

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO HAA 06 OF 2019**

**BETWEEN** : **RONIL RITESH CHAND**  
**Applicant**

**AND** : **THE STATE**  
**Respondent**

**Counsel** : **Applicant in person**  
: **Mr Niudamu for the Respondent**

**Date of hearing** : **25 April 2019**

**Date of ruling** : **23 May 2019**

**RULING**

**[Application for leave to appeal out of time]**

1. This is an application for leave to appeal out of time filed by the Applicant on 07 February 2019. The Applicant intends to appeal against a sentence handed down by the Magistrate's Court in Tavua.

2. The Applicant had been charged for one count of attempting to obtain financial advantage contrary to section 44 and 326(1)(a)(b)(c) of the Crimes Act, 2009. The Applicant has pleaded guilty on 08 May 2018. He had been represented by a Legal Aid counsel in the Magistrate's Court. On 05 June 2018 when the case was called for the pronouncement of the sentence the Applicant had not appeared in court. However the sentence had been pronounced in his absence while his counsel was present in court. The Applicant has stated in his application that when he came to court on the following day, he was arrested and committed to prison.
3. The Applicant waived right to counsel in respect of the present application for leave to appeal out of time. In his application filed in person on 07 February 2019, the Applicant has submitted the following;
  - "i. That the appellant lack of knowledge of filing a petition for appeal, even though the appellant was not present during passing of the sentence due to misunderstanding of the court date only to be notified on the next day on his appearance in court by the Police in Tavua and was arrested and taken to prison. The appellant had no other option but through assistance from inmate was alerted of matters which need intervention of the appellate court.
  - ii. That the appellant believe question of law of unusual points of determination is involve where the appellant is convicted on an offence not specifically specified under sections of crimes decree 2009 and that the appellant was charged with.
  - iii. That the appellant seeks enlargement of time with which to appeal upon leave of the court due to the inability of the appellant to

obtain a copy of sentence and the copy record, within a reasonable time of applying to the court of these documents.”

4. The parties subsequently filed their written submissions and the application was heard on 25 April 2019.
5. Every appeal against a decision of the Magistrate Court must be filed at the registry of the High Court within 28 days of the date of the decision appealed against. Section 248(2) of the Criminal Procedure Act confers power on the High Court to grant leave to appeal out of time. Subsection 2 and 3 of section 248 reads as follows;

(2) 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 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.

6. Apart from the above mentioned situations which are considered as good cause the courts have to examine the other circumstances to ascertain what good cause is. It appears that the practice of the courts have been to allow enlargement of time very sparingly. Time and again the appellate courts have emphasized the importance of exercising the discretion of the court to enlarge time in exceptional circumstances to avoid grave injustice. In Rasaku v State [2013] FJSC 4; CAV0009,0013.2009 (24 April 2013) the Supreme Court observed;

“The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of courts that has fixed a specific period for lodging his application.”

7. The Supreme Court in the judgment of Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012) stated that the appellate courts must examine the following factors in considering an application for extension of time to appeal;

- (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?

8. In the present application the Applicant has submitted that when he came to court on 06 June 2018 he was arrested and taken to Natabua Prison. He has

stated that he was not given an opportunity to contact his counsel or his family. Apart from that he has not mentioned anything else to explain what prevented him from coming to court for 8 months. The Applicant filed this application after about 8 months from the date of the sentence.

9. In Verebasaga V State [2016] FJSC 38; CAV0015.2016 (26 August 2016) the Supreme Court observed that;

“Incarceration cannot be considered as an acceptable excuse. Majority of the petitioners who come before this Court in Criminal appeals are serving prisoners. Our observation is that, considerable number of those cases are being successfully argued by them in court. Further according to the petitioner’s counsel, the petitioner had already become aware of the Court of Appeal judgment while in prison. In those circumstances I am convinced that the above reasons cannot be considered as good and exceptional reasons to be accepted by court to grant enlargement of time.”

10. The Applicant has not submitted any acceptable reason, to explain the long delay in the present case. It must be noted that the Applicant is obliged to provide a reasonable excuse for the delay for the court to consider whether time can be enlarged. In this case not only the delay is substantial but the Applicant has failed to explain the reasons for such delay as well.

11. I will now consider whether there are grounds of merit which justifies consideration of this application. The Applicant has submitted the following grounds of appeal;

- a) That the learned sentencing Magistrate failed to suspend the sentence since the Accused was a first offender.

- b) That the learned sentencing Magistrate erred in applying the principal of rehabilitation as provided by section 4 of the Sentencing and Penalties Act imposing a harsh and excessive sentence.
- c) That the Accused was not given the opportunity to mitigate on his behalf even being legally represented but due to misunderstanding of the court date which leads to his sentence passed in his absence.

12. The maximum punishment prescribed for the offence of obtaining financial advantage by deception contrary to section 326(1) of the Crimes Act is ten years imprisonment. As per section 44 of the Crimes Act it is the same punishment for attempt to commit the offence as well. The tariff for obtaining financial advantage by deception is 2 to 5 years imprisonment [State v Miller [2014] FJHC 16; Criminal Appeal 29.2013 (31 January 2014)].

13. Although the Applicant was a first offender at the time of sentencing, the learned Magistrate has clearly given reasons for his decision not to suspend the sentence. Suspending a sentence is a matter of discretion which a court can exercise for reasons given. I am satisfied that the reasons given by the learned Magistrate justifies his decision.

14. Although the Applicant has submitted that the sentence is harsh and excessive it appears that the final sentence is even below the tariff. Further the learned Magistrate has expressed that the primary purpose of his sentence is deterrence and "rehabilitation would be secondary". Section 4 of the Sentencing and Penalties Act provides for the purposes of sentencing and the sentence well reflects that the learned Magistrate has addressed his mind to those purposes when sentencing the Applicant.

15. The mitigation submissions have been filed by the Legal Aid Counsel on behalf of the Applicant. Further it appears that the Applicant had been present in court on the day that the mitigation was filed. However the Applicant has chosen not to appear on the day for the sentence. I do not see any merit in his third ground of appeal as well, since mitigation is done on his behalf.
16. The next matter that has to be considered is whether there is a ground of appeal that will probably succeed. It appears that the grounds of appeal submitted by the Applicant have no merits as discussed above. Therefore the Applicant is not successful in establishing that there is a ground of appeal that will probably succeed.
17. In Aziz v State [2016] FJSC 26; CAV 0035.2015(22 June 2016) the Supreme Court, while discussing the criteria that the court has to consider in an application for enlargement of time, observed the following in respect of the issue of prejudice to the Respondent if time is enlarged;
- “The final question that has to be considered is whether the grant of enlargement of time will prejudice the Respondent. The Respondent in this case is the State, which would not be gravely prejudiced by the enlargement of time in a criminal case, as the public interest would require that not only offenders against the law are brought to justice, but also that justice is done in relation to those who are innocent or whose culpability is minimal.”
18. In the present case too, the Respondent did not make any submissions of any possible prejudice that can be caused to the Respondent if time is enlarged.
19. As it was discussed above, extension of time to appeal is a matter of discretion that the courts will consider upon scrutiny of important factors to avoid grave

injustice. I have considered the reasons for delay, the length of delay and whether there are any meritorious grounds which would justify extension of time to appeal. However I am of the view that the proposed grounds of appeal have no merits and there is no good cause shown by the Applicant for extension of time to appeal.

20. In the circumstances I refuse the application for leave to appeal out of time.

30 days to appeal to the Court of Appeal.



**Rangajeeva Wimalasena**

**Acting Judge**

**Solicitors**

Applicant in person

Office of the Director of Public Prosecutions for the Respondent