

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

**CRIMINAL APPEAL NO. HAA 03 OF 2022**

**IN THE MATTER** of an Application for Leave to Appeal out of Time.

**AND IN THE MATTER** of an Appeal from the decision of the Lautoka Magistrate's Court in Criminal Case No. 412 of 2009.

**BETWEEN:** VALAME TURAGANIKELI

**APPELLANT**

**AND:** STATE

**RESPONDENT**

**Counsel:** Ms. Keli Vulimainadave for the Appellant  
Mr. Alvin Singh for the Respondent

**Date of Hearing:** 1 May 2024

**Date of Judgment:** 28 May 2024

**JUDGMENT**

- [1] This is an Application made by the Appellant by way of a Notice of Motion, filed on 24 February 2022, seeking Leave to Appeal Out of Time the decision made by the Resident Magistrate, Magistrate's Court of Lautoka, in Criminal Case No. 412 of 2009, on 22 November 2016.

- [2] The Notice of Motion is supported by an Affidavit in Support filed by the Appellant on 24 February 2022.
- [3] The Notice of Motion and the Affidavit in Support were originally filed by the Appellant in person. Thereafter, the Legal Aid Commission undertook to represent the Appellant. On 11 April 2023, with the Leave of Court, the Appellant filed a (Further) Affidavit in Support of the Application for Leave to Appeal Out of Time, together with an Amended Petition of Appeal.
- [4] It is revealed when perusing the Case Record of the Magistrate's Court of Lautoka that the Appellant, together with 2 others, were first charged (by way of an Amalgamated Charge) before the Magistrate's Court of Lautoka, on 28 August 2009 [Vide pages 15 to 16 of the Magistrate's Court Record].
- [5] After a lapse of over 3 years, on 17 September 2012, an Amended Charge was filed against the Appellant and the 2 others, before the Magistrate's Court of Lautoka [Vide pages 17 to 18 of the Magistrate's Court Record], containing the following offences:

**COUNT 1**

***Statement of Offence (a)***

**ROBBERY WITH VIOLENCE**: Contrary to Section 293 (1) (b) of the Penal Code, Chapter 17.

***Particulars of Offence (b)***

**JOSEFA LUTUNATABUA, VALAMI TURAGANIKELI AND PAULA NAMUA**, with others, on the 16<sup>th</sup> day of July 2009, at Lautoka, in the Western Division, robbed **YUTA SAMENO** of 10 rolls of Benson & Hedges cigarettes, valued \$3.00 and a room key, valued \$4.50, all to the total value of \$7.50, the property of **YUTA SAMENO**, and at the time of such robbery did use personal violence on the said **YUTA SAMENO**.

## COUNT 2

### *Statement of Offence (a)*

**ROBBERY WITH VIOLENCE**: Contrary to Section 293 (1) (b) of the Penal Code, Chapter 17.

### *Particulars of Offence (b)*

**JOSEFA LUTUNATABUA, VALAMI TURAGANIKELI AND PAULA NAMUA**, with others, on the 16<sup>th</sup> day of July 2009, at Lautoka, in the Western Division, robbed **MASAO JURI** of a Samsung Mobile Phone valued \$19.00, a Mitsubishi Mobile Phone valued \$100.00, a Seiko electric dictionary valued \$600.00, a shaving gear valued \$50.00 and a portable music player valued \$200.00, all to the total value of \$969.00, the property of **MASAO JURI**, and at the time of such robbery did use personal violence on the said **MASAO JURI**.

## COUNT 3

### *Statement of Offence (a)*

**ROBBERY WITH VIOLENCE**: Contrary to Section 293 (1) (b) of the Penal Code, Chapter 17.

### *Particulars of Offence (b)*

**JOSEFA LUTUNATABUA, VALAMI TURAGANIKELI AND PAULA NAMUA**, with others, on the 16<sup>th</sup> day of July 2009, at Lautoka, in the Western Division, robbed **TAKAAKI SAKAMOTO** of an electric shaver valued \$600.00, a Hipitch deep cleansing oil valued \$10.00, a digital camera valued \$600.00 and cash \$200.00, all to the total value of \$1,410.00, the property of **TAKAAKI SAKAMOTO**, and at the time of such robbery did use personal violence on the said **TAKAAKI SAKAMOTO**.

#### COUNT 4

##### *Statement of Offence (a)*

**ROBBERY WITH VIOLENCE**: Contrary to Section 293 (1) (b) of the Penal Code, Chapter 17,

##### *Particulars of Offence (b)*

**JOSEFA LUTUNATABUA, VALAMI TURAGANIKELI AND PAULA NAMUA**, with others, on the 16<sup>th</sup> day of July 2009, at Lautoka, in the Western Division, robbed **MASAHIRO KODA** of a Sharp electric dictionary valued \$600.00, a Lenovo laptop valued \$2,000.00, I-Pod valued \$400.00, a pair of reading glass valued at \$400.00 and cash of \$100.00, all to the total value of \$3,500.00, the property of **MASAHIRO KODA**, and at the time of such robbery did use personal violence on the said **MASAHIRO KODA**.

