IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

MISC. CRIMINAL NO. 12 OF 2012
(High Court HAC 177 of 2007)

BETWEEN : **INOKE BALEMILA DEVO**

Appellant

AND : **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

Respondent

Coram : **Calanchini P**

Counsel : **Mr A K Singh with Mr V Kumar for the Appellant**
Ms F Puleiwai for the Respondent

Date of Hearing : **24 June 2015**

Date of Ruling : **28 July 2015**

RULING

[1] This is an application for an enlargement of time to file an application for leave to appeal against conviction and sentence. The application was filed on 18 April 2012 and was supported by an affidavit sworn on 16 April 2012 by Inoke Devo. The

application was opposed by the Respondent. An answering affidavit sworn on 25 April 2014 by Krishna Sami Goundar was filed on behalf of the Respondent. Both parities filed written submissions before the hearing and Counsel for the Appellant handed to the Court at the hearing of the application a copy of further submissions.

[2] The power of the Court to extend the time for seeking leave to appeal is exercised pursuant to the discretion granted under section 26(1) of the Court of Appeal Act Cap 12 (the Act). Pursuant to section 35(1) of the Act that power may be exercised by a justice of appeal.

[3] The appellant was charged with 5 counts of official corruption contrary to section 106 of the Penal Code Cap 17 and 4 counts of abuse of office contrary to section 111 of the Code.

[4] Following a lengthy trial in the High Court before a Judge sitting with three assessors, the assessors returned majority opinion of not guilty on 2 of the official corruption counts and on one of the counts of abuse of office. The assessors returned unanimous opinions of not guilty on 3 of the official corruption counts. They returned unanimous opinions of guilty on the 3 remaining counts of abuse of office. In summary the assessors found the appellant not guilty on all 5 counts of official corruption and on 1 count of abuse of office. The learned trial Judge in his judgment, after giving his reasons, agreed with the opinions of the assessors and proceeded to record a conviction against the Appellant in respect of 3 counts of abuse of office and entered an acquittal in respect of the remaining 6 counts. On 9 April 2010 the Appellant was sentenced to a term of imprisonment of 9 months on each count to be served concurrently.

[5] Under section 26(1) of the Act the Appellant was required to give notice of his application for leave to appeal within 30 days from the date of the decision. On the basis that the Appellant's notice should have been filed by 9 May 2010, his application for an enlargement of time was about 23½ months out of time.

[6] In **Kumar and Sinu –v- The State** (CAV 1 of 2009; 21 August 2012) the Supreme Court discussed the factors that should be considered by a court when deciding

whether to enlarge time for appealing and summarised them as being (i) the length of the delay, (ii) the reason for the failure to file within time, (iii) whether there is a ground of merit justifying the appellate court's consideration or, where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (iv) if time is enlarged, will the respondent be unfairly prejudiced. These are matters relevant to determining whether it would be just in all the circumstances to grant the application.

[7] The explanation for the delay of over 23 months was set out in the supporting affidavit. The deponent offers as an explanation for the delay the fact that he was incarcerated from April 2010 to October 2010 as a result of which he was unable to instruct a lawyer to file his appeal. To that, of course, is the answer that nearly all appellants in criminal appeals are incarcerated and are still required to file a notice of appeal within 30 days. The vast majority, although unrepresented, manage to write to the Court Registry indicating their desire to appeal with some basic grounds of appeal set out. These are often amended or perfected at a later date. Furthermore, that explanation does not cover the delay from October 2010.

[8] Another explanation concerns the lack of funds due to suspension without pay, subsequent termination of employment and difficulty in accessing FNPF funds. None of these matters explain why the Appellant did not write a simple letter to the Registry stating that he wished to appeal his conviction. The Appellant states that *"vigorous attempts"* were pursued to obtain legal aid. There are no particulars in the affidavit as to those vigorous attempts made by the Appellant or on his behalf. There is no correspondence to or from the Legal Aid Commission exhibited to the affidavit to substantiate the claim that efforts were made or which might explain why legal assistance was not granted. The Appellant also refers to the passing of his wife on 6 December 2011 and the subsequent mourning period of 100 nights in his affidavit as a further explanation for the delay.

