

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 65 of 2017**

**BETWEEN** : **JOSAIA VAKAWALETABUA**

**APPLICANT**

**A N D** : **THE STATE**

**RESPONDENT**

**Counsel** : Ms. P. Chand [LAC] for the Applicant.  
: Mr. S. Seruvatu with Ms. S. Kiran for the  
Respondent.

**Date of Hearing** : 23 February, 2018

**Date of Ruling** : 27 February, 2018

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**RULING**

[Application for leave to appeal out of time]

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**BACKGROUND INFORMATION**

1. The Applicant was charged in the Magistrate's Court as follows:

**FIRST COUNT**

**Statement of Offence**

**BURGLARY**: Contrary to Section 299 (a) of the Penal Code Cap 17.

**Particulars of Offence**

**WAISAKE NAGUTO and JOSIA VAKAWALETABUA** with two others on the 23<sup>rd</sup> day of February, 2009 at Nadi in the Western Division by night broke and entered into the dwelling house of NARAYAN DATT with intent to commit felony therein namely to steal.

**SECOND COUNT**

**Statement of Offence**

**ROBBERY WITH VIOLENCE:** Contrary to Section 293 (1)(a) of the Penal Code, Cap 17.

**Particulars of Offence**

**WAISAKE NAGUTO and JOSIA VAKAWALETABUA** with two others on the 23<sup>rd</sup> day of February, 2009 at Nadi in the Western Division, robbed NARAYAN DATT of \$2,650.00 cash and assorted jewelries valued \$22,090.00, three mobile phones valued \$1539.00, one video deck valued \$350.00, one laptop computer, \$2,200.00, one torch light valued \$89.00, one digital camera valued \$675.00 two wrist watches valued \$190.00, one diabetics machine valued \$89.00 eleven bottles of assorted liquor at \$660.00 one electric jig saw valued at \$350.00 one electric grinder valued \$210.00 and assorted clothing valued \$1250.00 all to the total valued at \$32,342.00 and immediately before such robbery did use personal violence to the said NARAYAN DATT.

**THIRD COUNT**

**Statement of Offence**

**UNLAWFUL USE OF MOTOR VEHICLE:** Contrary to Section 292 of the Penal Code, Cap 17.

**Particulars of Offence**

**WAISAKE NAGUTO and JOSIA VAKAWALETABUA** with two others on the 23<sup>rd</sup> day of February, 2009 at Nadi in the Western Division, unlawfully and without color of right, but not so as to be guilty of

stealing used the motor vehicle registration number FL.933 of NARAYAN DATT.

**FOURTH COUNT**

**Statement of Offence**

**LARCENY:** Contrary to Section 259 and 262 of the Penal Code, Cap 17.

**Particulars of Offence**

**WAISAKE NAGUTO and JOSAI VAKAWALETABUA** with two others between 23<sup>rd</sup> day of February, 2009 and 3<sup>rd</sup> day of March, 2009 at Nadi in the Western Division, stole assorted vehicle parts from vehicle registration number FL.933 valued \$4,266.94 property of NARAYAN DATT.

**FIFTH COUNT**

**Statement of Offence**

**DAMAGING PROPERTY:** Contrary to Section 324(1) of the Penal Code, Cap 17.

**Particulars of Offence**

**WAISAKE NAGUTO and JOSAI VAKAWALETABUA** with two others between 23<sup>rd</sup> day of February, 2009 and 3<sup>rd</sup> day of March, 2009 at Nadi in the Western Division, willfully and unlawfully damaged the vehicle registration number FL.933 valued \$66,000.00 property of NARAYAN DATT.

2. The applicant elected Magistrate's Court trial, after numerous adjournments on 12<sup>th</sup> September, 2011 the Applicant pleaded not guilty to the charges. Thereafter the matter again went through numerous adjournments, on 23<sup>rd</sup> March, 2015 the Applicant changed his plea to guilty.

3. The charges were read to the Applicant who pleaded guilty after it was understood by him. Thereafter the Applicant admitted the summary of facts.

### **SUMMARY OF FACTS**

4. The summary of facts admitted by the Applicant was as follows:  
*"On the 23<sup>rd</sup> day of February 2009 at about 0100hrs at Togo, Lavusa, Nadi Josaiia Vakawaletabua (Accused) 22 yrs, unemployed of Saunaka, Nadi with others broke and entered into the house of Narayan Dutt (Complainant) 53 yrs, Farmer of Togo Lavusa, Nadi, threatened him and his family with the cane knives, 1 screw driver and pinch bars before robbing him and his family of \$2650.00 cash, assorted jewelries valued at \$22,090.00, 3 x mobile phones valued at \$1539.00, video deck valued at \$350.00, 1 x laptop valued at \$2,200.00, 1 x torch light valued at \$89.00, 1 x Digital camera valued at \$675.00, 2 x wrist watches valued at \$190.00, 1 x diabetic machine valued \$89.00, 11 x bottles of assorted liquor valued at \$660.00, 1 x electric jig saw valued at \$50.00, 1 x Electric Grinder valued \$210.00 and assorted clothings valued at \$1250.00 all to the total valued at \$32,342.00 and drove away his Toyota Hilux 4WD registration number FL:933 valued at \$66,000.00 the property of the said NARAYAN DATT.*

*Between 23<sup>rd</sup> day of February, 2009 at 0100 hrs to 3<sup>rd</sup> day of March, 2009 at 1400hrs at Bila, Nadi they stole both the head lamps valued at \$2459.00, head lamps covers at \$221.70, Car battery valued at \$185.72, Plastic bumper valued at \$100,MP3 Player valued at \$500.00 all to the total value of \$3465.94, the property of (Complainant) and then the said vehicle was completely damaged by setting it alight.*

#### **COUNT 1**

*On the above mentioned date and time the Accused with others broke and entered into the dwelling house of (Complainant) wearing masks armed with cane knives, screw drivers and pinch bars by force opening the front wooden door.*

*COUNT 2*

*On the above mentioned date and time the Accused with others entered Complainant's bedroom, threatened him, tied him up with a masking tape before stealing the above mentioned items.*

*COUNT 3*

*After robbing the Complainant, the Accused with others then drove away Complainant's Toyota Hilux 4WD registration number FL:933 after demanding the key from the Complainant.*

*COUNT 4*

*Between 23/2/09 at 0100hrs to 04/04/09 at 1400hrs the Accused with others dismantled the said parts of the vehicle registration number FL:933 and took it away. The Accused with others, after dismantling the parts of the vehicle, set alight to the vehicle which was completely destroyed.*

*The matter was reported to Police at Nadi Police station and investigation was conducted. The Accused was arrested and interviewed under caution where he admitted stripping the vehicle with the others where he took the car battery before they set it alight. Refer Q & A 46 – 52. The Accused was then charged by DC 3379 Nitesh.*

*ITEMS RECOVERED*

*1. Car battery (recovered from the Accused). ”*

5. Upon being satisfied that the Applicant had entered an unequivocal plea the learned Magistrate convicted the Applicant as charged.
6. After hearing mitigation, the Applicant was sentenced on 7<sup>th</sup> July, 2015 to 9 years imprisonment out of which 4 years was to be served concurrently to the current sentence and the remaining 5 years was to be served consecutively to the current sentence.

7. The Applicant being dissatisfied with the sentence filed his application for enlargement of time dated 14<sup>th</sup> April, 2017 which was received by the High Court Registry on 3<sup>rd</sup> May, 2017.
8. On 26 September, 2017 the Applicant who is now represented by the Legal Aid Commission filed a Notice of Motion and the affidavit of the Applicant sworn on 20<sup>th</sup> September, 2017 in support.
9. The application is opposed by the State, however, no affidavit in reply has been filed, the State relies on the submissions of counsel.
10. Both counsel have filed written submissions and also made oral submissions during the hearing for which the court is grateful.

**LAW**

11. 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.”*

12. 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**

#### **REASON FOR THE FAILURE TO FILE APPEAL WITHIN TIME**

13. The Applicant at paragraphs 4 and 5 of his affidavit sworn on 20<sup>th</sup> September, 2017 states that after sentence he was kept at the Naboro Corrections Centre, he did not know that he could appeal against his sentence. The learned Magistrate had informed the Applicant that he could appeal his sentence but he did not know what that meant. Furthermore, the Applicant does not possess any legal knowledge and that he was not aware that he could get legal assistance to file his appeal.
14. The Applicant has filed a very well researched Notice of Enlargement of Time in which he has very aptly and correctly cited relevant case authorities which intimates that the Applicant has legal knowledge contrary to his assertions.
15. Furthermore, by perusing the previous convictions of the Applicant it can be said with some certainty that the Applicant is not a stranger to the criminal justice system. He has been in contact with the court processes from as early as 17<sup>th</sup> August, 2007.

16. This court accepts that the Applicant was told by the learned Magistrate that he can appeal his sentence but it was the Applicant who did not do anything to further his cause.
17. The written version of the sentence at paragraph 23 mentions in simple English language “*You have a right of appeal within 28 days to the High Court.*” I do not accept that the Applicant did not know what right of appeal against sentence meant.
18. The reason for the delay given by the Applicant is unacceptable and unsatisfactory.

#### LENGTH OF DELAY

19. The Applicant was sentenced on 7<sup>th</sup> July 2015 and the application for enlargement of time was received by the High Court Registry on 3<sup>rd</sup> May, 2017. After the appeal period had expired the length of delay was about one year and 9 months (21 months).
20. The length of delay is substantial and inordinate which cannot be excused.

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

21. The Applicant submits that he has a meritorious appeal since the learned Magistrate had failed to consider his remand period in reducing his sentence.
22. According to the copy record the Applicant first appeared in the Magistrate’s Court on 8<sup>th</sup> May, 2009. On 16<sup>th</sup> July, 2009 the Applicant



was not present in Court because he was a serving prisoner so a production order was issued. From the list of previous convictions the Applicant had been sentenced to 11 years imprisonment on 13<sup>th</sup> March, 2009 for other matters.

23. Section 24 of the Sentencing and Penalties Act states that the period of time during which an offender was held in custody shall be regarded by the Court as a period of imprisonment already served by the offender.
24. The allegation in this matter arose between 23<sup>rd</sup> February, 2009 and 3<sup>rd</sup> March, 2009 which was before the Applicant was sentenced to 11 years imprisonment.
25. In view of the above, the noting in the copy record of 8<sup>th</sup> May, 2009 that bail was extended for the Applicant cannot be correct since the Applicant on 8<sup>th</sup> May was a serving prisoner.
26. This court does not agree that the Applicant was entitled to a reduction for his time in remand for this matter when in effect he was a serving prisoner. Section 24 of the Sentencing and Penalties Act does not allow for a reduction to be given where an offender was a serving prisoner (*see Rupeni Diani vs. The State, Criminal Appeal no. AAU0127 of 2013 (19/09/2014)*). Any reduction for a period in remand whilst the offender was a serving prisoner would defeat the purposes of sentencing as stated in section 4(1) of the Sentencing and Penalties Act.

27. The learned Magistrate was correct in not allowing any reduction for remand period since the Applicant was a serving prisoner. Any reduction whilst the Applicant was a serving prisoner would defeat the purpose of punishment for an offence proven against him for which he was required to serve.
28. This court agrees with the dicta comments made by Aluthge J. in *Aviyashni Vandhana Naidu vs. State, Criminal Misc. Case No. HAM 148 of 2017 (18 October, 2017)* at paragraphs 20 and 21 in the following words:

Paragraph 20

*“However from the 27<sup>th</sup> of October, 2016, the applicant was also convicted and sentenced for another Escaping offence for a period of 10 months. This sentence was reduced to 8 months on appeal on the 9<sup>th</sup> of February, 2017. Therefore, with remissions, the applicant would have spent about 5 to 6 months as a serving prisoner.*

Paragraph 21

*These 5 to 6 months cannot be added to the remand period otherwise it would defeat the purpose of her being punished for an offence proved against her and for which was required to serve.”*

29. The proposed ground of appeal does not have any merits.

PREJUDICE TO THE RESPONDENT

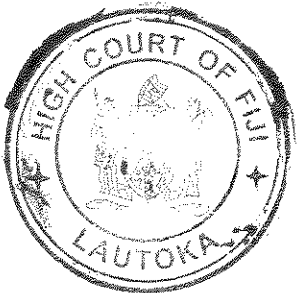
30. There is no evidence that the Respondent will be prejudiced if the Applicant is given leave to appeal out of time.

## **CONCLUSION**

31. Based on the reasons mentioned above, this court is satisfied that the proposed ground of appeal argued by the Applicant is without any merits which does not justify this court's intervention in granting the Applicant an extension of time to appeal.
  
32. Furthermore, no good cause has been shown by the Applicant in support of his application, the length of delay is substantial as well.


## **ORDERS**

1. The application for leave to appeal out of time is refused.
  
2. 30 days to appeal to the Court of Appeal.



**At Lautoka**

27 February, 2018

  
**Sunil Sharma**  
**Judge**

## **Solicitors**

**Office of the Legal Aid Commission, Nadi for the Applicant.**

**Office of the Director of Public Prosecutions for the Respondent.**