- [6] As could be observed, the Appellant was named as the 2<sup>nd</sup> Accused in the proceedings before the Magistrate's Court of Lautoka. However, on 16 October 2012, the State moved to withdraw the charges against the 3<sup>rd</sup> Accused, Paula Namua. Accordingly, the said Paula Namua was discharged from the proceedings. On the same day, the State had filed a Further Amended Charge in respect of the 1<sup>st</sup> Accused, Josefa Lutunatabua, and the Appellant and the matter proceeded in respect of the said two Accused [Vide page 61 of the Magistrate's Court Record].
- [7] The State was relying on the admissions made by the 1<sup>st</sup> Accused and the Appellant in their caution interview statements. Since the two of them were challenging the admissibility of the said caution interview statements, a voir dire hearing had been conducted.
- [8] At the conclusion of the said hearing, on 8 November 2016, the Learned Resident Magistrate ruled that the admissions in the said caution interview statements of both the 1<sup>st</sup> Accused and the Appellant were inadmissible [Vide pages 9 to 14 of the Magistrate's Court Record].
- [9] On 22 November 2016, the State made an application in terms of Section 169 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act) to withdraw the charge

against the 1<sup>st</sup> Accused and the Appellant. Acting in terms of Section 169 (2) (b) (ii) of the Criminal Procedure Act, the Learned Resident Magistrate discharged the 1<sup>st</sup> Accused and the Appellant from these proceedings [Vide page 115 of the Magistrate's Court Record].

[10] Aggrieved by this Order the Appellant has filed this instant Application by way of a Notice of Motion seeking Leave to Appeal Out of Time.

[11] This matter was taken up for hearing before me on 1 May 2024. Counsel for both the Appellant and the State were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

#### **THE AFFIDAVIT IN SUPPORT FILED BY THE APPELLANT**

[12] As stated earlier, the Appellant filed a (Further) Affidavit in Support of the Application for Leave to Appeal Out of Time, on 11 April 2023. Therein he deposes that he was discharged by the Magistrate's Court of Lautoka on 22 November 2016, after the voir dire ruling was delivered.

[13] He submits that after he was discharged he was not able to obtain legal advice on the next step to take in this matter as he was incarcerated for a different matter. He further states that he only became aware in 2022 that he can file an appeal in this matter. Thereafter, he proceeded to filing the appeal papers through the administration of the Fiji Corrections Service.

[14] The Appellant deposes that the Ground of Appeal proposed by him is meritorious and as such, there is a real prospect that he will succeed in his appeal. He states that there will be no prejudice caused to the Respondent (State) should the appeal be allowed as the voir dire ruling has already been delivered. In the circumstances, the Appellant moves that leave be granted to appeal this matter out of time.

#### **PROPOSED GROUND OF APPEAL AGAINST THE ORDER OF DISCHARGE**

[15] Following is the proposed Ground of Appeal against Discharge filed by the Appellant:

- (i) That the Learned Magistrate erred in law in not exercising his discretion when he failed to act fairly and reasonably in the interest of justice under the provisions of law.

### THE LAW

[16] Section 246 of the Criminal Procedure Act deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

*"(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 judgement and sentence.*

*(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*

*(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*

*(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

*(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.*

*(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.*

*(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.*

[17] Section 248 (1) of the Criminal Procedure Act provides that *“Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant’s lawyer, and (filed) within 28 days of the date of the decision appealed against.”*

[18] However, Section 248 (2) of the Criminal Procedure Act sets out that *“The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.”*

[19] Section 248 (3) of the Criminal Procedure Act stipulates:

*“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.”*

[20] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

*“(2) The High Court may —*

*(a) confirm, reverse or vary the decision of the Magistrates Court; or*

*(b) remit the matter with the opinion of the High Court to the Magistrates Court;  
or*

*(c) order a new trial; or*

*(d) order trial by a court of competent jurisdiction; or*

*(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*

*(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

*(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."*

[21] Section 169 of the Criminal Procedure Act, which deals with withdrawal of charges reads as follows:

*169. — (1) The prosecutor, may with the consent of the court, withdraw a complaint at any time before a final order is made.*

*(2) On any withdrawal under sub-section (1) —*

*(a) where the withdrawal is made after the accused person is called upon to make his or her defence, the court shall acquit the accused;*

*(b) where the withdrawal is made before the accused person is called upon to make his or her defence, the court shall subject make one of the following orders —*

*(i) an order acquitting the accused;*

*(ii) an order discharging the accused; or*

*(iii) any other order permitted under this Decree which the court considers appropriate.*

*(3) An order discharging the accused under sub-section (2)(b)(ii) shall not operate as a bar to subsequent proceedings against the accused person on the basis of the same facts.*

#### **PRINCIPLES RELATING TO ENLARGEMENT OF TIME FOR FILING OF APPEALS**

[22] It has now been well established that there are several factors that an Appellate Court needs to take into consideration when dealing with such applications.

[23] In *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), His Lordship Chief Justice Anthony Gates has elaborated on the principles to be applied or considered by the Appellate Courts when exercising its discretion in such matters. These factors are:



- (i) The reasons 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?

### **ANALYSIS**

- [24] In this case the Appellant was discharged of the four charges of Robbery with Violence by the Learned Magistrate of Lautoka, on 22 November 2016. In terms of Section 248 (1) of the Criminal Procedure Act, an appeal against this decision had to be filed within 28 days of the decision. Thus the appealable period lapsed on or about 20 December 2016.
- [25] This application was filed in the High Court of Lautoka only on 24 February 2022. Thus, these proceedings have been instituted over 5 years after the appealable period had lapsed.
- [26] The reasons provided by the Appellant for the delay in filing the appeal is that he was not able to obtain legal advice since he was incarcerated for another matter.
- [27] In terms of Section 248 (2) of the Criminal Procedure Act it is stated that the Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this Section for filing of an appeal. Section 248 (3) of the Criminal Procedure Act broadly sets out as to what good cause shall deem to include.
- [28] In *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* (supra), the Supreme Court has elaborated on the principles to be applied or considered by the Appellate Courts when exercising its discretion in such matters.
- [29] In the instant case, the reasons for the failure to file the appeal within time cannot be acceptable as reasonable. The length of the delay of over 5 years in instituting these proceedings, in my view, is also not reasonable.
- [30] However, in terms of the principles set out in *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* (supra), even where there has been substantial delay, nonetheless the Appellate Court has to consider whether there are grounds of appeal that will probably

succeed. In other words, whether there is a ground of merit justifying this Court's consideration.

[31] Therefore, it is necessary for this Court to go into the proposed Ground of Appeal filed by the Appellant to determine this fact.

### Ground of Appeal

[32] The sole Ground of Appeal urged by the Appellant is that the Learned Magistrate erred in law in not exercising his discretion when he failed to act fairly and reasonably in the interest of justice under the provisions of law.

[33] It is true that the State made an application to withdraw the charges against the 1<sup>st</sup> Accused and the Appellant, only after the Learned Resident Magistrate had ruled that the admissions made by both of them in their caution interview statements were inadmissible. This application was made pursuant to Section 169 of the Criminal Procedure Act.

[34] It is provided in terms of Section 169 (1) of the Criminal Procedure Act that the Prosecutor may, with the consent of the Court, withdraw a complaint at any time before a final order is made. When an application is so made, the Learned Magistrate must act in terms of Section 169 (2) of the Criminal Procedure Act.

[35] Section 169 (2) (a) stipulates that where the withdrawal is made after the Accused person is called upon to make his or her defence, the Court shall acquit the Accused. In such instances there is no discretion, but an obligation imposed on the Learned Magistrate to acquit the Accused.

[36] However, in terms of Section 169 (2) (b) where the withdrawal is made before the Accused person is called upon to make his or her defence, the Court shall subject make one of the following orders —

*(i) an order acquitting the accused;*

*(ii) an order discharging the accused; or*

*(iii) any other order permitted under this Decree which the court considers appropriate.*

- [37] It is manifest on reading of the above provision that in such situations the Magistrate has the discretion to either acquit the Accused or discharge the Accused or to make any other order which the Court considers appropriate. In the instant case, the Learned Magistrate has made order to discharge the Appellant. This was well within his discretion.
- [38] Therefore, I am of the opinion that the proposed Ground of Appeal is without merit.
- [39] I concede that the real concern for the Appellant is the provisions of Section 169 (3) of the Criminal Procedure Act which states that *"An order discharging the accused under sub-section (2) (b)(ii) shall not operate as a bar to subsequent proceedings against the accused person on the basis of the same facts"*.
- [40] However, it is highly unlikely for the State to institute fresh proceedings against the Appellant, on the basis of the same facts, nearly 7 years later. If the State decides to do so, at this late stage, it may even tantamount to an abuse of process.
- [41] I wish to state in conclusion, that to bring in certainty to the law, it would be prudent for the Legislature of Fiji to enact similar provisions to the provisions found in Section 188 of the Code of Criminal Procedure Act No 15 of 1979 of Sri Lanka, which provides as follows (where a discharge has been made by the Magistrate's Court in similar instances):
- (3)The order of discharge referred to in subsection (2) shall operate as an acquittal where either:-*
- (a) it is not set aside and the case against the accused is not reopened within a period of one year from the date of such order; or*
- (b) the case has been duly reopened and an order of discharge is made for the second time:*
- Provided that where an application to set aside the order of discharge is pending before a Magistrate or any other court in revision, the order of discharge shall not operate as an acquittal at the end of the period of one year until the Magistrate or such court makes order refusing the application to set it aside.*

[42] For all the reasons aforesaid, I conclude that enlargement of time to file this Appeal out of time should not be granted and that the application should stand dismissed.

**FINAL ORDERS**


[43] In light of the above, the final orders of this Court are as follows:

1. Leave for enlargement of time to file Petition of Appeal is disallowed.
2. The application is dismissed.
3. There will be no order for costs.



**AT LAUTOKA**

**Dated this 28<sup>th</sup> Day of May 2024**

  
**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**

**Solicitors for the Appellant:**

**Office of the Legal Aid Commission, Lautoka.**

**Solicitors for the Respondent:**

**Office of the Director of Public Prosecutions, Lautoka.**