

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO.: HAM 139 OF 2014

BETWEEN: **MOHAMMED SHAMIM KHAN**

Applicant

AND: **STATE**

Respondent

Counsels: **Ms. S. Ratu for the applicant**
Mr. F. Lacanivalu for the Respondent

Date of Judgment: **15 September 2014**

RULING

1. The applicant was charged before the Sigatoka Magistrate Court for the offence of Criminal Intimidation contrary to Section 375 (1) (a) of the Crimes Decree No. 44 of 2009.
2. The particulars of the offence are that on 13th day of April 2103, appellant threatened MOHAMMED NAZIR with a cane knife to cause injury to the said MOHAMMED NAZIR. He pleaded guilty to the charge and was convicted.
3. The applicant was sentenced for 16 months and 9 days imprisonment on 10.6.2014.
4. This appeal against the sentence out of time was filed on 10.7.2014 and therefore 2 days out time.
5. The grounds for the delay are:
 - (i) He is unaware of the procedure of the appeal,
 - (ii) He had to obtain Legal Aid assistance from Legal Aid Commission.
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 grounds of appeal against the sentence are:

- (i) That the learned Magistrate erred in law and in principle when he regarded this case as middle range without an objective seriousness of the offence which resulted in a harsh and excessive sentence.
- (ii) That the learned Magistrate erred in law and in principle when he took into account as an aggravating factor that the appellant was accompanied by 3 i-Taukei men whilst he made threats to the complainant which is erroneous and was disputed by the appellant in the summary of facts.
- (iii) The learned Magistrate erred in law and in principle when he took into account as an aggravating factor verbal threats when this is already an ingredient of the offence of criminal intimidation.
- (iv) That the learned Magistrate misstated the maximum penalty of Criminal intimidation in this case which therefore renders the sentence of 16 months and 9 days imprisonment harsh and excessive.

10. Both parties have filed written submissions. The state in their submissions had conceded that the length of delay is not excessive and the above appeal grounds have merit and those are arguable.


11. The applicant was not represented at the trial. There is a delay of 2 days, nonetheless there are grounds of appeal which have merit and arguable as conceded by the State.

12. The Court is also of the view that the delay is not excessive and grounds of appeal are arguable. The copy record is not available.

13. Application for leave to appeal out of time is allowed.



At Lautoka
15th September 2014


Sudharshana De Silva
JUDGE

Solicitors : **Legal Aid Commission for the Applicant**
 Office of the Director of Public Prosecutions for Respondent