The learned Magistrate erred in his sentencing discretion not to promote reconciliation but to consider the offence as a domestic violence offence, despite no domestic relationship between the complainant and the Appellant.*

GROUND TWO

19. *The learned Magistrate erred in his sentencing discretion to issue a permanent domestic violence order against the Appellant despite no domestic relationship between the complainant and the Appellant.*

20. Both the proposed grounds of appeal are interrelated therefore it will be dealt with together.
21. The learned counsel for the applicant submits that the learned Magistrate erred when he took into account that there was a domestic relationship between the complainant and the applicant when there was none. Counsel further states that under section 23 of the Domestic Violence Act it was for the court to inquire into the relationship to satisfy itself that there was a domestic relationship existing between the applicant and the victim.
22. The applicant had pleaded guilty when the matter was first called in the Magistrate's Court on 14 November, 2016. The applicant had also admitted the summary of facts after it was read and explained to him.
23. This court accepts that the summary of facts admitted by the applicant does not state that the victim and the applicant were in a domestic or family relationship. However, in mitigation it was the applicant who informed the court that the victim was his nephew (page 7 of the Copy Record).
24. The learned Magistrate at paragraph 3 of the sentence accepted the fact that the complainant and the applicant were related to each other.
25. The applicant being a Police Officer of 24 years having tertiary education had provided a comprehensive mitigation which included the fact that the complainant was his nephew. The court accepted this fact as correct and acted upon it. Section 23 (1) of the Domestic Violence Act states:

“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...”

26. In this case the court was satisfied that there was a domestic relationship in existence after being told by the applicant in his mitigation that the victim was his nephew. The court acted upon what was mentioned by the applicant. There was no obligation on the learned Magistrate to inquire further into the relationship.
27. The learned Magistrate did not err in the exercise of his sentencing discretion when he considered the relationship between the applicant and the victim to be one of uncle and nephew hence the interim Domestic Violence Restraining Order was correctly made permanent. The learned Magistrate was also correct in not applying section 154 (6) of the Criminal Procedure Act to promote reconciliation between the applicant and the victim considering the facts of the case.
28. The above proposed grounds of appeal are without any merits.

PREJUDICE TO THE RESPONDENT

29. There is no evidence that the Respondent will be prejudiced if the applicant is given leave to appeal out of time.

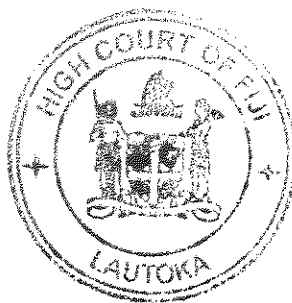
CONCLUSION


30. Based on the above reasons, this court is satisfied that the proposed grounds of appeal argued by the applicant is without any merits which

does not justify this court's intervention in granting the applicant an extension of time to appeal against his sentence. Furthermore, no good cause has been shown by the applicant in support of his application, the length of delay is substantial as well.

ORDERS

1. The application for leave to appeal out of time is refused.
2. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

27 April, 2018

Solicitors

Messrs M.Y. Law, Ba for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.