

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO: AAU0041 of 2015
[High Court Case No: HAC48 of 2012]

BETWEEN : EREMASI TASOVA
Appellant

AND : THE STATE
Respondent

Coram : Hon. Mr. Justice Daniel Goundar

Counsel : Appellant in person
Ms P Madanavosa for the Respondent

Date of Hearing : 14 June 2017

Date of Ruling : 3 July 2017

RULING

[1] Following a trial in the High Court at Lautoka, the appellant was convicted of two counts of aggravated robbery, one count of theft of a motor vehicle and one count of resisting arrest. On 22 July 2014, he was sentenced 12 years imprisonment for each count of aggravated robbery, 9 months imprisonment for theft of a motor vehicle and 6 months imprisonment for resisting arrest, to be served concurrently. This is an application for an enlargement of time to appeal against both conviction and sentence.

[2] Section 35(1) of the Court of Appeal Act, Cap 12 gives a single judge power to grant an enlargement of time to appeal. The factors to be considered are:

- (i) The reason for the failure to file within time.
- (ii) The length of the delay.

- (iii) Whether there is a ground of merit justifying the appellate courts consideration?
- (iv) Where there has been substantial delay, nonetheless is there a ground that will probably succeed?
- (v) If time is enlarged, will the respondent be unfairly prejudiced? (*Kumar v State* unreported Cr App No CAV0001 of 2009; 21 August 2012).

[4] Section 26 of the Court of Appeal Act prescribes for a 30-day appeal period from the date of the decision appealed against. It is not in dispute that after the appellant was convicted and before he could be sentenced, he escaped from lawful custody. The appellant was sentenced in absentia. The appeal was filed after the appellant was arrested and committed to prison to serve his sentence. The appeal is out of time by about nine months. Nine months is a significant period and the reason for the late appeal is not good. The real question is whether there is a ground of merit justifying the appellate court's consideration?

Defective charge

[5] The appellant contends that the resisting arrest charge was defective. The appellant was charged with resisting arrest contrary to section 277(b) of the Crimes Decree 2009. The particulars of the charge alleged that the appellant on 14 March 2012 at Lautoka in the Western Division resisted DC Nakatasavu a police officer while effecting arrest in due execution of his duty. The appellant submits that the evidence led at the trial by the prosecution did not conform to the particulars of the charge. The appellant submits that DC Nakatasavu's evidence was that the appellant resisted arrest when he arrested him in the Central Division and not in the Western Division as alleged in the particulars of the charge. In the summary of evidence outlined by the learned trial judge in the summing up, the assessors were directed that the evidence of DC Nakatasavu was that the appellant resisted arrest when he arrested him at Nadera in the Central Division. Counsel for the State was unable to confirm whether the particulars of the charge were amended to conform to the evidence led at the trial. The question whether a charge is defective is a question of law alone. This question of law is not frivolous and will probably succeed.

Jurisdiction to try summary offence

- [6] The appellant contends that resisting arrest is a summary offence triable in the Magistrates' Court only. The question of jurisdiction involves a question of law alone. In the present case, the appellant was charged with resisting arrest together with the indictable offence of aggravated robbery. The High Court held a joint trial to try both the indictable and summary offences. This question of law is not frivolous and will probably succeed.

Admissibility of confession

- [7] The appellant contends that the trial judge erred in admitting his confession made under caution in evidence. The appellant challenged the admissibility of his confession on various grounds but the learned trial judge ruled it admissible after hearing evidence in a voir dire. The question of admissibility is a question of law alone. The question is not a frivolous question and will probably succeed.

Separate consideration of the charges

- [8] The appellant contends that the learned trial judge failed to direct the assessors to consider the evidence on each count separately. In paragraph 75 of the summing up, the learned trial judge told the assessors to consider evidence against each charge separately but he did not identify the evidence and the issue as it related to each charge separately for the assessors. This ground will probably succeed.

Identification evidence

- [9] The complainant identified the appellant from a photo album at the police station. The learned trial judge gave no direction regarding photo identification held at the police station. This ground will probably succeed.

Use of element of offence as an aggravating factor

- [10] The group offending was an element of aggravated robbery. The learned trial judge used the group offending as an aggravating factor to enhance the sentence. This ground will probably succeed.

Remand period

- [11] The appellant was in remand before he was convicted and sentenced. The length of the remand period is significant although the actual period is disputed by the State. However, the learned trial judge gave no reduction in sentence to reflect the remand period. This ground will probably succeed.

Result

- [12] Enlargement of time granted.
Leave granted.



A handwritten signature in black ink, appearing to read "Daniel Goundar", written over a horizontal line.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Appellant in person
Office of the Director of Public Prosecutions for the State