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

CRIMINAL APPEAL AAU 54 of 2012
(High Court HAC 290 of 2011
HAC 291 of 2011
HAC 292 of 2011)

BETWEEN : **MACIU TAMANI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr S Waqainabete for the Appellant**
Mr S Vodokisolomone for the Respondent

Date of Hearing : **28 April 2016**

Date of Ruling : **13 June 2016**

RULING

[1] This is an application for an enlargement of time for leave to appeal against sentence. The application was filed by the Appellant in person. The handwritten application

was dated 18 June 2012. The application was typed by the Corrections Office at the Maximum Corrections Centre at Naboro but was not filed until 4 July 2012. The filing of the application by the Corrections Centre on behalf of the Appellant is a matter that is beyond the control of the Appellant. The date of the application for leave to appeal sentence will be the date on the Appellant's hand written application, being 18 June 2012.

[2] The application was formalized on behalf of the Appellant by the Legal Aid Commission by the filing on 12 August 2014 of a notice of motion together with a supporting affidavit sworn on 11 August 2014 by the Appellant.

[3] The application for an enlargement of time is made pursuant to section 26(1) of the Court of Appeal Act Cap 12 (the Act). The application comes before me pursuant to section 35(1) of the Act which provides that the power of the Court of Appeal to enlarge time for appealing may be exercised by a Judge of the Court.

[4] The Appellant appeared before the High Court charged with three offences of aggravated robbery and three offences of theft. The offences occurred on three separate occasions. The Appellant pleaded guilty to all six charges when the trial commenced on 3 November 2011. The Judgment which is dated 3 November 2011 states that the Appellant was convicted as charged. Although the Court was told from the Bar table that the Appellant had been unrepresented up to the date of the trial, the Legal Aid Commission appeared as duty solicitor for the Appellant on 3 November 2011.

[5] The background facts have been conveniently summarized by the learned Judge in his sentencing judgment dated 11 November 2011 and are reproduced as follows:

> *"[2] The facts show the offences were planned and co-ordinated by you and your accomplices. All three victims were taxi drivers and were of Indian ethnicity. It is safe to infer that you targeted the victims because of their vulnerability as public service provider.*
>
> *[3] On 2 June 2011 at 4.30pm, your co-accused hired Abdul Munaf Shah's taxi from Nabua. Your co-accused directed Shah to take him to Sukanaivalu Road to pick up his mother.*

> *When Shah reached Suva Muslim School, your co-accused grabbed hold of the victim's neck and managed to slow him down. You and another co-accused were waiting at the roadside. When the vehicle slowed down, you and your co-accused ran and got into the back seat of the taxi. You tied the victim's legs and hands and pulled him out of the taxi.*
>
> *[4] You and your accomplices drove away in the victim's taxi. The taxi was later abandoned and found in Kinoya with damages to its fuel cap. You also stole the taxi meter valued at $200.00 and $126.00 cash from the victim.*
>
> *[5] According to Shah's medical report, he was punched on the head, strangled by throat and kicked several times. He sustained swelling, tenderness and bruising over his head, neck and back. According to the report, the injuries were mild and due to blunt impact.*
>
> *[6] Two days later, on 4 June 2011 at 4.30pm, you and your two accomplices, hired Nirdesh Pranil Prasad's taxi from Raiwaqa and took him to Suva Muslim School. The victim was pulled to the back seat, gagged and dumped at Suva Cemetery. You and your accomplices drove away in the taxi. The taxi was later found abandoned at Vishnu Deo Road. You also stole from the victim his taxi meter valued at $200.00, $46.00 cash, wrist watch valued at $110.00, mobile phone valued at $80.000 and gold chain valued at $80.00.*
>
> *[7] Two months later, on 27 August 2011 at 8.30pm, you and your accomplices hired Jineshri Nand's taxi from Nabua. The victim was pulled to the back seat, gagged and threatened with a kitchen knife placed to his neck. The offenders stole his mobile phone valued at $100.00 and $46.000 cash."*

[6] The Appellant was sentenced to terms of imprisonment of 10 years for each count of aggravated robbery and 2 years imprisonment for each count of theft. The learned Judge ordered that all the sentences be served concurrently with a pre-existing sentence and with a non-parole term of 8 years imprisonment.

[7] It is against that sentence that the Appellant now seeks an enlargement of time to apply for leave to appeal. The Supreme Court in **Rasuku and Another –v- The State** (CAV 9 and 13 of 2012; 24 April 2013) considered the principles involved and the criteria to be considered when an appellate court is called upon to determine such an application. At page 4 of the unreported decision the Supreme Court observed that:

"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 court that has fixed a specific period for lodging his application."

[8] Then on page 5 the Court noted that :

"Enlargement of time has generally been permitted by courts only exceptionally, and only in an endeavour to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court."

[9] In the course of its judgment the Supreme Court affirmed that the factors that should be considered in the exercise of the discretion included those that had been summarized in its earlier decision in **Sinu and Kumar –v- The State** [2012] FJSC 17; CAV 1 of 2009; 21 August 2012. They are (1) the length of the delay, (2) the reason for the delay, (3) whether there is a ground of merit justifying the appellate court's consideration, or where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (4) if time is enlarged, will the Respondent be unfairly prejudiced?

[10] In considering the length of the delay, it must be recalled that under section 26(1) of the Act the Appellant was required to give notice of his application for leave to appeal sentence within 30 days from the date of the sentencing decision. The Appellant was sentenced on 11 November 2011. The Appellant's application was dated 18 June 2012. The Appellant was required to file his appeal papers no later than 11 December 2011 and as a result his application was about 6 months out of time.

[11] The reasons for the delay are explained by the Appellant in his supporting affidavit. The Appellant claims that he was not given a copy of the sentencing decision. However it is not suggested that he was not in court when sentence was pronounced. Certainly his Counsel has not deposed that he was not given a copy of the sentencing decision. It is not a satisfactory explanation for not at least filing a notice of appeal within time with grounds to be provided at a later date. Unfortunately, the sentencing decision does not inform the Appellant that he should file a notice of appeal within 30

days from the date of sentencing. He also deposes that he had experienced difficulty in obtaining legal advice and that he is not well educated person. The explanations for the delay in this case do not by themselves justify granting an enlargement of time. Under those circumstances it is necessary to determine whether there is sufficient merit in the appeal to grant an enlargement of time and thereby excuse the Appellant's failure to file within time.

[12] In the Amended Petition of Appeal filed on 13 August 2014 by the Legal Aid Commission there are 4 grounds of appeal upon which the Appellant relies in the event that the application is granted:

> *"a) That "he" (presumably a reference to the learned Judge) took a high starting point of 10 years imprisonment.*
>
> *b) Adding 4 years as aggravating factors to the already high starting point.*
>
> *c) Did not treat the guilty plea separately from the mitigating factors.*
>
> *d) Did not discount the guilty plea after the mitigating and aggravating factors had been accounted for."*

[13] In considering the grounds of appeal against sentence it is important to note at the outset that the learned Judge determined the Appellant to be a habitual offender under section 11 of the Sentencing and Penalties Decree 2009 (the Sentencing Decree) for offences involving robbery or housebreaking. As a result of such a determination the learned Judge was required, under section 12 of the Sentencing Decree, to take into account the need to protect the community from the offender when determining the length of the sentence. Furthermore, in order to achieve that purpose the learned Judge was at liberty to impose a sentence longer than that which would otherwise be proportionate to the gravity of the offences for which the Appellant was sentenced (Section 12(b)). Although empowered under section 13 of the Sentencing Decree to impose consecutive sentences the learned Judge ordered all sentences to be served concurrently with the Appellant's pre-existing uncompleted sentence.

[14] The learned Judge selected a starting point of 10 years which was at the top of what he had identified as the appropriate range being that of "*robbery of taxi driver*." The

authorities cited by the learned Judge were decided in 1991 and 2003 and both related to offences under the Penal Code. However the facts of this case clearly indicate that these were offences that could have been charged under the Penal Code as robbery with violence prior to 1 February 2010 and were correctly charged as aggravated robbery under the Crimes Decree since they were committed in 2011. Therefore the approach that should have been adopted was that which the same learned Judge had adopted in **<u>State v Manoa</u>** [2010] FJHC 409; HAC 61 of 2010, 6 August 2010 when he observed:

> *"The maximum penalty for robbery with violence under the Penal Code is life imprisonment while the maximum penalty for aggravated robbery under the Crimes Decree is 20 years imprisonment. Although the maximum sentence under the Decree has been reduced to 20 years imprisonment, in my judgment the tariff of 8 – 14 years imprisonment established under the old law can continue to apply under the new law. I hold this for two reasons. Firstly, the established tariff of 8 – 14 years under the old law falls below the maximum sentence of 20 years under the new law. Secondly, under the new law aggravated robbery is made an indictable offence, triable only in the High Court, which means the Executive's intention is to continue to treat the offence seriously."*

[15] Therefore in 2011 the appropriate tariff for aggravated robbery was 8 – 14 years. This was not just a case of robbery of a taxi driver. This was a case of aggravated robbery of a taxi driver and furthermore the tariff for aggravated robbery remains the same irrespective of the circumstances of the victim. What determines the starting point within the tariff will involve the consideration of a range of factors including the circumstances of the victim.

[16] In my judgment there has been no error in selecting a starting point of 10 years which is at the lower end of the tariff that applied at the time the offences were committed. It is not apparent that the Judge has double counted factors determining the starting point and matters considered to be aggravating factors. The learned Judge identified what he termed as "*numerous*" aggravating factors. The victims were threatened with weapons such as a screwdriver and a bread knife. The victims were punched and/or kicked. Each victim feared for his life. Although their injuries were not serious the incidents have greatly affected their lives and their livelihood. Each victim was dumped and the taxi stolen together with items belonging to each victim. Each

incident was well planned and the actions of the Appellant and his accomplices were calculated to instill fear in the minds of the victims. By fixing a starting point at the lower end of the tariff it cannot be claimed that the learned Judge was wrong when he added 4 years for aggravating factors.

[17] Although the guilty plea and confession in the caution interview have been identified, they were not deducted separately when the learned Judge determined the head sentence for each offence of aggravated robbery. The learned Judge referred to the Appellant's personal circumstances, his remorse and early guilty plea as mitigating factors. The personal circumstances were unremarkable. The Judge allowed 4 years as a deduction for mitigation factors.

[18] In my view the sentence imposed by the learned Judge of 10 years imprisonment for each of three separate counts of aggravated robbery to be served concurrently with a pre-existing sentence and with a non-parole term of 8 years does not indicate an arguable error in the exercise of the sentencing discretion let alone an injustice. The appeal against sentence lacks sufficient merit and as a result the application for an enlargement of time is refused.

W. Calanchini

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL