



NAURU COURT OF APPEAL  
AT YAREN  
APPELLATE JURISDICTION

Criminal Appeal No: 7 of 2021  
(Supreme Court Criminal Case  
No: 20/2020)

BETWEEN

REPUBLIC

Applicant

AND

(1) JOHN-FIJ AGEGE  
(2) BILLY KAKIOUEA  
(3) LACHLAN BRECHTEFELD  
(4) MASON TANNANG  
(5) NAZON HURBERT  
(6) ROBSON TEMAKI

Respondents

Before : Fatiaki CJ (President)

Date of Hearing : 29 October, 2021

Date of Ruling : 19 November , 2021

CITATION : Republic v John-Fij Agege and others

CATCHWORDS: “*criminal appeal*” ; “*appeal period* ” ; “*courts discretion to extend*” ; “*filing and service of notice of appeal*” ; “*application for extension of time to appeal*” ; “*requirements for affidavit in support*” ; “*guiding principles and factors to consider in exercise of the Courts unfettered discretion to extend*” ;

LEGISLATION : ss. 26, 29, 37 ; 40 & 48 Nauru Court of Appeal Act 2018 ; Rules 26 & 36 Nauru Court of Appeal Rules 2018 ;

CASES REFERRED TO : Soronaivalu v State [1998] 44 FLR 6 ; Avery v No 2 Public Service Appeal Board and other [1973] 2 NZLR 86 ; Norwich and Peterborough Building Society v Steed [1991] 2 ALL ER 880 ; Aru v Vanuatu Brewery [2002] VUCA 43 ; Ratnam V Cumarasamy [1964] 3 ALL ER 933(PC) ; Revici V Prentice Hall Incorp and others [1969] 1 ALL ER 772.

APPEARANCES:

Counsel for the Applicant :

DPP

Counsel :

R. Tagivakatini for 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> & 6<sup>th</sup> Respondents

Counsel :

E. Soriano for 3<sup>rd</sup> & 5<sup>th</sup> Respondents.

## RULING

### INTRODUCTION :

1. The incident in this case occurred on the early morning of 1 November 2020 and gave rise to an information that jointly charged the five (5) respondents with various criminal offences including intimidating , harming , and obstructing various named police officers as well as a charge of assisting an escape from custody.
2. The trial in this case was held over six (6) days in May , 2021 and verdict was delivered on 3 August, 2021 acquitting five (5) respondents on all charges. The sixth respondent Robson Temaki was acquitted at the “*no-case-to-answer*” stage on the DPP’s concession that there was no evidence against him.

### THE APPLICATION

3. By Summons dated 7 September, 2021 filed in the Court of Appeal , the DPP sought leave to appeal out-of-time pursuant to Rule 26 of the Court of Appeal Rules 2018. The Summons was supported by an affidavit deposed by Senior Constable Joni Ratabwiw.
4. In the affidavit which is based on Constable’s “*...personal knowledge (and) from information acquired in his official capacity*” , it is not disclosed from who or what official records were the source(s) of information nor has the officer deposed to having an active or directing role in the investigation of the case.
5. Be that as it may , the Constable deposes interalia that :
  - “*...the intended appeal raises (without any details) important questions of law and fact which requires the Court of Appeal to consider... (para 3) ;*
  - “*..... the intended appeal raises important questions of law and fact as well as judicial interpretations o f the relevant (unidentified) provision in the Crimes Act 2016 (para 4) ;*
  - “*...the (unspecified) questions of law and fact will clarify the position in the Republic by way of setting judicial precedent in relation to arrest and unspecified consequential acts” (para 5) ;*
  - “*.... The (undefined) questions raised and formulated in the grounds of appeal required proper and careful analysis of the judgment in the Court below. This required further (undetailed) research into the (unidentified) issues raised and time (of unknown duration)and finally: was spent on that... (para 6) ;*and finally :
  - “*..... this appeal is likely to succeed” (para 7) ;*

(my insertions in brackets)

### THE LAW

6. Section 29(3) of the Nauru Court of Appeal Act 2018 (“*the Act*”) gives the DPP a right of appeal to the Court of Appeal :

“(a) where a person is acquitted on a question of law or a question of mixed law and fact”.

7. Section 36 of the Act headed : **Time for appealing** relevantly provides :

- “(1) Where a person convicted and sentenced desires to appeal under this Part, he or she shall file and serve a notice of appeal within 30 days of the date of the delivery of the judgment, decision or order of the Supreme Court.*
- (2) Where a person convicted and sentenced requires leave to appeal under this Part , he or she shall file and serve a summons for leave to appeal within 14 days of the date of the delivery of the judgment , decision or order of the Supreme Court.*
- (3) Where a person seeks to appeal the judgement, decision or order of the Supreme Court under section 30, the application for leave shall be filed and served within 21 Days of the judgment, decision or order of the Supreme Court.*
- (4) **The time for filing of an appeal or an application for leave to appeal under this Section may be extended :***
- (a) by the Supreme Court before it expires ; or*
- (b) the Court after it expires.*
- (5) The time for filing an appeal or an application for leave to appeal may be extended by the Supreme Court or the Court under subsection (3) before or after it expires concurrently with the application for leave to appeal under subsection (2)”*  
(my highlighting)

8. On the face of the above provisions , it is clear that subsections (1) and (2) in express terms refers and are limited in their application to : “...*a person convicted and sentenced....*” They have no application in the present matter which concerns : “... *A person (who) is acquitted....*”.
9. Similarly , subsection (3) is expressly limited to appeals against the judgment of the Supreme Court in the exercise of its appellate jurisdiction. Such an appeal requires the “*leave of the Court*” and is limited to “...*a question of law only*”. It too , has no relevance, in the present application which concerns a verdict of the Supreme Court delivered in its original jurisdiction.
10. Having noted the above , of particular concern by its absence in section 36 , is a provision which permits the extension of time for filing of an appeal by the DPP against an acquittal under Section 36(3) after the expiry of thirty (30) days from the date of the delivery of the judgment of the Supreme Court. (“*the lacuna*”).
11. However , subsection (4) above, clearly provides for the extension of the time for filing of an appeal by the Supreme Court (before the time expires) or by the Court of Appeal (after the time expires) but the subsection is expressly limited in its application to appeals brought “*under this section*” namely , section 36. It does not therefore extend to the DPP’s appeal under section 29 of the Act.

12. In this latter regard Rule 26 of the Nauru Court of Appeal Rules 2018 (*“the Rules”*) under the heading : **Extension of time to appeal or seeking leave to appeal** provides :

*“(1) The Court shall only extend the time for appealing in accordance with the Act, the Rules or any other written law.*

*(2) Where an intended appellant or appellant who seeks leave of the Court to extend the time for filing or serving of an application for leave to appeal or notice of appeal out of time, the intended appellant or appellant shall file and serve to the respondents or other interested parties to the application or intended appeal:*

*(a) a summons seeking an order to enlarge the time to file an application for leave to appeal or appeal out of time with any other appropriate orders in Form 16 in Schedule 1; and*

*(b) one or more affidavits in support of the application for and on behalf of the applicant.*

*(3) The affidavit in sub rule (2)(b) shall include:*

*(a) the prospect of success of the intended appeal or exhibit a duly completed copy of the proposed notice of appeal in Form 8 in Schedule 1;*

*(b) the explanation for the nature, length and reasons for delay; and*

*(c) any other matters which the intended appellant may deem necessary.*

*(4) The Court shall give such directions or make such orders as it deems fit for the purpose of the hearing and determination of the application.*

(my highlighting)

13. I do not accept that Section 40 of the Act assists in filling *“the lacuna”* in so far as it is predicated on an appeal or application being instituted by an appellant or applicant who was convicted in proceedings in the lower Courts that *“... were carried on by a public prosecutor”*. In other words , section 40 has no application to the interpretation of Section 29(3) where the DPP is the appellant of applicant nor in interpreting the provisions of Section 36 which are clear.

14. On the foregoing analysis of the relevant statutory provisions and Rules , I conclude that the DPP’s right to appeal against an acquitted must be brought *“...within thirty (30) days of the date of delivery of the judgment.... and”* , in the absence of a right to apply for an extension of time under Section 36 which deals with : **Time for appealing** , on expiry of the thirty (30) days, the DPP irreversibly loses the right to appeal against the respondents acquittals.

15. This seemingly different treatment of an appeal against a conviction by an offender and an appeal against an acquittal by the DPP is justifiable , on the basis and by the need for finality and certainty of an acquitted person who , despite his/her acquittal , remains in suspense for a further thirty (30) days until the expiry of the appeal period granted by statute.

16. Needless to say if the DPP is entitled to apply for an extension of the time to appeal without any limit like an ordinary convicted offender , then , an acquitted person’s innocence and personal liberty could remain in jeopardy for an unknown length of time.

That cannot be right even with the Court having the ultimate discretion to grant or refuse an extension application.

17. I am fortified by the provisions of Section 48 of the Act which permits the amendment and service of a Notice of Appeal without leave of the Court up to fourteen (14) days before the hearing of the appeal.
18. In other words , a Notice of Appeal that is filed and served “ *within thirty (30) days*” would put the acquitted person on notice and enable him/her to file and serve a respondent notice within twenty-one (21) days of the service of the Notice of Appeal against his/her acquittal. Such a Notice filed and served in time would still allow the DPP time to consider and conduct further research with a view to amending the grounds of appeal **ie** a Notice of Appeal is an initiating document and does not prohibit or preclude amendments.
19. In light of the foregoing analysis , the DPP’s right of appeal against the respondents’ acquittals expired on 2 September, 2021 and , in the absence of any entitlement or right of the DPP to seek an extension of time to file and serve his Notice of Appeal against the acquittal of the respondents , the application is incompetent and must be dismissed.
20. If I should be wrong however , in construing the above-mentioned provisions of the Act and Rules , I turn to consider the DPP’s motion and affidavit in support on its merits.
21. In this regard Section 37 of the Act provides for the commencement of an appeal by way of the filing of a Notice of appeal and Section 36 provides that the Notice of Appeal shall be filed and served “*within thirty (30) days*” of the date of the judgment appealed against. It may be noted that an appeal is not commenced by the mere filing of a Notice of Appeal within time, in addition, it must be served on the respondent within time as clearly stated in **Rule 19(4)** which deals with a Notice of Appeal as follows:

*“The appeal shall file and serve the notice of appeal to the respondent within 30 days from the date of the delivery of the judgment, decision or order which is the subject of appeal.”*

22. In other words, a Notice of Appeal that is filed within time, but is not served until after the time to appeal has expired, has not been commenced within time and requires an extension of time under Rule 26(2) which clearly distinguishes between the filing and the service of a Notice of Appeal. This latter distinction does not apply in the present case where the Notice of Appeal itself has been filed outside the “*30 days*” allowed.
23. The combined unitary nature of the process comprised in the filing and service of a Notice of Appeal was endorsed by the Supreme Court of Fiji in Soronaivalu v State [1998] 44 FLR 6 where it said:

*“The interpretation that service as well as filing is to be within the thirty days gives effect to the principle of criminal justice that **parties to criminal proceeding should be notified promptly if the case is to be taken further after the verdict at trial.**”*

24. Although the discretion to extend the time for filing of an appeal is unfettered, the Court have developed well-established principles and factors to guide the exercise of its discretion including the following:



- (a) “ ... once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for an indulgence by the Court. The onus set upon him to satisfy the Court that in all the circumstances the Justice of the case requires that he be given the opportunity to attack the judgment from which he wished to appeal,” (per Richmond J in Avery v No 2 Public Service Appeal Board and other [1973] 2 NZLR 86 at 91) ;
- (b) “Once the time for appealing has lapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of his entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would be the appellant. The classic statement of the elements of this equation is to be found in the judgment of Griffiths LJ in ....[1983] 1 ALL ER 699.... and are as McCowan LJ has set them out, namely: (1) **The length of the delay;** (2) **The reasons for the delay;** (3) **The chances of the appeal succeeding if an extension is granted** (4) **The degree of prejudice to the respondent if the application is granted.** “(per Lord Donaldson MR in Norwich and Peterborough. Building Society v Steed [1991] 2 ALL ER 880 at 885) ;
- (c) “**The time limit for bringing an appeal from a final decision is imposed to bring about finality between the parties.** Before the time limit will be extended, the proposed appeal has to show an acceptable excuse for the delay, and the Court must be satisfied that there is arguable merit in the proposed appeal. The power to extend is discretionary ...” ( Aru v Vanuatu Brewery [2002] VUCA 43);
- (d) “ **The rule of Court must, prima facie, be obeyed and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion.** If the law is otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation” (per Lord Guest in Ratnam v Cumarasamy [1964] 3 ALL ER 933 (PC) at 935.

(my highlighting)

25. Adopting the factors in the “Building Society” case (above) , the following are the results of the Court’s deliberations :

**(1) The length of the delay**

26. In this case the time period between the expiry of the appeal date on 2 September 2021 and the filing of the application on 7 September 2021 is five(5) days which is not inordinately ;

**(2) The reason for the delay**

27. The deposed reason is that:

“ ... further research into the issues raised and time was spent on that...”

I confess that the vagueness of the reason given and the unqualified right of an appellant to amend his/her grounds of appeal means that much more detail is required explaining

why and whether or not a deliberate decision was made not to appeal and then there was a change of mind or was it a case of indecision. Delay in both instances, would be viewed seriously and would militate against the grant of an extension.

**(3) Any prejudice of hardship to the respondents...**

28. In this regard the affidavit blithely states :
- “... *There is no prejudice to the respondents...*” and the DPP submits that the respondents are not prejudiced by granting the extension since the appeal has not been heard and determined. I disagree.
29. This is a proposed appeal against an acquittal in a criminal case. The affidavit in support claims that the appeal raises “*important questions of law and facts that require the Court of Appeal to consider*”. Nothing is deposed as to the nature and novelty of the questions raised by the appeal or in how the interpretation of the provisions in the Crimes Act 2016 will be clarified by it.
30. In addition, if all that is being sought in the appeal is a clarification of the law, then, why is it that, beside the setting aside of the acquittal order, the proposed appeal seeks an order for retrial which DPP submit is required by justice and in upholding “*order in society*”.
31. In this latter regard counsel for the 3<sup>rd</sup> and 5<sup>th</sup> respondents forcefully submits that whatever may be the questions of law raised by the appeal, none requires a retrial. “*Public order*” is required off all citizens but mores so, “*police officers*” who possess the power to deprive people of their liberty. In short, clarification of the law may be achieved without a retrial of the respondents.
32. If I may say so, the above extracts from the affidavit fails to address in any meaningful way the mandatory requirements of Rule 26(3)(b) which relates to: “*the explanation for the nature, length and reasons for the delay...*”. Indeed, the DPP went to great lengths in trying to include all 3 limbs in **para 6**.
33. As was held in Revici v Prentice Hall Incorp and others [1969] 1 ALL ER 772 :
- “(1) *The rules of the court must be observed and it mattered not that the plaintiff offered to pay the costs and that no injustice would be done to the otherside; and*
- “(2) *If there was non-compliance with the rules it must be explained; and prima facie if no excuse was offered no indulgence should be granted.*”
34. In light of the foregoing, the application for extension of time to appeal the acquittals of the respondents is refused.

DATED : this 19 day of November, 2021

  
D.V. FATIAKI (CJ)  
PRESIDENT