[9] I am not convinced that the reasons put forward either individually or taken together provide a satisfactory explanation for the delay. The Appellant was a senior civil servant and is a well educated man who was experienced in the ways of the world and the requirement for timely action. Many young appellants with minimum education

who find themselves charting a path for the first time through the criminal justice system are able to write a letter, have it typed by the corrections office and forwarded to the Registry within 30 days of their conviction or sentence. None of the reasons put forward by the appellant satisfactorily explain why he could not have done the same.

[10] The effect of this conclusion is that the Appellant is required to establish that at least one of his grounds of appeal will probably succeed in order for the Court to conclude that it would be just in all the circumstances to grant an enlargement of time for the appeal to proceed.

[11] Exhibited to the Appellant's affidavit is a draft notice of appeal setting out the grounds upon which the Appellant relies in the event that an enlargement of time is granted. They are:

> *"1.* ***THAT*** *His Lordship the Learned Trial Judge Justice Daniel Goundar erred in fact and in law in:*
>
> *(i) Referring this matter to the Assessors for determination when under all the circumstances of the case it was unsafe or unsatisfactory to do so;*
>
> *(ii) In not adequately directing/misdirecting the Assessors on law regarding abuse of office;*
>
> *(iii) In not directing/misdirecting the Assessors that the Prosecution Evidence before the Court demonstrated that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellant;*
>
> *(iv) In not adequately directing/misdirecting the Assessors to disregard all the media reports including TV coverage that existed before the trial and during the trial of the Appellant;*
>
> *(v) Considering factors, that were irrelevant and not considering factors that were relevant in the conviction and sentence of the Accused;*
>
> *(vi) In hearing the matter which was transferred to the High Court when there was no preliminary inquiry held as to*

the transfer pursuant to Section 224 of the Criminal Procedure Code; and

(vii) In imposing a sentence that was harsh and unjust and not commensurate with the gravity of the offence or the facts in support of the charged offences."

[12] The Appellant's submissions filed on 23 May 2014 do not address these grounds of appeal. The submissions analyse in some detail the elements of the offence of abuse of office under section 211 of the Penal Code. The submissions handed up to the Court on the day of the hearing do address the grounds of appeal. However the submissions do not address ground (v) and it is therefore assumed that the Appellant is not relying on that ground in support of his application. Furthermore, as the Appellant had been released from prison in October 2010, the application for leave to appeal against sentence was not pursued at the hearing.

[13] Ground 1 appears to be related to the role of the trial judge at the end of the prosecution case which itself is concerned with section 231 of the Criminal Procedure Decree 2009. The Decree came into effect in February 2010, before the commencement of this trial. Section 231 (i) states:

> *"When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments ___ the court shall record a finding of not guilty if it considers that there is no evidence that the accused person ___ committed the offence."*

[14] This provision reflects what is sometimes referred to as the first test outlined in **R v. Galbraith** [1981] 1 W.L.R. 1039 at page 1042 (per Lord Lane CJ) wherein the Court gave guidance as to the proper approach at common law when considering the sufficiency of evidence.

[15] The reference in ground (i) to *"unsafe or unsatisfactory"* is of no relevance when a no case submission must be considered. Furthermore *"unsafe or unsatisfactory"* are not grounds upon which a criminal appeal may be allowed under section 23(1) of the Act.

[16] All three of the abuse of office offences for which the Appellant was convicted rely upon particulars whereby the Appellant was alleged to have authorized the unlawful

expenditure of public funds by sending out his staff members in a government vehicle to collect liquor and alcoholic beverage from various liquor outlets within the Central Division which was an "*arbitrary act _ _ _*." These offences were alleged to have occurred at times when (a) the Appellant was charged with duties of election preparations (count 3) and (b) the Appellant was charged with the general duties as Commissioner Central (counts 7 and 9). In count 3 there were no particulars as to the purpose for which the liquor was acquired. In counts 7 and 9 the particulars state that the liquor was acquired for *"their office Christmas party."*

