

## OSEA WAQAMAILAU v STATE (AAU0102 of 2011)

COURT OF APPEAL — APPELLATE JURISDICTION

5 BASNAYAKE JA

24 October, 30 November 2012

10 **Practice and procedure — time limit extensions — leave to appeal out of time — five months delay — whether good reason to be granted leave — stereotyped reasons for delay — Court of Appeal Act s 26**

15 The appellant was convicted of murder and robbery. The appellant had pleaded guilty to manslaughter and robbery, however the court had only accepted the guilty plea with regard to the robbery charge. He was sentenced to life with a minimum of 20 years” imprisonment for murder, and 14 years” imprisonment for robbery. The appellant did not file a leave to appeal application for nearly five months after the conviction, citing lack of legal knowledge as the cause for the delay.

**Held –**

20 (1) The chances of success in this appeal are very remote.

(2) The reasons the appellant gave for the delay are stereotyped grounds used in practically every belated application, and so cannot be considered seriously.

(3) The appellant must demonstrate that there is a good reason why he should be granted leave to appeal out of time. In the present case, leave to appeal out of time should be refused.

25 Application for leave to appeal refused.

**Cases referred to**

30 *Isimeli Seresere v State* [2008] AAU 92/2008 (5 November 2008); *Lebobo v State* [2005] FJCA 47; *Milio Nakoroluvu v State* [2007] AAU1 58/05 (25 June 2007); *Opeti Delana Koro v State* [2007] AAU 28/2008 (14 May 2008); *Shakir Buksh, Jitoko Metui & Are Amea v State* [2008] AAU 59/2006 (4 November 2008); *State v Ramesh Patel* [2002] AAU 2/2002 (15 November 2002); *Veretariki Vetaukula v State* [2008] AAU 17/2008 (29 May 2008), considered.

*Appellant* in person.

35 *M.D. Korovou* for the respondent.

40 [1] **Basnayake JA.** This is an application for leave to appeal out of time. The application dated 15 April 2011 was received by the High Court of Lautoka on 9 May 2011. The appellant was charged for murder and robbery with violence of \$150 and three mobile phones. At the commencement of the trial the appellant pleaded guilty to the charge of robbery and manslaughter. The court however accepted the plea only with regard to the charge of robbery and proceeded to trial on the issue of whether the appellant did have the malice aforethought in the act of causing the death of the deceased.

45 [2] After trial the Assessors found the appellant guilty of manslaughter. However the learned High Court Judge found the appellant guilty of murder and on 22 November 2010 imposed a life sentence with a minimum of twenty years in prison. The appellant was also sentenced to fourteen years for the charge of robbery.

50 [3] In his application the appellant mentioned the following grounds that caused the delay in submitting this application namely:-

Through lack of legal knowledge the appellant failed to submit a petition within 30 days;

This application was filed immediately after receiving legal advice from the prison officers and fellow inmates.

5 [4] I have observed that these are stereotyped grounds used practically in every belated application as grounds for the delay. Thus these grounds could not be considered seriously. The appellant also submitted that the sentence of 20 years is excessive.

10 [5] Section 21 (1) makes provision for a person convicted, to appeal to the Court of Appeal against the conviction and with leave of the Court of Appeal against the sentence. The relevant portion of the section is as follows:-

**Right of appeal to the Court of Appeal against the conviction and the sentence**

15 21(1): 'A person convicted on a trial held before the High Court may appeal under this part to the Court of Appeal-

(a) Not reproduced.

20 (b) With the leave of the Court of Appeal... that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the court to be sufficient ground of appeal; and

(c) With the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law'.

25 **Time period to lodge an appeal**

[6] If a convicted person desires to appeal or obtain leave to appeal, he shall give notice of appeal or notice of his application for leave to appeal within 30 days of his conviction (s 26 (1) of the Court of Appeal Act, Per Henry, Scott & Mcpherson JJA in *Lebobo v State* [2005] FJCA 47).

30 The section is as follows:-

26 (1) 'Where a person convicted desires to appeal under this part to the Court of Appeal, he shall give notice of his application for leave to appeal in such manner as may be directed by rules of Court within thirty days of conviction.....

35 [7] The appellant did not file a leave to appeal application within the 30 days period as required by s 26 (1). The appellant filed this application nearly five months after the conviction (conviction was on 16 November 2010).

**Conviction not challenged**

40 [8] At the inquiry before this court the appellant submitted that he would not add anything other than what is stated in the application dated 15 April 2011. He stated that he was aware of the time period within which one has to lodge an appeal. He also stated that he does not dispute the fact that he has no complain against the caution interview.

45 **Chance of success**

50 [9] Mr. Korovou for the respondent submitted that the appellant's chances of success are very remote in view of the guilty plea and therefore to dismiss this application. The appellant was charged for murder and robbery with violence of a sum of \$150 and three mobile phones. At the commencement of the trial the appellant pleaded guilty to the charge of robbery and manslaughter. The court however accepted the plea with regard to the charge of robbery and proceeded to

trial on the issue whether the appellant did have the malice aforethought in the act of causing the death of the deceased.

[10] After trial the Assessors found the appellant guilty of manslaughter. However the learned High Court Judge found the appellant guilty of murder and on 22 November 2010 imposed a life sentence with a minimum of 20 years in prison. The appellant was also sentenced to 14 years for the charge of robbery. The learned High Court Judge stated thus while imposing such a severe sentence:

(paragraph 8) Your multiple attacks with varying degrees of force resulted in grievous injuries to the vital organs of the deceased including those of the lungs and the brain. The left lung was punctured....The brain was heavily damaged....which led the deceased to an immediate death. The nature of the injuries...was such that any medical intervention...had only little chance of saving the life of the deceased.

As the deceased was dying you robbed him.... you rushed thereafter to hospital in order to treat your injuries, while leaving the deceased all alone when he was profusely bleeding. You took no trouble to see what had happened to the deceased, whose medical assistance you sought a little earlier in the day...you left him to die.

In the light of the above set of facts, you were convicted on 12 November 2010 for the offence of robbery with violence on your own plea of guilt; and for the offence of murder pursuant to the verdict of court.....

Considering the above material I am of the view that the chances of success in this appeal are very remote.

### **Long Delay**

[12] The practice of courts to accept delays of up to three months are excusable where the appellant has been in prison and if there is merit. Leave to appeal one month out of time is refused because the proposed appeal on rape of girl friend has no merit as the court considered guilty plead, and is bound to fail: per Powel JA in *Isimeli Seresere v State* [2008] AAU 92/2008 (5 November 2008), *State v Ramesh Patel* [2002] AAU 2/2002 (15 November 2002), *Milio Nakoroluvu v State* [2007] AAU1 58/05(25 June 2007). The appellant must demonstrate that there is a good reason why he should be granted leave to appeal out of time. Appeal 4 months out of time was refused in *Veretariki Vetaukula v State* [2008] AAU 17/2008 (29 May.2008) An appeal received 2[@fffd] months out of time was refused in *Opeti Delana Koro v State* [2007] AAU 28/2008 (14 May 2008), *Shakir Buksh, Jitoko Metui & Are Amea v State* [2008] AAU 59/2006 (4 November 2008).

[13] Considering the above reasons I am of the view that leave to appeal out of time should be refused.

[14] Order of Court:

The application for leave to appeal is refused.

*Application refused.*