

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 376 OF 2013

BETWEEN : **VIJENDRA NAIDU**
Applicant

AND : **STATE**
Respondent

Counsel : **Applicant in Person**
Ms Shelyn Kiran for Respondent

Date of Hearing : **6 March 2014**
Date of Ruling : **7 March 2014**

RULING

1. This is an application for leave to appeal out of time.
2. The applicant was charged before the Magistrate Court of Lautoka in three cases:
 - (i) 335/12 - one count of Indecently annoying a person
 - (ii) 352/12 - one count of Serious Assault
 - (iii) 354/12 - one count of Theft
3. He had pleaded Guilty to all three counts in the three cases and admitted the summary of facts in each case. He was sentenced on 8.10.2012 as follows:
 - (i) 335/12 - 6 months imprisonment
 - (ii) 352/12 - 9 months imprisonment
 - (iii) 354/12 - 3years imprisonment with non-parole period of 30 months

4. This application for late appeal dated 23rd April 2013 was forwarded to this Court on 23rd July 2013 and received in Court on 7th August 2013. Thus application is out of time by 9 months.
5. The reasons given for the delay are that:
 - (i) The applicant is not well educated and lacks knowledge on Criminal Appeal system.
 - (ii) Lack of legal representation.
6. The Section 248 of the Criminal Procedure Decree provides:
 - (1) Every appeal shall in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against-
 - (a) it shall be presented to the Magistrates Court from the decision of which the appeal is lodged;
 - (b) a copy of the petition shall be filed at the registry of the High Court; and
 - (c) a copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.
 - (2) The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.
 - (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 or 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.
7. The principles for an extension of time to appeal are settled. The Supreme Court in **Kumar v State; Sinu v State** [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

“Appellate courts examine five factors by way of a principled approach to such applications. These factors are:

(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 courts 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?”

8. More recently, in ***Rasaku v State*** [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), the Supreme Court confirmed the above principles and said at paragraph [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 endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court.’

9. The applicant has 29 previous convictions and therefore cannot be considered as a novice in the Criminal Justice system. The fact that he is not well educated and lacks knowledge on Criminal Appeal system cannot be considered as a justifiable ground to extend the appealable period by 9 months. There is no merit in this ground for delay.

10. However, considering the fact that the applicant was not represented at the Magistrate court, this Court considered the grounds of appeal on conviction and sentence in order to ascertain any substantial prejudice had been caused to the applicant or there are grounds of merit justifying this Court’s consideration.

11. The ground of appeal against the conviction is:

(i) It was not his intention to plead guilty but he was approached by the prosecutor to plead guilty when he was a patient at St. Giles hospital.

12. The three cases have come before the same Magistrate. On 31.7.2012, the learned Magistrate had observed that the applicant is not answering the questions put to him. Thus a report was called from the St. Giles hospital. On 27.8.2012, a report was received from the St. Giles hospital that the applicant is assessed as fit to plead. The applicant had pleaded Guilty for two cases on 11.9.2012 and the third case on 1.10.2012. Summary of facts were admitted in one case on 12.9.2012 and in other two cases on 1.10.2012.

13. Section 247 of the Criminal Procedure Decree provides,

'No appeal shall be allowed in the case of an accused person who had pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence.'

14. In **Bogiwalu v The State** [1998] FJCA 16; AAU 0006u.96s (15 May 1998) it was held that:

'If it can be demonstrated that an accused person had pleaded guilty in a manner that is any way equivocal or uncertain, or that the accused entered the plea when he did not have a full understanding of the effect of the plea, namely that he was admitting that he committed the offence with which he has been charged, an appeal against the conviction may be entertained despite the guilty plea.....'

Whether a plea of guilty is effective and binding will be a question of fact determined by the appellate court ascertaining from the record and from other evidence tendered, what occurred at the time the plea was entered. The onus will be on the appellant to establish the facts on which the validity of the plea is challenged.

15. According to court records, the charge in each case read and explained to the accused in Hindi language. It is also recorded that the accused understood the charge. The summary of facts were cited and explained to the accused. He had understood and admitted the same. Thereafter, the learned Magistrate had convicted the accused. There is nothing in the records to indicate that the plea was equivocal. In fact the pleas were not on the same day.

Considering all above there is no merit in the ground against the conviction and it fails.

16. The applicant had not filed any grounds of appeal against the sentence. If all three sentences to run concurrently, then applicant had already served the sentences for cases 335/12 and 352/12.

17. The learned Magistrate had not indicated whether these sentences to run consecutively. Thus Section 22 (1) of the Sentencing and Penalties Decree 2009 comes into operation. The section is as follows.

'Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.'

18. Thus the applicant had already served the sentences for 335/12 and 352/12.

19. In 354/12 the summary of facts are as follows.

'On 12th day of July 2012 at Yawini Street, Lautoka accused aged 34 years stole one Taxi meter valued \$180.00 and one car stereo valued \$ 150.00 all to the total value of \$ 330.00 the property of complainant Abdul Alfaz aged 26 years taxi driver.

On the above mention date, time and place the complainant parked his taxi Reg. No. LT 436 when accused opened his taxi and stole therein above mentioned items and sold it to another.

The matter was reported to police and accused was located, interviewed under caution and he admitted committing the offence. Subsequently accused was charged for the offence of theft.

Both items stolen were nor recovered.'

20. The learned Magistrate had identified following aggravating factors:

- (i) Victim is a taxi driver who is providing a public service
- (ii) Value of the stolen good is high

21. He had further stated that,

'I see no considerable mitigation in this case other than your own plea of guilt. You also have 16 previous convictions for various offences including house breaking, entering and larceny, theft and resisting arrest for the period of last ten years. (total number is 29) Therefore your previous good behavior cannot be considered.'

22. Then the learned Magistrate had picked a starting point of 3 years. For the aggravating factors the sentence was enhanced by 1 year. For the guilty plea period of 1 year was deducted. The final sentence was 3 years. It is also stated that 'you are eligible for parole after serving 30 months.'

23. The learned Magistrate had further observed that,

'You are not a first offender. This kind of offences are prevalent in the society and it is the duty of the court to take appropriate actions to prevent such offences. Therefore in this case, I do not think that you deserve a non custodial sentence.'

24. Tariff for the offence of theft was discussed in several cases. In **Saukilagi v State** the Court accepted between 2 to 9 months as tariff for simple theft.

'The tariff for simple larceny on first conviction is 2-9 months (Ronald Vikash Singh v. State HAA 035 of 2002) and on second conviction a sentence in excess of 9 months. In cases of the larceny of large amounts of money sentences of 1 ½ years imprisonment (Isoa Codrokadroka v. State Crim. App. HAA 67 of 2002) and 3 years imprisonment have been upheld by the High Court (Sevanaia Via Koroi v. State Crim. App. HAA 031 of 2001S). Much depends on the value of the money stolen, and the nature of the relationship between victim and the defendant. The method of stealing is also relevant.'

25. In Ratusili v State [2012] FJHC 1249; HAA 011.2012 (1 August 2012) Hon. Mr. Justice Paul Madigan summarized the tariff judgments.

'From the cases then the following sentencing principles are established:

- (i) For a 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 up to three years*
- (iv) Regard should be had to nature of the relationship between offender and the victim*
- (v) Planned thefts will attract greater sentences than opportunistic thefts*

26. In Chand v State [2007] FJHC 65; HAA 30.2007 (11 October 2007) sentence of 3 years 4 months imprisonment for 6 cases of larceny was confirmed by the High Court. Hon. Mr. Justice Isikeli Mataitoga considered the following in respect of the totality of the sentence.

- The appellant has 37 previous convictions of similar offences.*
- No sign of remorse demonstrated by the appellant.*
- Need to ensure that offenders like the appellant who are persistent in their anti-social behavior are warehoused to protect the community who have been the subject of his unacceptable behavior*
- The appellant has been given favourable consideration before by the court but he exhibits no sign that he would change for better*
- The sentence was within the tariff for the kind of offence in question*
- The need for deterrence to anyone who may be like minded*

27. In Lanyon v The State [2004] FJHC 126; HAA 0042.2004 (4 August 2004) Hon. Mr. Justice Gerald Winter held that:

'Repetitive, recidivist offending must inevitably lead to longer sentences of imprisonment unless the offender can demonstrate special circumstances that motivate the court to

sentence otherwise. This principle meets three of society's needs. Firstly it might act as a deterrent to the offender and others who fall into a pattern of semi-professional crime to support themselves. Second, society is entitled to sideline or warehouse repeat offenders out of the community for longer periods of time so that at least during the term of incarceration they cannot wreck havoc on the lives of law abiding citizens. Third, offenders deserve punishment that fits the circumstances of the crime.'

28. The applicant in this case has 29 previous convictions. 19 of them are for theft related offences. Although the learned Magistrate had chosen a starting point outside the accepted tariff, this Court is of the view that it is justified considering all circumstances of this case. Thus the sentence is neither harsh nor excessive.
29. Considering all above, leave to appeal out of time against the conviction and sentence is refused.
30. For clarity, it is stated that applicant had already served the sentences for 335/12 and 352/12. The sentence for 354/12 is confirmed. That is 3 years imprisonment with non-parole period of 30 months effective from 8.10.2012.

Sudharshana De Silva
JUDGE

At Lautoka
7th March 2014

Solicitors: Applicant in person
Office of the Director of Public Prosecutions for Respondent