[17] The issue raised by the Appellant is that the Respondent was required to establish that the acts of the Respondent as alleged in the particulars of each of the three counts were *"arbitrary acts."* The learned trial Judge in paragraph 16 of his summing up states that:

> *"In law, an arbitrary act is an unreasonable act, a despotic act, an act which is not guided by rules and regulations but by the wishes of the accused."*

[18] The Appellant does not challenge the legal definition of *"an arbitrary act"* but rather challenges the convictions on the basis that there was no evidence before the Court at the conclusion of the Respondent's case as to what rules or regulations were in force and in what way the Appellant had not been guided by those rules and regulations.

[19] The second ground of appeal relies on the same issue and is directed towards what is claimed to be inadequate directions given by the learned Judge in his summing up to the assessors and to himself. The third ground of appeal is not significantly different from the second ground and adds nothing further to the issues raised by these three grounds.

[20] The learned trial Judge outlined the case for the prosecution from paragraphs 34 to 68. The Respondent called 22 witnesses. In his summary of the Respondent's evidence there was no reference to any regulations, rules or orders that may have offered guidance as to the limits or restrictions on the use of government vehicles. However in paragraph 67 of the summing up the learned Judge refers to certain admissions made by the Appellant during the course of his caution interview. The Judge noted:

> *"The accused admitted that he authorized the use of official vehicle to collect liquor from outlets for the office Christmas party. He said the runs were unofficial. He admitted he may have abused the authority of his office by authorizing the use of GM472 for unofficial runs to collect liquor."*

[21] Whether those admissions (if true) in the absence of any other evidence were sufficient to constitute *"an arbitrary act"* in accordance with the legal definition given by the learned Judge in my opinion raises a ground of appeal of sufficient strength to justify an enlargement of time. This is particularly so when other admissions made by the Appellant in the course of the caution interview were not regarded as of sufficient weight for either the assessors or the trial Judge to convict the Appellant on any of the other six counts.

[22] The fourth ground raises an issue concerning the media coverage of the proceedings and an alleged failure to warn the assessors that such material should be disregarded. In my judgment the directions given by the learned Judge in paragraph 6 are quite sufficient and the ground has no merit. Leave to appeal is refused.

[23] The final ground remaining for consideration raises an issue under 224 of the Criminal Procedure Code Cap 21 (CPC). It is assumed that this is raised since the Appellant was charged and brought before a court for the first time when the CPC was still in force. [This is re-inforced by the fact that section 224 in the Criminal Procedure Decree 2009 relates to assessors and is not related to this ground of appeal]. However the Appellant's ground is misguided. Section 224 was amended with effect from 13 October 2003 by Act No.13 of 2003 to read as follows:

> *"An accused person shall not be subject to a preliminary enquiry or to committal proceedings prior to transfer to the High Court for trial."*

As a result this ground has no merit and leave is refused.

[24] The Respondent does not address the issue of prejudice in its written submissions instead opposing the application on the merits of the appeal grounds. I see no prejudice to the Respondent that could reasonably be considered unfair.

[25] The Appellant is granted an enlargement of time and as a result leave to appeal. The appeal is limited to the first three grounds of appeal in the draft notice exhibited to the affidavit in support.

Orders:

1. *Enlargement of time granted.*

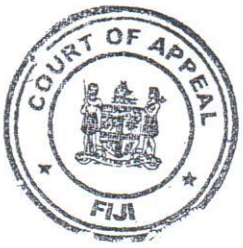
2. *Leave to appeal granted.*

3. *Notice of appeal to be filed within 30 days from the date of this Ruling with grounds redrafted and restricted to the first three grounds of appeal in the draft notice exhibited to the affidavit in support.*

4. *Appellant to file and serve written submissions for the appeal within 30 days after filing the notice of appeal.*

5. *Respondent to file and serve written submissions for the appeal within 30 days thereafter.*

6. *Upon the filing of submissions the appeal is to be placed in the list of appeals for callover on a date to be fixed.*



W. Calanchini

Hon. Mr Justice W.D. Calanchini
PRESIDENT, COURT OF APPEAL