

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 13 of 2023

BETWEEN : **LIVAI RATABUA**
APPLICANT

A N D : **THE STATE**
RESPONDENT

Counsel : Applicant in person.
: Mr. M. I. Rafiq for the Respondent.

Date of Hearing : 24 May, 2024

Date of Ruling : 30 May, 2024

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:

FIRST COUNT

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

LIVAI RATABUA and SAMUELA RAVOUVOU, on the 14th day of May, 2016 at Lautoka in the Western Division dishonestly appropriated one

black ladies hand bag valued at \$80.00 containing one black sunglass valued \$85.00, one baby wipes packet valued \$2.00 and 2 x 500ml Fiji Water valued \$4.00 all to the total value of \$171.00 the property of WINNIE CECELIA AISEA with the intention of permanent depriving the said WINNIE CECELIA AISEA.

SECOND COUNT

Statement of Offence

BREACH OF SUSPENDED SENTENCE: Contrary to section 28 (1) (2) and 26 of the Sentencing and Penalties Decree No. 42 of 2009.

Particulars of Offence

SAMUELA RAVOUVOU, on the 14th day of May, 2016 at Lautoka in the Western Division, breached the suspended sentence of 3 months imprisonment which was suspended for 5 years dated the 31st day of August, 2015 vide Lautoka Case File Number 347/15 by committing an offence namely theft.

2. There are two charges, however, it is only the first count which relates to the applicant. The applicant first appeared in the Magistrate's Court on 17th May, 2016. The charge was read and explained to the applicant in his preferred Itaukei language. The applicant understood the charge and indicated that he will represent himself. On this date the applicant was served his disclosures.

3. On 31st May, 2016 the applicant informed the court that he was ready to take his plea. On this date the applicant pleaded guilty to the charge after the charge was read to the applicant and understood by him. In the afternoon the applicant admitted the summary of facts read and explained to him in the Itaukei language.

4. After hearing mitigation on 17th June, 2016 the applicant was sentenced to 6 months imprisonment which was suspended for 5 years after being found guilty and convicted for one count of theft.
5. The brief summary of facts was as follows:
 - a) On 14th May, 2016 the victim was seated inside her car parked beside the road. The applicant went to the driver's side window and asked for money from the victim. The applicant diverted the victim's attention to him, Samuela the other accused grabbed the handbag of the victim which was on the front passenger seat of the car through the car window and ran towards the MH Supermarket.
 - b) The applicant followed Samuela but was apprehended by a sales assistant namely Paulina. The matter was reported to the police the applicant was arrested, caution interviewed and charged for the offence of theft.

APPEAL IN THE HIGH COURT

6. The applicant being dissatisfied with the conviction and sentence filed an undated hand written notice for leave to appeal with proposed grounds of appeal against conviction and sentence which was received by the High Court Registry on 16th March, 2023. Thereafter, the applicant also filed an undated handwritten one additional proposed ground of appeal against conviction.
7. The application filed is opposed by the state, however, no affidavit in reply has been filed, the state relies on the submissions of counsel.

8. The applicant and the state counsel filed written submissions and also made oral submissions during the hearing for which this 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

REASONS FOR THE FAILURE TO FILE APPEAL WITHIN TIME

11. The applicant states that he is a lay person who does not have any knowledge of law to have prepared a timely appeal. It was only last year (2023) that he was able to prepare his application for leave to appeal out of time with the help of his inmates.
12. After perusing the documents filed I do not accept that the applicant delayed the filing of his appeal due to lack of legal knowledge. The grounds mentioned by the applicant in his notice for leave to appeal out time are properly drafted.
13. The reason given for the delay is not satisfactory.

LENGTH OF DELAY

14. The applicant was sentenced on 17th June, 2016 and the notice for leave to appeal out of time was received by the High Court Registry on 16th March, 2023. After the appeal period had expired the length of delay was about 6 years and 8 months.
15. The length of delay is substantial and inordinate, despite taking into account the unexpected circumstances of COVID 19 pandemic that existed from April, 2021 to later part of that year this court is unable to accept the length of delay as beyond the control of the applicant.

