

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU0108 of 2013
[High Court Misc. Case No. HAM81 of 2011Ltk)

BETWEEN : **VIKATORE TABEUSI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini, P**
Goundar JA
Perera JA

Counsel : **Ms S Ratu for the Appellant**
Ms P Madanavosa for the Respondent

Date of Hearing : **10 November 2017**

Date of Judgment : **30 November 2017**

JUDGMENT

Calanchini P

[1] I have read the draft judgment of Goundar JA and agree that the application for an enlargement should be remitted to the High Court to be determined according to law.

Goundar JA

[2] On 9 June 2010, the appellant was charged with a spate of offences as follows:

Case No:	Offence:	Date of offence:	Place of offence:	Victim:	Value of stolen items:
324/10	Burglary Larceny from dwelling house	27 & 28/3/09	Lautoka	Naresh Chandra	\$2890.00
325/10	Burglary Theft	11/4/10	Lautoka	Joytish Singh	\$400.00
326/10	Burglary Theft	11 & 12/4/10	Lautoka	Yunus Ali	\$30.00
327/10	Burglary Theft	11/4/10	Lautoka	Raven Chand	\$90.00
328/10	Burglary Theft	11 & 12/4/10	Lautoka	Ajesh Nand	\$140.00
329/10	House Breaking Entering & Larceny	1-31/10/08	Lautoka	Bal Ram	\$825.00
330/10	Burglary Theft	5/4/10	Lautoka	Andrew Amesh	\$700.00
331/10	Burglary (4 counts) Theft (4 counts)	5-6/4/10	Lautoka	Hema Wati Rajesh Singh Mairul Nisha Anita Wati Barkat Ali	\$29.50 \$10.00 \$1079.00 \$70.00
333/10	Burglary Theft	12/4/10	Lautoka	Rahul Prasad	\$470.00
334/10	Burglary Theft (2 counts)	1/3/10	Lautoka	Shafil Ramzan	\$90.00 \$600.00
335/10	Burglary Theft	3/2/10	Lautoka	Daya Nand	\$1943.00
337/10	Burglary Theft	7/4/10	Lautoka	Radha Krishna	\$4100.00
338/10	Burglary Theft	4/5/10	Lautoka	Mukesh Kumar	\$550.00
339/10	Burglary Theft	11/4/10	Lautoka	Shakil Chand	\$1360.00
390/10	Burglary Theft	6/5/10	Lautoka	Mukesh Kumar	\$500.00

391/10	Burglary Larceny from dwelling house	8-9/7/09	Lautoka	Prakash Chandra	\$1347.00
392/10	Burglary Theft	1-31/3/10	Lautoka	Raza	\$150.00
393/10	Burglary Theft	3-4/4/10	Lautoka	Parwati Pillay	\$993.00
394/10	Burglary Theft	7/3/10	Lautoka	Gangaya Naicker	\$470.00

[3] When the appellant appeared in the Magistrates' Court at Lautoka for arraignment, he pleaded guilty to all the charges after waiving his right to legal representation and admitted the facts tendered in support of the charges. He also admitted 110 previous convictions, most of which were for burglary and theft. In mitigation he advised the learned Magistrate that he was 47 years old and had difficulty finding a job due to his previous convictions. He said he cooperated with the police investigation and admitted all the offences to them as well.

[4] After recording convictions in all the cases, on 31 August 2010, the learned Magistrate transferred the cases to the High Court for sentencing pursuant to section 190(1) of the Criminal Procedure Act 2009. When the matter came for sentencing before the High Court at Lautoka, all the cases were consolidated and dealt together. In his sentencing remarks, the learned High Court judge described the appellant's conduct as a 'burglary binge' after escaping from prison in 2008. He classified the appellant as a 'habitual offender' pursuant to section 11 of the Sentencing and Penalties Act 2009 and considered the protection of the community as the primary purpose of the punishment. For each count of burglary, the appellant was sentenced to 5 years imprisonment. For each count of theft, he was sentenced to 3 years imprisonment. All the sentences were made concurrent, except the sentence of 3 years' imprisonment that was imposed for house breaking entering and larceny in the Case No. 329/10 was made consecutive. The total sentence was 8 years' imprisonment with a non-parole period of 6 years, effective from 16 September 2010.

[5] Subsequently, on 6 December 2010, the appellant was sentenced in three other cases after he pleaded guilty to the charges in the Magistrates' Court at Nadi:

Case No:	Offence:	Date of Offence:	Place of Offence:	Victim:	Value of Stolen Item:
785/10	Burglary Theft	10 & 11/5/10	Nadi	Dinesh Prasad	\$859.00
786/10	Theft	10 & 11/05/10	Nadi	Rakesh Chand	\$1800.00
801/10	Burglary (3 counts) Theft (3 Counts)	2-3/4/10	Nadi	Bal Krishna Yangamma Naicker Anand Kumar	\$107.00 \$13.00 \$5015.00

[6] For each count of burglary, the appellant was sentenced to 5 years imprisonment, and for each count of theft, the appellant was sentenced to 2 years imprisonment. Sentences imposed in Cases 785/10 and 786/10 were made concurrent. In respect to Case 801/10, while the individual terms were made concurrent, making a total sentence of 5 years imprisonment in that case, the learned Magistrate without directing the total sentence to be served consecutively with the total sentence imposed in Cases 785/10 and 786/10 concluded that the appellant's aggregate sentence was 10 years imprisonment. He further made the 10 years consecutive with any pre-existing sentence. The total effective sentence as of 6 December 2010 was 18 years' imprisonment.

[7] Six months later, on 26 May 2011, the appellant filed an application for an enlargement of time to appeal against his sentence that was imposed on 6 December 2010 by the Nadi Magistrates' Court. The application was filed in person. In that application the appellant stated that he had handed his Notice of Appeal to the Department of Corrections within the statutory appeal period and when he later made enquiries regarding the status of his appeal, he learnt that his document was misplaced and never forwarded to the High Court registry. By the time the appellant learnt that his initial document had been misplaced, his appeal was out of time by about six months. Hence, he had to seek an enlargement of time to appeal.

[8] Apart from justifying the delay, the appellant in his own words provided the following grounds of appeal in his application:

- (i) That the sentence was harsh in totality and disproportionate to the offending.
- (ii) That the learned Magistrate erred in law and fact in considering my prior convictions as an aggravating factor in the deliberation of my sentence.
- (iii) That the sentence is severe, unlawful and was passed in consequence of an error of law.
- (iv) That the learned Magistrates failed to consider the four classical principles of sentencing.

[9] The application for an enlargement of time was called for mention in the High Court at Lautoka on 6 July 2011. The appellant appeared in person and explained the reason for the delay to the learned judge. The case was adjourned to 20 July 2011 for counsel for the State to make enquiries and to decide whether to grant leave or not.

[10] When the appellant appeared in the High Court on 20 July 2011, the application for an enlargement of time was refused after a brief hearing and in an extempore ruling. The proceeding is recorded as follows:

In Person - for Applicant
Mr. Whippy I - for Respondent

Application to appeal out of time.

Whippy: On the last date, confusion because sentence passed involved 6 different files and we had to clarify that. He applied on time. He says previous convictions taken into account. He says too severe. When we looked through the Crimes Decree, no likelihood of success and therefore we say that leave should not be granted.

Court: Why not in the 6 months you enquire about your appeal either of the Court or your administration?

Applicant: Told by prison officer to make another application.

Court: After 6 months?

Applicant: Yes. Some instances, cases called early and some always late. Also a busy prison.

Ruling: Applicant, I do not believe you filed your appeal on time. The fact that 6 months passed and you made no enquiries suggests that you didn't. In any event, I am told that the sentences are within acceptable range and that your appeal would most likely not succeed. Your application to appeal out of time is refused.

(Signed)

Judge

20.07.2011

[11] The present appeal is brought against the High Court's decision, refusing an enlargement of time to appeal. The appeal is governed by section 22 of the Court of Appeal Act 1949. Under this section, the appellant's right of appeal is confined to a question of law alone. The question of law alone that arises from the High Court's decision relates to the principles for an enlargement of time to appeal.

[12] Section 248(1) of the Criminal Procedure Act 2009 requires appeals from the Magistrates Courts to the High Court to be filed within 28 days from the decision appeal against. Section 248(2) of the Criminal Procedure Act 2009 gives both the Magistrates Court and the High Court discretion to enlarge the period of limitation for good cause. The phrase 'good cause' is not defined in the statute but subsection (3) of section 248 states:

(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.

[13] In the present case, none of the above factors were relevant. The principles upon which an application for an enlargement of time to appeal is determined are derived from the common law. In *Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), Gates CJ said at [7]:

The rights of appeal are granted by statute within a framework of rules. Enlargement normally can only be granted because of specific powers granted to the appellate courts. No doubt because of a need to bring litigation to finality, once there is non-compliance, the courts can only exercise a limited discretion.

[14] In *Kumar* (supra), the Supreme Court also said that the appellate courts should consider the applications for an enlargement of time in a principled manner by examining the following factors:

- (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?

[15] In a subsequent judgment, in *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), the Supreme Court endorsed the above factors and said at [21]:

These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court. (per Marsoof JA)

[16] Short delays have been disregarded in cases where the appellants are unrepresented and incarcerated, but in cases of excessive delay, "very exceptional circumstances would have to be established before the court would be justified in granting an extension" (*R v Williams* (1911) 6 Cr. App R 158). In *Cama v State* [2012] FJSC 4; CAV0003.09 (1 May 2012), the Supreme Court made the following observation at [2] when dealing with excessive delay:

Delay of this length requires the applicant to show a compelling case that the criteria for leave are met, albeit, the touchstone is the interests of justice in the particular case (*The State v Ramesh Patel Criminal Appeal No.AAU0002 of 2002S* (15 November 2002)).

[17] In the present case, the length of the delay was six months. The delay was substantial. However, the appellant's explanation that the Department of Corrections had misplaced his timely Notice of Appeal was plausible. The State did not rebut that explanation. The most important question was whether there was a ground of appeal

that would probably succeed? The learned High Court judge answered this question in negative based on what counsel for the State told him about the merits of the appeal instead of carrying out his own independent assessment of the grounds of appeal. In his brief extempore ruling, the learned High Court judge said:

In any event, I am told that the sentences are within acceptable range and that your appeal would most likely not succeed. Your application to appeal out of time is refused.

[18] The common law principles on an enlargement of time are clear. The discretion to enlarge time to appeal requires the courts to carry out an independent assessment of the merits of the grounds of appeal to make a determination whether there is a ground of appeal that will probably succeed. In the present case, the learned High Court judge made an error of principle in exercising his discretion based on what counsel for the State told him regarding the merits of appeal. The appellant was not heard on the question of whether his appeal had merits before his application for an enlargement of time was declined. In my judgment, the discretion was flawed in law and the appellant was denied an opportunity to be heard, resulting in a miscarriage of justice. It is not within our jurisdiction to make an assessment whether there is a ground of appeal that will probably succeed. That assessment is for the High Court to make in a principled manner after giving the appellant an opportunity to make submissions.

[19] For these reasons, I would allow the appeal and set aside the High Court's decision refusing the appellant an enlargement of time. I would remit the appellant's application for an enlargement of time to appeal to the High Court at Lautoka to be heard by another judge consistent with the principles set out in this judgment.

Perera JA

[20] I agree with the reasons and the conclusion in the draft.

Orders of the Court:

1. *Appeal allowed.*
2. *The High Court's refusal of an enlargement of time is set aside.*
3. *The case is remitted to the High Court for the application for an enlargement of time to appeal to be heard by another judge.*
4. *The case is listed for mention on 8 December 2017 at 9.30am in the High Court at Lautoka.*

W. Calanchini

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



D. Goundar

.....
Hon. Mr Justice D Goundar
JUSTICE OF APPEAL

V. Perera

.....
Hon. Mr Justice V Perera
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent