

IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO HAA 31 OF 2019

BETWEEN : THE STATE

**Applicant**

AND : HIRENDRA VINOD SHARMA

**Respondent**

Counsel : Ms Naibe for the Applicant

: Respondent in person

Date of hearing : 22 August 2019

Date of ruling : 17 September 2019

**RULING**

[Application for leave to appeal out of time]

1. The Applicant filed a notice of motion seeking leave to appeal out of time on 08 May 2019. The Applicant intends to appeal against a sentence delivered by the Magistrate Court in Lautoka, on 08 January 2019.

2. As per section 247 of the Criminal Procedure Act no appeal shall be allowed in the case of an accused person who has pleaded guilty and who has been convicted on such plea by a Magistrate's Court, except as to the extent, appropriateness or legality of the sentence.
  
3. Every appeal against a decision of the Magistrate Court must be filed at the registry of the High Court within 28 days of the date of the decision appealed against. However, if an appeal is not filed within the prescribed time, section 248(2) of the Criminal Procedure Act confers power on the High Court to enlarge the period of limitation for good cause. Section 248(3) further provides;
  - (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.
  
4. Apart from the above-mentioned instances under section 248(3), the courts have to examine other relevant considerations as well to ascertain good causes for enlargement of time. It appears that the practice of the courts has been to

allow enlargement of time very sparingly. Time and again the appellate courts have emphasized the importance of exercising the discretion of the court to enlarge time in exceptional circumstances to avoid grave injustice.

5. In Rasaku v State [2013] FJSC 4; CAV0009,0013.2009 (24 April 2013) the Supreme Court observed;

“The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of courts that has fixed a specific period for lodging his application.”

6. The Supreme Court in the judgment of Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012) discussed the factors that the courts must examine in considering an application for extension of time to appeal;

- (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?

7. In the present case the delay is four months. The Applicant submits that the delay is due to the internal procedures of the office of the Director of Public Prosecutions. As per the submissions made by the counsel for the Applicant, the police prosecution has sent the file to the DPP's office on 11 January 2019 and thereafter the delay had been caused due to the number of persons the file had to go through.

8. The Applicant further quoted two decisions; *State v Dau* [2016] FJHC 966; HAM99.2016 (25 October 2016) and *State v Lal* [2016] FJHC 427; HAM16.2016 (19 May 2016) to support the application. However, in those cases the courts have granted leave when the State was late by 42 days and 40 days respectively.
9. The delay is four months in the present case and the reasons advanced by the Applicant do not constitute good cause and the explanation provided by the Applicant is not at all satisfactory. In *State v Waqa* [2016] FJHC 787; HAM116.2016 (5 September 2016) the court observed the following while considering a similar application by the State;

“The reason for the delay as claimed by the Appellant is attributed to the obtaining of the police docket of this case. It was brought into the office of the Director of Public Prosecution on the 19th of January 2016, that was twenty days after the pronouncement of the sentence. The Appellant did not provide any explanation for the failure to file the petition of appeal within the remaining eight days’ time. The learned counsel for the Appellant submitted in her written submissions that this case was not the only file that her office handles as they received large number of files each day with complicated legal issues to be dealt with. This is an unacceptable explanation, given by the state to justify the delay of four months. I want to believe that this is not an official explanation given by the Director of Public Prosecution and it only resembles the personal opinion of the counsel of the Appellant. Otherwise it would create a grave concern about the rule of law of this jurisdiction. Hence, I do not find there is a valid reason for the delay of four months in failing to file this petition of appeal”.

10. However, in *State v Waqa* (supra) the court granted leave based on the merits of the appeal, although the delay was 4 months.

11. In *State v Prasad* [2018] FJHC 753; HAA133.2017 (17 August 2018) the court granted leave based on the merits of the appeal when the State was 3 months late.

12. In *State v Ceinaturaga* [2008] FJHC 330; HAM113.2008 (28 November 2008) the State was late by 6 months. In that case the explanations given for the delay by the State were that the DPP was not aware of the sentence as the DPP was not represented when the sentence was delivered and the difficulty in obtaining relevant information. The court refused leave to appeal and observed the following while referring to section 76 in the repealed Criminal Procedure Code which corresponds with Section 54 of the Criminal Procedure Act;

“By virtue of s. 76 of the Criminal Procedure Code, the Director of Public Prosecutions is responsible to put into operation a procedure where lenient sentences imposed in cases prosecuted by the police are brought to his attention without delay for review. Without such a procedure in place to check the appropriateness of a sentence, any claim of lack of knowledge of the existence of a lenient sentence would not be given much weight by the courts. I say this because under the Criminal Procedure Code the right of appeal against inadequacy of a sentence is granted to the Director of Public Prosecutions and not the police prosecutors, and therefore it becomes the Director’s duty to file timely appeals”.

13. The courts do not expect sloppy explanations from the State, and it is the duty of the Director of Public Prosecutions to file timely appeals. Delay caused by internal procedures cannot be considered as a good cause for the purposes of enlargement of time. Besides 4 months is far too long to merely attribute delay to internal procedures.

14. In any event I have considered whether there is merit in the appeal. The Respondent is convicted in the Magistrate’s court for one count of driving motor vehicle whilst there was present in the blood a concentration of alcohol

in excess of the zero limit contrary to section 105(1)(a)(2) and 114 of Land Transport Act No 35 of 1998 and another count of careless driving contrary to section 99(1) and 114 of Land Transport Act No 35 of 1998. The Applicant contends that the learned sentencing Magistrate failed to impose mandatory disqualification of the Respondent's driver's license. However, the Respondent relies on section 105(3) where it provides for the court to impose any lesser penalty than the prescribed penalty.

15. In *State v Jale* [2011] FJHC 674; HAM168.2011 (31 October 2011) Justice Goundar observed the following while granting leave to appeal when the State was late by two months;

“While I accept that the State has failed to show good cause for the late appeal, or for an adjournment in the Magistrates' Court, the test for leave to appeal out of time or for an adjournment, is the overall interests of justice”.

16. In the present case the reason for delay is not satisfactory. However, the court has to consider overall interests of justice. It is my considered opinion that there is merit in the appeal which justifies consideration by the court with regard to the extent, appropriateness and legality of the sentence.

17. In the circumstances I decide to grant leave to appeal out of time. The Applicant is allowed to file the petition of appeal within 14 days.



**Rangajeeva Wimalasena**

**Acting Judge**

**Solicitors**

Office of the Director of Public Prosecutions for the Applicant

Respondent in person