

**IN THE COURT OF APPEAL, FIJI**  
**Appellate Jurisdiction**

**CRIMINAL APPEAL NO. AAU 024 OF 2023**

**BETWEEN:**            **MOSESE TARAU**

**Appellant**

**AND:**                 **THE STATE**

**Respondent**

**Coram:**               **Mataitoga, RJA**

**Counsel:**            **In-Person for Appellant**  
**Ms. Shameem S for Respondent**

**Date of Hearing:**    **16 July 2024**

**Date of Ruling:**    **1 August 2024**

**RULING**

1. The appellant [Mosese Tara] was charged with another with the following:

**COUNT ONE**

**Statement of Offence**

**AGGRAVATED ROBBERY:** *Contrary to section 311 (1)(a) of the Crimes Act of 2009*

Particulars of Claim

*JEKE VAKARARAWA and MOSESE TARAU on the 17 day of May, 2015 at Suva in the Central Division stole motor vehicle Registration No. LT 5218 \$120.00 cash, a ZTE mobile containing assorted cards, the property of Ashnil Asmeet Kumar and immediately before committing the theft used force on Ashnil Asmeet Kumar phone valued at \$199.00 and a billabong wall.*

2. The appellant pleaded guilty to the charge on 20 February 2017, in the presence of his counsel, when the charged was explained to him. The prosecution then tendered an outline of the summary of facts in court. The court checked with both accused counsels whether or not they are admitting the prosecution, summary of facts and the particulars of charges in count 1 and 3. Again both defence counsels on behalf of their clients admitted the prosecution's summary of facts and the particulars of offences in count 1 and 3. Both counsel for the accused confirm their admission of the facts.
3. The appellant [Moses Tarau] was found guilty of one count of aggravated robbery he was jointly charge with another. He was then sentenced to 10 years imprisonment without parole.
4. The hearing in this case was held on 20 February 2017 and 18 August 2017, and the sentence ruling was made on 29 December 2017. In paragraph 3 of the Sentence Ruling<sup>1</sup> the court stated:

“3. The court then checked with both accused's counsels on whether or not they are admitting the prosecution's summary of facts and the particulars of offences in counts no. 1 and 3. Both defence counsels, on behalf of their clients, admitted the prosecution's summary of facts and the particulars of offences in count no. 1 and 3. On the basis of the above admissions, the court found both Accused guilty as charged on count no. 1 and convicted them accordingly on that count. It also found accused no. 2 guilty as charged on count no. 3 and convicted him on that count also

5. In calculating which date from which the 30 days for appeal begin, it is 29 December 2017.

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<sup>1</sup> [2017] FHC (Crim Case No: HAC 206 of 2015S)

6. On 15 May 2022 the appellant wrote a letter to the Court of Appeal submitting an application to Appeal Out of Time Against Conviction. In the same letter there are two grounds of appeal enumerated. This letter was received in the Court Registry on 20 May 2022.
7. The delay in this application is 4 years 4 months 7 days.

### **Enlargement of Time to Appeal**

#### **Governing Law - Enlargement of Time to Appeal**

8. In Rasaku v State<sup>2</sup> the Supreme Court stated the following, as factors to be considered by a Court in Fiji when considering an application for enlargement of time:

{21} In paragraph 4 of his judgment in *Kamalesh Kumar v State: Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), Chief Justice Anthony Gates has summarized the factors that will be considered by a court in Fiji for granting enlargement of time as follows:-

- (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 court's consideration.
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will the Respondent be unfairly prejudiced.

#### **Length and Reason for the Delay**

9. As regards factors i) and ii) above, the appellant has not provided any reasonable explanation to explain the delay of 4 years 4 months and 7 days. This delay is substantial and it is unlikely that leave to appeal out of time may be granted. In a letter written by the appellant dated 8 March 2024, which was received in the court registry on 16 April 2024, provided the following explanation:

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<sup>2</sup> [2013] FJSC 4; (CAV 009 of 2013)

- i) Appellant claim that he filed his application to appeal on time, but the Reception Officer did not send the application to the Court Registry. This is a lie, his first ever application was written and dated by him dated 16 May 2022. On that day, the leave period had already expired by over 3 years.
- ii) Due to COVID the cases in the Court Registry cause a massive backlog of cases. However, it was not explained how that affected his application. Imaginative reasoning after the fact.
- iii) No prejudice to the state because of grounds of appeal against conviction. He conveniently sideswiped that fact he pleaded guilt to the charge against him.

10. In **Julien Miller v The State**<sup>3</sup> Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave. The appellant in that case was 11½ months late and leave was refused. For an incarcerated unrepresented Appellant up to 3 months might persuade a court to consider granting leave if other factors are in the Appellant's favour.

#### Merit of the Application

11. There is no merit in this application. The appellant pleaded guilty to the charge. There is nothing so far before the court that merits the appellate court consideration. The grounds submitted are misconceived in a case when the appellant pleaded guilty.

#### Reasonable Prospect of Success

12. The two grounds of appeal submitted by the appellant in support of his application for enlargement of time to appeal are:

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<sup>3</sup> [2007] FICA (AAU 0076 of 2007

- i) The trial judge erred in law in asking the counsel to admit the summary of facts when the appellant disputed the summary of facts causing an error affecting the administration of justice.
  - ii) The trial judge erred in law and fact by sentencing the appellant [Accused 2] Mosese Tarau at paragraph 2 for Violently robbing the first and second complainant was charged for a single count, count 1 causing a serious miscarriage of justice.
- 13. On ground i) above the issue of the appellant had authorized his counsel to admit the facts. There is no basis of the claim from my review sentence ruling of the trial judge. Unless otherwise proven, he is bound by the undertaken made on his behalf by his counsel. This belated afterthought, where the appellant blamed their counsel for an issue he agreed is misguided.
- 14. The same with ground ii) paragraph 12 above, it is misconceived. The basis of the appellant's being found guilty is stated in paragraph 3 of the Sentence Ruling, which quoted in paragraph 4 above. It makes it clear that the claim in this ground is incorrect. This ground of appeal has no prospect of success.

Prejudice to the Respondent/Administration of Criminal Justice

- 15. In this case there are serious prejudice to the respondent in trying to reopen a case after four years, 4 months and 7 days, in which the appellant pleaded guilty. The likelihood of non-availability of witnesses, exhibits, witnesses etc. after such a long delay is likely and all because of the appellant own fault in not applying on time.
- 16. The factors identified above strikes at the need to strike the balance between the rights of accused persons to a fair trial and that of the need to ensure that the administration of criminal justice by way of the efficiency of the court is efficient and effective is not prejudiced by undue delay. The rules of the court are in place to ensure everyone who uses it take seriously and prosecute their business therein within the rules provided

17. In this case allowing an application for enlargement of time for an appeal that is 4 years 4 months and 7 days delayed is unacceptable because of the prejudice it will cause if allowed, to the prosecution if the appeal succeeds and a new trial is ordered ad to the court registry in having to resurrect the files for the case that rightly would have been stored away.

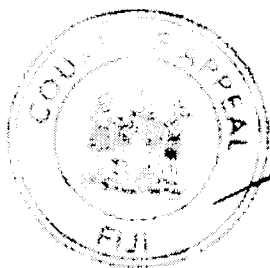
**Assessment**


18. It is clear from the observations made above, that on the facts of this case, it would be a miscarriage of justice, if the application for enlargement of time is granted. It is difficulty to try an understand why the appeal was so late, except to observe that the appellant may have been pushed into doing it, given the fact that he pleaded guilty.

19. The court has determined that there is no basis on which the appellants application for Enlargement of Time to Appeal may be granted and on that basis the grounds of appeal provided by appellant for leave to appeal is refused.

**ORDERS:**

1. Application for Enlargement of Time to Appeal is refused.
2. Leave to Appeal against conviction is refused.



  
Isikeli U Maitoga  
**RESIDENT JUSTICE OF APPEAL**