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

PROPOSED GROUND OF APPEAL AGAINST CONVICTION

16. The applicant submits that he has a meritorious appeal upon the following proposed grounds of appeal against conviction:

Ground One

1. *That the plea was equivocal in that:*
 - a) *The charge against me was defective.*
 - b) *I did not plea to the elements in my caution interview.*
 - c) *I did not understand the charge.*

Ground Two

1. *That the summary of facts does not conform to the particulars of offence and does not conform [to] the evidence.*

Ground Three

1. *That the sentence is harsh and excessive.*

Additional Ground

1. *That the guilty plea was equivocal as it was not given from his own will but was threatened by the co-accused to plead guilty.*

17. All the proposed grounds of appeal in respect of conviction can be dealt with together. The applicant states that his plea was equivocal in that the charge of theft was defective, he did not admit to the elements of the charge in his caution interview, he did not understand the charge and he was

threatened to plead guilty by his co-accused. Furthermore, the applicant also submitted that the summary of facts does not conform to the particulars of the offence and the evidence.

18. To answer the question whether the plea taken was equivocal this court has to look at the copy record particularly from page 6 to 7 which is as follows:

31/5/16

Prosecution: Cpl. Shelvin

Accused: [1] Present [2] Present

Clerk

Court: Accused are you ready to take plea?

A1 & A2: Yes sir.

Court: Charge put to the accused.

A1 & A2: Preferred language – Fijian

Charge read in English – understood both counts.

<i>PLEA</i>	<i>1ST COUNT</i>	<i>2ND COUNT</i>
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<i>Accused 1</i>	<i>Guilty</i>	<i>-</i>
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<i>Accused 2</i>	<i>Guilty</i>	<i>Guilty</i>
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Accused 1 I plead guilty on my own free will.

Accused 2 I plead guilty on my own free will.

Court Did you both fully understand the nature of the charges against you and the consequences of a guilty plea when you pleaded?

Accused 1 Yes sir.

Accused 2 Yes sir.

Prosecution Seek matter – stood down for summary of facts.

Court Stood down for summary of facts

LATER AT 12.45 PM

Prosecution Cpl. Theodore

Accused: [1] Present [2] Present

Prosecution Summary of facts read over and explained.

Accused 1 Summary of facts understood and admitted.

Accused 2 Summary of facts understood and admitted.

Court: There are no facts on the 2nd count.

Prosecution:: Seek leave of court to amend the summary of facts.

Court: Allowed. Summary of facts amended.

Prosecution: Amended summary of facts read over and explained to 2nd accused.

2nd accused: Amended summary of facts understood and admitted.

Prosecution: Seek leave of court to submit the caution interview statement of accused and the previous convictions. Nil previous conviction on first accused.

19. From the above, the charge was read and explained to the applicant who understood the same and pleaded guilty. The applicant went further to inform the court that he was pleading guilty on his free will. Thereafter the

summary of facts was read and tendered as an exhibit, followed by the caution interview. Although the copy record states the charge was read in English, however, this is a typing error since the handwritten notes of the learned Magistrate mentions the charge was read and explained in Fijian that is Itaukei language.

20. The learned Magistrate upon being satisfied that the applicant had entered an unequivocal plea convicted the applicant as charged. The applicant in his plea in mitigation inter alia sought forgiveness and promised not to re-offend.
21. This court can in its discretion set aside the guilty plea if it is satisfied that there was evidence of an equivocal plea or the summary of facts did not disclose the offence charged or there was prejudice caused to the applicant due to lack of legal representation.
22. The above has been succinctly mentioned by the Court of Appeal in *Aiyaz Ali vs. The State*, criminal appeal no. AAU 031 of 2015 (27 February, 2020) at paragraphs 15 to 17 as follows:

[15] The paramount question on any change of plea application, is whether the plea was unequivocal, and made with a full understanding of the offence alleged and its ingredients. In considering this question, the history of the case itself is highly relevant (vide State v Seru [2003] FJHC 189; HAC 0021D.2002S (26 March 2003).

[16] In Hefferman v The State [2003] FJHC 163; HAA 0051J.2003S (12 December 2003) Justice Nazhat Shameem said

“The law on the subject of change of plea was clearly set out in S (an infant) -v- Recorder of Manchester and Others (1971) AC 481 by the House of Lords. I applied those principles in State -v- Timoci Kauyaca Bainivalu HAC0006 of 2002. A plea can be changed at any time before sentence. However in considering change of plea, the court should only allow the change if there was an equivocal plea, or the facts did not disclose the charge or there was prejudice as a result of lack of legal representation. The discretion should be exercised sparingly and judicially.”

[17] In Tuisavusavu v State [2009] FJCA 50; AAU 0064.2004S (3 April 2009) the Court of Appeal held:

“[9] The authorities relating to equivocal pleas make it quite clear that the onus falls upon an applicant to establish facts upon which the validity of a guilty plea is challenged (see Bogiwaluv State [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea ‘with caution bordering on circumspection’ (Liberti(1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.

[10] Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no doubt from the material before us that the 1st applicant’s plea was not in any way equivocal. As the 1st applicant admitted to us during argument, he pleaded guilty to the charge after having been advised to do so by his counsel in the hope of obtaining a reduced sentence. As was stated by the High Court of Australia in Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132;

"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."

23. Whether the plea was equivocal

The copy record is self-explanatory in this regard. The applicant had informed the court that he will represent himself. The charge was read and explained which was understood by the applicant and he also stated that he was pleading guilty on his freewill.

24. There is nothing in the copy record to suggest that the plea was equivocal. In my view the applicant pleaded guilty with the full understanding of what he was pleading to including the consequences of pleading guilty.

CAUTION INTERVIEW OF THE APPLICANT

25. In the caution interview tendered in court the applicant admitted committing the offence in Q's & Ans.'s 27 to 31. The applicant did not inform the Magistrate's Court about his challenge to the admissibility of his confession. The applicant incorrectly asserted in court that he did not confess when his caution interview tendered in the Magistrate's Court

states otherwise. The confession of the applicant indicates his active participation in the commission of the offence of theft by distracting the victim and allowing the other accused to run away with the victim's bag. The applicant was jointly charged with the other accused.

SUMMARY OF FACTS

26. The summary of facts satisfies all the elements of the offence of theft as charged which was admitted by the applicant. In respect of the contention that the summary of facts did not satisfy all the elements of the offence alleged one has to consider the summary of facts in its entirety with the exhibits tendered. Furthermore, the charge is also not defective it has specific particulars of the offence of theft in simple language. The applicant did not specifically say how the charge was defective.

THREAT BY THE CO-ACCUSED

27. The applicant stated that he pleaded guilty due to threat by his co-accused there was no evidence in this regard before the Magistrate's Court. In my considered judgment this claim is an afterthought.
28. Finally, the applicant had made it clear to the learned Magistrate that he wished to represent himself and was pleading guilty on his freewill. The mitigation advanced by the applicant also confirmed his understanding of the charge and the summary of facts read.
29. The copy record is self-explanatory there is no error made by the learned Magistrate in accepting the unequivocal guilty plea of the applicant.

30. For the above reasons, all the proposed grounds of appeal against conviction are dismissed due to lack of merits.

PROPOSED GROUND OF APPEAL AGAINST SENTENCE

31. The applicant argued that the sentence is harsh and excessive. The applicant was sentenced to 6 months imprisonment for one count of theft which was suspended for 5 years. The learned Magistrate had correctly applied deterrence factor in suspending the imprisonment term for 5 years which is justified in a well planned and executed theft like this one.
32. For the offence of the theft the maximum penalty is 10 years imprisonment.
33. The tariff for the offence of theft is settled. In *Mikaele Ratusili v. State, Criminal Appeal no. HAA 011 of 2012 (1 August, 2012)* Madigan J. set out the tariff for theft as follows:
- “(i) For the first offence of simple theft the sentencing range should be between 2 and 9 months.*
 - (ii) any subsequent offence should attract a penalty of at least 9 months.*
 - (iii) Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences of up to three years.*
 - (iv) regard should be had to the nature of the relationship between offender and victim.*

(v) planned thefts will attract greater sentences than opportunistic thefts.”

34. The manner in which the offence was committed including the culpability of the applicant the sentence is neither harsh nor excessive but lenient bearing in mind the prevalence of such offences.
35. The proposed ground of appeal against sentence is also dismissed due to lack of merits.

PREJUDICE TO THE RESPONDENT

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

CONCLUSION

37. Based on the reasons mentioned above, this court is satisfied that all the proposed grounds of appeal argued by the applicant are without any merits which does not justify this court's intervention in granting the applicant an extension of time to appeal.
38. There is no good cause shown by the applicant in support of his application.

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

30 May, 2024

Solicitors

Applicant in person.

Office of the Director of Public Prosecutions for the Respondent.

