

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 114 OF 2022
High Court No. 179 of 2017 Ltk

BETWEEN : **SEMI BATI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Ms. Prakash. S for Appellant**
Mr. Lal U. for Respondent [ODPP]

Date of Hearing : **18 March 2024**

Date of Ruling : **2 April 2024**

RULING

1. The appellant was charged with 1 count of Murder contrary to section 237 of the Crimes Act 2009. On the 6th November 2018 in the High Court at Lautoka, the appellant entered a plea of guilty to the charge of murder, contrary to section 237 of the Crimes Act 2009.

2. The charge particularised that he did murder Akeneta Kelea (his mother) on the 8th September 2017 at Lautoka. The facts of the case are that on the 8th September 2017 at about 6pm both the appellant and his mother (the deceased) were by the roadside of Queen's highway Navutu, Lautoka, selling mangoes. An argument developed and the appellant pushed his mother into the path of oncoming vehicles. She was hit by a vehicle and sustained injuries, which resulted in her death on arrival at the Lautoka Hospital. A post mortem report revealed multiple traumatic injuries and a rupture of the aorta. She was 47 years old.
3. The appellant tried to flee the scene but was stopped by a farmer standing nearby. He was arrested by the Police and on being questioned admitted the offence. In mitigation it is submitted that the accused is 26 years old, unemployed and single. He had been living with his mother and stepfather until the tragic incident.
4. Ever since he was young, the appellant's educational and social welfare had been provided for him by Pacific Counselling and Social Welfare because his family had rejected him because of his sexual orientation, which they disapproved of. He has a clear record and has been in remand for 6 months awaiting this sentence.
5. On the 16 November 2018, the appellant was sentenced to life imprisonment with a minimum 12 years to be served before he can be considered for pardon.
6. The Enlargement of Time to Appeal and Leave to Appeal will be assessed together.

Enlargement of Time to Appeal

7. On the 4 October 2022, the appellant filed a Notice of Motion, filed in the court registry on 13 October 2022, seeking an Enlargement of Time for Leave to Appeal Against conviction. This appeal against conviction is 3 years, 11 months and 19 days late.
8. The Supreme Court provided the guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** [2013] FJSC CAV0009, 0013 of 2009: 24 April 2013 and **Kumar v State; Sinu v State** [2012] FJSC 17 CAV0001 of 2009: 21 August 2012.

9. In Rasaku the Supreme Court held

"[18] 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. As the Judicial Committee of the Privy Council emphasized in Ratnam v Cumarasamy [1964] 3 All ER 933 at 935 at 935:

The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step-in procedure requires to be taken there must be some material upon which the court can exercise its discretion."

10. In Kumar the Supreme Court held

'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors 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 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?*

11. In Rasaku the Supreme Court further held:

'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'

12. I shall now consider each of the above factors.

Reasons for the failure to file within time

13. The appellant's affidavit filed in support of the Motion to seeking enlargement of time to appeal, provided the following reasons for the delay;

- (i) My lack of knowledge of possible appeal grounds and I was unsure whether I wanted to appeal or not;
- (ii) After receiving legal advice from Legal Aid Commission counsel that there may be a point in my application before the Fiji Court of Appeal;

- (iii) My appeal application and 2 grounds are submitted as part of this application
- (iv) I am advised by my lawyer and verily believe that my grounds of appeal have a good chance of success.

The length of the delay

14. The two new grounds of appeal against conviction are late by about 3 years 11 months 19 days and therefore, the delay is *prima facie* substantial and unacceptable.

Is there a meritorious ground of appeal or a ground of appeal that will probably succeed?

15. The threshold that an appellant has to reach under this heading is higher than that of leave to appeal. The Court of Appeal in recent times has raised the bar even in timely leave to appeal applications by applying the test of 'reasonable prospect of success' to identify whether an arguable ground of appeal exists: **Caucau v State** [2018] FJCA 171, **Navuki v State** [2018] FJCA 172 and **State v Vakarau** [2018] FJCA 173 and **Sione Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019.
16. In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal. If not, an appeal with a very substantial delay such as this does not deserve to reach the stage of full court hearing.
17. The test of 'real prospect of success' would help achieve the criteria for enlargement of time as set out by the Supreme Court in **Rasaku** as follows

*"[19] **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.**"*

18. The high threshold for allowing enlargement of time to seek leave to appeal is to protect against belated and unmeritorious appeals consuming the limited resources of the

appellate court at the expense of timely and meritorious appeals, which have successfully passed the threshold for leave to appeal. In such cases some of the appellants may be forced to serve the full sentence before their appeals finally reach the full court, as the roll of the court may already be clogged with underserving cases.

Grounds of appeal against conviction

19. There were initially 3 grounds of appeal against conviction submitted by the appellant on 4 October 2022. These grounds were amended by Counsel in a later filing dated 7 February 2024 to 2 grounds and they are as follows:

“(i) The trial judge erred in law in accepting the appellant’s guilty plea on the basis of the evidence set out in the “Summary of Facts” in the judge’s sentencing decision.

“(ii) On totality of the evidence available, the trial Judge erred in law in convicting the appellant of murder when the facts disclose only elements of manslaughter.”

20. Both grounds of appeal consolidate into one question of law: namely, whether on the “Summary of Facts” provided by State, to which the appellant pleaded guilty, the elements of the charge of Murder were made out or the lesser charge of Manslaughter. The Sentencing Judge had this to say about what he thought the charge should have been:

“12.] The State charged the accused with murder on the basis of extreme recklessness. That is the States prerogative, but this Court opines that had the matter gone to trial, a lesser verdict of manslaughter may well have been found. That will be a factor in determining the minimum sentence.”

21. In light of the above analysis, I conclude that the grounds of appeal have a reasonable prospect of success on appeal. I would grant enlargement of time to appeal and also leave to appeal against conviction.

Appeal against sentence

22. I find no merit in the sentence appeal. I believe the 12 years minimum to be served is already acknowledging that the charge should have been manslaughter, not murder.

ORDERS

1. Application for Enlargement of time to seek Leave to Appeal is granted
2. Leave to appeal against conviction is granted
3. Leave to appeal against sentence refused.



Isikeli U Maitaitoga
Isikeli U Maitaitoga
Resident Justice of Appeal.