

**IN THE HIGH COURT**

**AT LABASA**

**APPELLATE JURISDICTION**

**Criminal Appeal No. HAA 17 of 2023**

**IN THE MATTER OF** application for leave to file  
appeal out of time in Criminal Appeal No. HAA 17 of  
2023

**BETWEEN:** NIMISH DEO SINGH

**APPELLANT**

**AND:** STATE

**RESPONDENT**

**Counsel:** Ms. S. Devi for the Appellant  
Ms. L. Latu for the Respondent

**Date of Hearing:** 3<sup>rd</sup> August 2023

**Date of Ruling:** 27<sup>th</sup> September 2023

**RULING ON APPLICATION FOR ENLARGEMENT**  
**OF TIME FOR APPEAL**

1. This is the Ruling on the Appellant's Notice of Motion for leave to Appeal out of Time. The Motion was filed on the 5<sup>th</sup> of June 2023 and in it the Appellant, Land Transport Authority seeks to be heard for: -
  - a) An extension of time within which to appeal to be granted to the Appellant.
  - b) Leave be granted for the Applicant to file his amended ground of appeal against his conviction and sentence.
  - c) Any other order that this Court may deem just in the circumstances.

2. The Motion for enlargement of time is supported by the affidavit of Nimish Deo Singh, filed on the 16<sup>th</sup> June 2023.

**The Grounds for the Application for enlargement of time**

3. The Applicant/Proposed Appellant was represented by Legal Aid in the Court below and he was tried in absentia on the 30<sup>th</sup> August 2022. He was convicted in his absence on the 11<sup>th</sup> November 2022.
4. On 23<sup>rd</sup> November 2022 he was sentenced to 2 years 6 months imprisonment, nonpatrol period of 24 months.
5. The 28 days appeal period expired on the 21<sup>st</sup> December 2022.
6. He first filed his appeal grounds on the 28<sup>th</sup> of March 2023.
7. He blames Legal Aid for not filing his appeal on time as he had given appeal instructions to Ms. Diroiroyi to file his grounds of appeal. He was waiting for a Court date, but he was not informed of any such date.
8. He was not advised until sometime in February 2023 that the appeal grounds were not filed so he re drafted his Grounds of Appeal and filed the same.
9. The Appellant believes that the appeal has reasonable prospects of success and will rely on the following amended proposed grounds of appeal: -
  - (a) THAT the Learned Trial Magistrate erred in law by granting the Prosecution's application for trial in absentia and thereafter proceeding with trial in absentia.
  - (b) THAT the Learned Magistrate erred in law and in fact when she made a finding that the identity of the Accused has been proved beyond a reasonable doubt when in fact the identity of the Accused was not properly established by the Prosecution witnesses.
  - (c) THAT the Learned Magistrate erred in law and fact when she failed to analyse that the chain of custody of the illicit drugs has not been proved beyond a reasonable doubt.

- (d) THAT the Learned Magistrate erred in law and fact when she failed to consider that the illicit drugs analysed as positive for methamphetamine is in issue as to whether it is the same illicit drugs that were seized from the scene of the crime.
10. As to the appeal against sentence, the only ground of appeal is – “THAT the learned Trial Magistrate erred in law and in fact when she failed to deduct the period in remand whilst sentencing the Accused.”
11. The Appellant submits that the Respondent will not suffer any prejudice if the time for appeal is extended.

### **The objection to the application**

12. The application is opposed and the State submits that they will only agree to extension for time for appeal against sentence as the State concedes that the Magistrate fell into error when she failed to deduct the time spent in remand.
13. The State submits that the grounds of appeal against conviction are without substance and not meritorious.
14. The State therefore submits that the application for enlargement of time should be dismissed.

### **Analysis**

15. Section 246 of the Criminal Procedure Act 2009 provides for appeals from the Magistrate’s Court. Section 246 (1) provides as follows: -

#### “Division 1 — Appeals Appeal to High Court

246.-(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgment and sentence.”

16. All appeals from the Magistrate’s Court must be filed within 28 days from the date of the decision being appealed against (section 248 (1) Criminal Procedure Act).

17. The Act also gives this Court the power to enlarge the time and this is provided at section 248 (2) of the Act. This is a discretionary power to be exercised if the Court finds “good cause.”

Good cause is also defined at section 248 (3) as follows: -

“(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”

18. In this case, the main reason for the delay in appealing is that the Appellant wrongfully thought that counsel had filed his grounds of appeal in time, but he was mistaken and he filed as soon as he was able to do so.
19. Of particular relevance to this application is section 172 of the Criminal Procedure Act 2009, which provides as follows: -

*“Conviction in absence of accused may be set aside*

172. If the court convicts the accused person in his or her absence, it may set aside the conviction upon being satisfied that the absence was from causes over which he or she had no control, and that there is an arguable defence on the merits.”

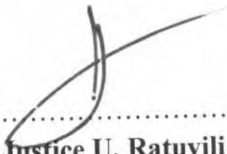
20. The Appellant is entitled to show whether he has an arguable defence on the merits.
21. The prospects of success or otherwise of the grounds of appeal will be determined at the hearing of the appeal.

**This is the Court's Ruling: -**

- 1. The application for enlargement of time for appeal is granted.**
- 2. The appellant shall file and serve their Petition of Appeal setting out their Amended Grounds of Appeal within 14 days.**

So ordered



  
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**Mr. Justice U. Ratuveli**  
**Acting Puisne Judge**  
**Labasa High Court**

**Solicitors:**

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent