

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT, FIJI ISLANDS

CRIMINAL APPEAL NO. AAU0022 OF 2003S
(High Court Criminal Appeal No. HAA080/2001)

BETWEEN:

VILIAME CAVUBATI

Appellant

AND:

THE STATE

Respondent

Coram: Smellie, JA
Davies, JA
Penlington, JA

Hearing: Monday, 10th November 2003, Suva

Counsel: Mr. A.K. Singh for the Appellant
Mr. G.H. Allan for the Respondent

Date of Judgment: Friday, 14th November 2003, Suva

JUDGMENT OF THE COURT

This is an appeal on a question of law in respect of a High Court Judgment in which a sentence of 6 months imprisonment was substituted for a sentence of imprisonment for one year suspended for two years and a fine of \$500.00 which was imposed in the Magistrates Court.

In the Magistrates Court the appellant was charged with an act with intent to cause grievous bodily harm and with damaging property. The two charges arose out of a violent incident which took place in the early hours of the morning of 12 December 1999 outside the Government Handicraft Centre in Suva. The appellant pleaded not guilty to both charges. A defended hearing took place. On 20 July 2001 the appellant was convicted on the grievous bodily harm charge and acquitted on the other charge. He was then sentenced as set out above.

At the conclusion of the sentencing in the Magistrates Court the Magistrate reminded the parties that there was a right of appeal and that the time for appeal was 28 days.

Section 310 (1) of the Criminal Procedure Code Cap. 21 ed. 1978 is in point. It provides:

“Every appeal shall be in the form of a petition in writing signed by the appellant or his barrister and solicitor and shall be presented to the magistrates’ court from the decision of which the appeal is lodged within twenty-eight days of the date of the decision appealed against.

Provided that the magistrates’ court or the Supreme Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.”

Section 310(2) then sets out for the purposes of section 310(1) and without prejudice to its generality a number of deemed situations of “good cause.” The list is not exclusive and in any event is irrelevant to the present appeal.

As the Magistrate gave his decision on 20 July 2001 the time for appealing therefore expired on 17 August 2001. A right of appeal is available to both the Prosecution and the Defendant. See section 308.

The State considered that the sentence was manifestly inadequate. It did not however present a petition on appeal to the Magistrates Court until 20 August 2001. It was out of time. The State did not then or at any subsequent time file in either of the Magistrates Court or in the High Court an application, under the proviso to section 310(1), to enlarge the period of limitation prescribed by the sub-section.

As at 20 August 2001 the appellant was living in New Zealand with his partner and their three children. He was employed by the New Zealand Department of Social Welfare.

On 5 April 2002 the appeal was called before Shameem J. The judge was informed that the appellant had not been served. The proceeding was adjourned sine die.

It was again called before the same judge on 29 October 2002. The appellant was present. He had been served that morning. He informed the court that he was living in New Zealand, that he was only in Fiji for that week and that he would return to this country on 28 November 2002. He also stated that his lawyer was out of Fiji. Shameem J set the proceeding down for hearing on 28 November 2002.

On 28 November the same judge heard full argument from counsel for the State and counsel for the appellant. He was a different counsel from the one who was said to be out of Fiji on 29 October.

Counsel for the State did not inform either the judge or counsel for the present appellant that the appeal was out of time and that an application to enlarge time had not been filed. At the conclusion of the argument Shameem J reserved her decision indicating that it would be delivered on 5 December. In accordance with that indication the judge delivered her decision on 5 December. In that judgment the judge allowed the appeal. She imposed an immediate custodial sentence of 6

months imprisonment and ordered a refund of the fine of \$500.00 which had been paid by the appellant. The respondent was not present when the judgment was delivered. He has not returned to Fiji since then and, of course, has not served any part of the substituted prison sentence. The original suspended sentence has now expired.

In the amended grounds of appeal to this court a number of complaints were made. The first ground however is sufficient to dispose of the appeal.

It reads:

“That the decision of the Learned Judge dated 5 December 2002 is nullity on the basis that the State’s Appeal was lodged after the expiration of the date of appeal and without any leave to Appeal out of time.”

This ground speaks for itself given the wording of section 310(1) of the Criminal Procedure Code which we have already set out.

Mr. Allan for the State in response to the appeal in this court accepted:

- that the State’s appeal was filed out of time
- that leave was not sought at any time in either the Magistrates Court or the High Court to enlarge the time for appeal
- that the State was not entitled to present a petition on appeal to the High Court until the time had been enlarged
- that the State was not now in a position to demonstrate “good cause” under the proviso to section 310(1)
- that the High Court Judge erred in law in hearing the appeal without first having enlarged the time for the filing of the petition
- that accordingly the petition and all that followed including the hearing and the judgment were invalid.

Against the background of these concessions Mr. Allan very properly abandoned the State's opposition to the appeal in this court. As the result we propose to allow the appeal.

Before however departing from the case we desire to make some pertinent observations.

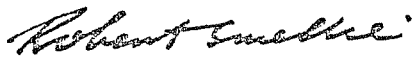
It is fundamental that a right of appeal is a creature of statute and that that right only exists to the extent created by statute. See *Police v. S.* [1977] 1 NZLR 1 (CA) *Nuplex Industries Ltd v. Auckland Regional Council* [1999] 1 NZLR 181,185. It is not a mere matter of practice or procedure, and neither a superior nor an inferior court, nor both combined can create or take away such a right. See 37 Halsbury Laws of England (4th ed) para 677. The requirements of the Criminal Procedure Code creating the right of appeal must be strictly complied with. See *R v. Suggett* 81 Cr. App. R.243 Archbold Criminal Pleadings and Practice 1995 volume 1 para. 7-166.

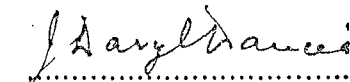
It therefore behoves the State, when it considers that a sentence imposed in the Magistrate Court is manifestly lenient, to file its appeal within time. Likewise it behoves counsel for the State in a situation such as the present case to bring to the attention of the court and the person whose sentence is under attack or his counsel the fact that the appeal has not been properly bought, and to file an application, with a supporting affidavit. We are concerned that this was not done in the present case.

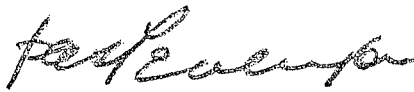
One final matter. At the hearing of this appeal we were minded to order costs against the State. After the hearing, however, our attention was drawn to section 32 of the Court of Appeal Act which provides that on the hearing and determination of an appeal under Part IV of the Act (which is the position here) no costs shall be allowed to either side.

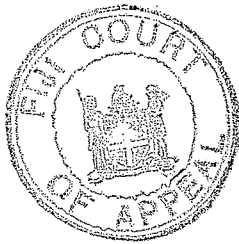
Result:

The appeal is allowed. The judgment of Shameem J of 5 December 2002 is vacated. The sentence of the Magistrate imposed on 20 July 2001 is reinstated.


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Smellie, JA


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Davies, JA


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Penlington, JA



Solicitors:

A.K. Singh Law, Nausori for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent