

IN THE COURT OF APPEAL, FIJI ISLANDS
APPLICATION FOR LEAVE TO APPEAL
FROM THE HIGH COURT OF FIJI

Criminal Appeal No. AAU0029/2008
[High Court Criminal Appeal No: HAC 69/2007
and 70/2007 and 71/2007]

BETWEEN:

SHAILESH CHAND CHAUDHARY

Appellant

AND:

THE STATE

Respondent

Coram: Hickie, JA

Date of Hearing: 15 August 2008

Counsel: Mr F. Vosarogo for the Appellant
Mr A. Rayawa for the Respondent

Date of Decision: 11 September 2008

DECISION

- [1] On 5 February 2008, the Appellant stood trial in the High Court at Suva for 25 offences (eight of which were withdrawn during the trial) leaving 17 offences as follows:
- (a) One (1) count of "Larceny", contrary to Sections 259 and 262 of the Penal Code, Cap. 17;
 - (b) Eight (8) counts of "Forgery", contrary to Sections 232 and 335(2) of the Penal Code, Cap. 17;

(c) Four (4) counts of "Uttering a Forged Document", contrary to Sections 343(1) of the Penal Code, Cap. 17; and

(d) Four (4) counts of "Obtaining Goods on Forged Documents", contrary to Sections 345 of the Penal Code, Cap. 17.

[2] He was found guilty by three assessors on 19 February 2008 to all 17 offences. He was convicted and sentenced on 19 February 2008 by Justice I. Mataitoga as follows:

(a) For Count 1 (**one count of "Larceny"**, contrary to Sections 259 and 262 of the Penal Code, Cap. 17): six months imprisonment;

(b) For Counts 2, 5, 8, 11, 14, 17, 20 and 23 (**eight counts of "Forgery"**, contrary to Sections 232 and 335(2) of the Penal Code, Cap. 17): two years imprisonment on each count;

(c) For Counts 15, 18, 21 and 24 (**four counts of "Uttering a Forged Document"**, contrary to Sections 343(1) of the Penal Code, Cap. 17): six months imprisonment on each count;

(d) For Counts 16, 19, 22 and 25 (**four counts of "Obtaining Goods on Forged Documents"**, contrary to Sections 345 of the Penal Code, Cap. 17): three years imprisonment on each count;

(e) All sentences **to be served concurrently**, meaning a **total sentence of three years imprisonment from 19 February 2008**.

[3] The Appellant appealed (by way of handwritten letter dated 19 March 2008 together with an undated typed letter received on 1 April 2008) against his conviction arguing seven grounds of appeal. The Application is, therefore, outside the 30 day time-limit and requires leave to extend the time within which the notice of appeal can be filed.

[4] Initially, the Applicant submitted two grounds in support of his Application for Leave to Appeal outside of time.

[5] The matter was adjourned on 14 and 27 May and 20 June 2008 to allow the Applicant to clarify whether the Legal Aid Commission would be appearing on his behalf and, if so, to also clarify the grounds of Appeal.

[6] The Director of Legal Aid filed on 15 August 2008 an "Amended Notice of Application for extension of Time within which to Appeal" as follows:

1. *THAT the learned Judge erred in law and in fact when he failed to properly take into account the parity principles of sentencing when the court sentenced the Appellant to 3yrs imprisonment.*
2. *THAT the learned Judge failed to give proper reduction and give due consideration to the Appellant being a first offender.*
3. *THAT the Appellant was prejudiced by the lack of representation in the trial and the learned Judge erred in allowing the trial to proceed with the Appellant without counsel."*

THE HEARING OF THE GROUNDS FOR LEAVE

[7] The Director of Legal Aid appeared on 15 August 2008 on behalf of the Appellant and Mr Rayawa appeared on behalf of the Office for the Director of Public Prosecutions.

[8] Counsel on behalf of the DPP noted that the Appellant required leave of the Court to Appeal out of Time and submitted that the State was prejudiced in this regard as there had been a disposal of exhibits. He also referred the Court to a recent decision of Scutt JA in *Koro v The State*, 14 May 2008 which was just under two months out of time where the Court even though it was of the view that the application for leave to appeal out of time should be granted, held that the Appellant still had to overcome "the hurdle of satisfying this Court that his grounds disclose a reasonable chance of success".

[9] In the present case the Appellant has previously written to the Court an undated letter received on 1 April 2008 noting:

"a. I lodged my lodged my Appeal within 28 days and on the 29th day of February 2008, I handed my Appeal towards the Prison's department. After one month I found out that my appeal was misplaced by the Prison's department."

b. That it is my first time in prison and without having any knowledge of the laws."

[10] The Appellant was convicted on 19 February 2008 and 30 days from that date which means that he was 12 days out of time.

[11] On this question, the Director of Legal Aid submitted:

"The Appellant had appealed from prison within time but the appeal papers were lost by the Prison Authorities and the Appellant had to produce another letter to appeal the Decision of Mataitoga J."

The Two (2) Grounds in support of an appeal against Sentence

[12] In support of the First Ground, the Director of Legal Aid submitted that the Appellant was sentenced to three (3) years imprisonment and in terms of parity of sentence that his co-accused received a suspended sentence (see sentencing judgment page 3 paras. 10 – 11), (see also *Singh and Ors v The State* (Unreported, Court of Appeal of the Fiji Islands, Criminal Appeal No. AAU0008 of 2000S, Sheppard, Gallen and Ellis JJA, 19 March 2004).

[13] In support of the Second Ground, the Director submitted that the Appellant was a first offender and appropriate consideration must be given to that fact noting also that he was not represented at trial (see para.13 judgment).

DPP's Submission in Reply

[14] Counsel on behalf of the DPP noted that there were a number of counts of forgery involved carrying a maximum sentence of 14 years. Further, it was submitted that the sentencing judge had taken into account whether from the facts it justified a concurrent sentence and had given considerable consideration to ordering a suspended sentence but was unable to find any exceptional circumstances.

Appeal against Conviction

[15] It is the Court's understanding that this ground was not proceeded with at the Application for Leave.

GRANTING OF LEAVE TO APPEAL OUT OF TIME

[16] The 30 DAYS requirement pursuant to Section 26(1) *Court of Appeal Act, Cap.12, 1978* (as amended by the *Court of Appeal (Amendment) (No.2) Act 1998*, Act No. 38 of 1998) states:

"Time for appealing

*26.-(1) Where a person convicted desires to appeal under this Part to the Court of Appeal, or to obtain leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of Court **within thirty days of the date of conviction or decision** ... the time, within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Appeal."*

[17] I note that the appellant was out of time but, in the circumstances, have no hesitation in granting him leave to appeal out of time.

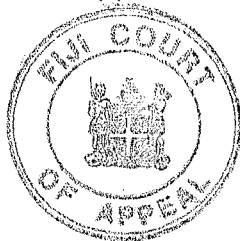
GRANTING OF LEAVE TO APPEAL ON SEVERITY OF SENTENCE

[18] Having considered the submissions made by the Director of Legal Aid on behalf of the Appellant, the Court is of the view that the questions of both parity principles in sentencing and the proper reduction for a first offender are proper questions of law to be considered by the Court of Appeal.

ORDERS

[19] This Court makes the following Orders:

1. Leave to Appeal out of Time is granted.
2. Leave to Appeal sentence is granted in relation to both grounds 1 and 2.



The Hon. Thomas V. Hickie
Judge of Appeal

Solicitors:
Legal Aid Commission
Office of the Director of Public Prosecutions for Respondent