

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 46 OF 2018

BETWEEN: **ERONI CAKAUNITABUA** **APPELLANT**

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

Counsel: Ms. N. Mishra for the Appellant
 Mr. T. Tuenuku for the State

Date of Hearing: 25th October 2018

Date of Judgment: 19th December 2018

RULING

[Leave to Appeal out of Time]

1. The Appellant filed two notices for leave to appeal out of time in person on the 13th of July 2018 and the 30th July 2018 respectively. Subsequently, he engaged the service of the Legal Aid Commission and filed an affidavit in support of this notices for leave to appeal, stating his reasons and grounds for this application. The State informed the court that they do not wish to file any affidavit in reply, however, wishes to object to this application. Subsequently, the parties were directed to file their respective written submissions, which they filed as per the directions. The hearing of the leave application was taken place on the

25th of October 2018. The learned counsel for the Appellant and the Respondent consented to have the hearings of leave application and substantive appeal together. The learned counsel for the Appellant and the Respondent made their respective oral arguments and submissions during the hearing.

2. Having carefully considered the affidavit of the Appellant, the respective written and oral submissions of the parties, I now proceed to pronounce my ruling/judgment as follows.
3. The Appellant had been charged in the Magistrate's Court in Nausori with one count of Obtaining Money By False Pretence, contrary to Section 309 (a) of the Penal Code. The particulars of the offence are that:

“Litia Raleba, Melisa Sera, Savaira Molitabua and Eroni Cakaunitabua, between 28th day of March 2006 and 31st day of March 2006 at Luvuluvu Nausori in the Central Division, with intent to defraud, obtained \$1,800.00 from Public Works Department by falsely pretending that it was payment for weeding done on Vusuya Road, whereas no weeding was done on the said road, such representation being false and they converted the money to their own use.”

4. Consequent to the plea of not guilty of the Appellant, the matter has proceeded to hearing. During the hearing, the prosecution has presented the evidence of three witnesses and the Appellant and Melisa Sera (the 2nd accused in the matter) had given evidence for the defence. The learned Magistrate in her judgment dated 10th of July 2017, found the Appellant guilty to the said offence. The learned Magistrate has then sentenced the Appellant to a period of 19 months imprisonment with a non-parole period of 13 months on the 22nd of January 2018. Aggrieved with said conviction and the sentence, the Appellant has now filed this notice for leave to appeal out of time.
5. Section 248 (1) of the Criminal Procedure Act has stipulated that every appeal from the Magistrate's Court to the High Court shall be presented within 28 days of the date of the

decision appealed against. Section 248 (2) has given a discretion to the High Court to enlarge the period of 28 days if the court finds a good cause to do such. Moreover, Section 248 (3) has then provided certain factors that the court could take into consideration as good cause, where it states that:

"For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include —

- i) 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;*
- ii) Any case in which a question of law of unusual difficulty is involved;*
- iii) 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;*
- iv) 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.*

6. The Supreme Court of Fiji in **Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012)** has outlined the following factors that the court could take into consideration when it deals with the issue of extension of time to appeal, where Hon Chief Justice Gates held that:

"Appellate courts examine five factors by way of a principled approach to such applications. Those 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 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?*

7. The length of delay in this appeal is nearly seven months. The Appellant in his affidavit deposed that he was not properly advised by his lawyer in the Magistrate's Court about the right to appeal. He neither understood the explanation of the learned Magistrate about his appeal rights. However, after nearly seven months, he had filed these two notices of motions in person.
8. Hon Chief Justice Gates in **Kumar v State; Sinu v State (Supra)** has discussed the applicable approach in determining the length of delay in an application of this nature, where his Lordship held that:

"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. Viliame Caubati AAU0022.03S 14th November 2003 at p.5.

In Rhodes 5 Cr. App. R 35 at 36 it was said:

"A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons."

The approach was explained shortly in The Queen v Brown (1963) SASR 190 at 191:

"The practice is that, if any reasonable explanation is forthcoming, and if the delay is, relatively, slight, say for a few days or even a week or two, the Court will readily extend the time, provided that there is a question which justifies serious consideration."

9. Accordingly, the court will extend the time, if the delay is relatively short and there is a question which justifies the appeal. However, in this matter the delay is not in days or weeks, but in seven months, which is substantively a long delay.
10. If there is a substantive delay for the appeal, the court must not grant the extension unless the court is satisfied that there are such merits that the appeal will probably succeed. Hon Chief Justice in **Kumar v State; Sinu v State (Supra)** has further held that:

"In both cases before us, the delay is considerable, more so in that of Kamlesh Kumar (3 years and 4½ months late). In Brown (supra at p.191) the Court said:

"In the cases cited the delay ranged from a little over a month (in R. v. Rhodes(9))to more than three months (in R. v. Cullum(10)). In R.v. Marsh(11), where the delay was about two months, the rule laid down is that, where the delay is substantial, extension will not be granted unless the Court is satisfied that there are such merits that the appeal will probably succeed,"

11. In this case, I find the delay is substantively long therefore, the court is required to determine whether there are merits in the grounds of appeal that has a probability of success. The Appellant in his affidavit deposed that he only relies on one ground against the conviction. The proposed ground of appeal is that:

"The learned Magistrate erred in law when she convicted the Appellant on insufficient evidence as to the Appellant making false representation to

obtain money from the Public Works Department with the intent to defraud.”

12. The learned counsel for the Appellant submitted that there was no sufficient evidence before the learned Magistrate to establish that the Appellant had an intention to defraud the Public Works Department and also he has not obtained any money. He had merely cashed the cheque on the request of his sister, who was the second accused in the matter.

13. Section 309 (a) of the Penal Code states that:

“Any person who by any false pretence-

“with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person; or.”

14. Accordingly, the main elements of the offence of Obtaining Money by False Pretence under Section 309 (a) of the Penal Code are that:

- i) The Accused,
- ii) With the intent to defraud,
- iii) Obtain from another person money, or causes or procures any money to be paid to himself or to any other person,
- iv) For the use or benefit or on account of himself or any other person.


15. Having carefully considered the record of the proceedings in the Magistrate’s Court, I find that the Appellant had not disputed that he cashed this disputed cheque issued under his name from the Divisional Road Engineer Central/ Eastern Drawing Account. The evidence of the prosecution has established that this was a false cheque made on false

documentation. The Appellant has only stated that he did not know about the cheque and he only cashed it on the request of his sister. Having cashed the cheque he has given the money to his sister.

16. The learned Magistrate in paragraph 13 of her judgment has refused to accept the version of the accused. There is sufficient evidence before the learned Magistrate to safely form an inference of intention to defraud by the Appellant. The evidence of the three prosecution witnesses have established that this cheque was raised on the false documentation. The disputed cheque has been tendered in evidence. It is clearly visible that the cheque was raised from the government funds. The Appellant was neither a government officer nor a someone who was due to any payment from the government. If the learned Magistrate refused to accept the version of the Appellant, she has sufficient evidence to safely form an inference of intention of defraud.
17. Moreover, the prosecution is not required to establish that the Appellant had obtained the money for his personal benefit or use. It is sufficient that the money was obtained for the use or benefit of any other person. There is evidence to establish that the money were used or distributed among the other people who were involved in this fraud.
18. In view of these reasons, I do not find that the appellate court would intend to interfere with the conclusion of the learned Magistrate on this ground. Accordingly, I find there is no meritorious ground against the conviction to justify the extension of time to appeal after such a substantive delay of seven months.
19. In conclusion, I refuse to enlarge the time to appeal against the judgment of the learned Magistrate dated 10th of July 2017.

20. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
19th December 2018

Solicitors
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the State.