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

CRIMINAL APPEAL NO. AAU 075 of 2020
[Suva High Court Case No. HAC 115 of 2018]

BETWEEN : **EMOSI BALEIDROKADROKA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Qetaki, RJA**

Counsel : **Appellant in Person**
: **Ms. S. Shameem for the Respondent**

Date of Hearing : **04th February, 2025**
Date of Ruling : **28th February, 2025**

RULING

Background

[1] The Appellant was charged with Aggravated Robbery contrary to section 311(1)(a) of the Crimes Act 2009. He, with others had on 15th day of March 2018 at Nasinu in the Central Division, in the company of each other, entered into Kinoya Car Wash and robbed Pita

Cili of cash, in the sum of $130.00, assorted cigarettes approximately valued at $140.00 and 1x Samsung brand (JI) Mobile phone approximately valued at $129.00; all to the value of $399.00, the properties of Pita Cili.

[2] The Appellant pleaded not guilty to the charge at the trial on 8th April 2019, however, he subsequently changed his plea in the middle of the trial on the 9th of April in the presence of his counsel after the information was read to him again and explained. The learned Judge was satisfied that that change in plea by the Appellant was voluntary, unequivocal and the Appellant had well understood the consequences of having pleaded guilty.

[3] The learned trial Judge convicted and sentenced the Appellant to 9 years imprisonment with a non-parole period of 7 years commencing on 9th May 2019.The Appellant being dissatisfied with the decision, filed an untimely application to appeal against conviction and sentence on 13 August 2020 after a period of 1 year and 3 months from the date of his sentence.

[4] The appellant was a serving prisoner on the date of the sentencing arising from another case, HAC 117 of 2019 in which he was sentenced with an 8 years and 9 months imprisonment with a non-parole period of 6 years and 9 months imprisonment commencing on 28th May 2019.

[5] The Appellant filed his Notice of Grounds of Appeal against Conviction and Sentence, and Notice for Leave to Appeal out of Time on 13 August 2020.

Consolidated Grounds of Appeal Against Conviction and Sentence (Filed on 13th August 2020, 26th November 2021 and 23rd October 2024):

[6] Against conviction

1. That the learned sentencing Judge erred in law and in fact, when he failed to consider that the guilty plea was equivocal because it was entered without understanding the nature of trail within a trial. In doing so, cause a miscarriage of

justice in all the circumstances of the case and also had caused the conviction to be unsafe

2. That the Appellant relied solely on his defence counsels but half-way through-out the trail the Appellant had been pressured and also being told by lawyers that he could not further proceed to defend him to just plead guilty and make it easier for the court.

[7] Against Sentence

3. That the learned sentencing Judge erred in law and in fact when taking into account and considering the Appellant's "*previous conviction*" also as an aggravating factor, which has caused serious injustice to the Appellant.

4. The learned sentencing Judge had erred in law, in failing to remind himself that the Appellant is a serving inmate, while sentencing him without notice of imposing a consecutive or a concurrent sentence in his Lordship's sentencing directions.

5. Whether the sentence of five (5) years with four (4) years non-parole term imposed on an offender who committed an identical offence as the Appellant on the same car wash at Kinoya where the appellant also committed the same offence, however the distinction being the Appellant had pleaded guilty while the Appellant had been convicted after the trial yet the Appellant was sentenced to more severe term of nine (9) years with non-parole of seven (7) years, infringe the Appellant constitutional right in section 26 which provides equal protection treatment and benefit of the law?

6. Whether the sentencing court fell into error in applying the tariff of **Wallace Wise** CAV 004/2015(24 April 2015**)** on the appellant's offence where the distinction of Car office from home invasion is a glaring factor?

Notice for Leave to Seek Enlargement of time

[8] The Appellant was sentenced on 9th May 2019.He filed his appeal papers on 13th August 2020, making this an untimely appeal by almost 1 year and 3 months. The reasons for the delay are set out in the Appellant's affidavit, they are:

(a) The plea was equivocal;

(b) A Lay person without any knowledge of law and legal proceedings,

(c) The failure of the Suva Correction Centre Administration to send my first petition for appeal that was been given to them on the 13th of May 2019 had or which caused the delay.

The Law - Factors to be considered

[9] In **Rogomuri v State** [2021 FJCA 30; AAU0047.2018 (8 February 2021) at paragraphs [6] to [11], His Lordship Prematilaka, JA set out the relevant laws and legal principles and authorities on the "*principled approach*" to exercise of the Courts discretion to grant or otherwise an application for enlargement of time. In **Kumar v State; Sinu v State** CAV0001 of 2009:21 August 2012 [2012 FJSC 17, the Supreme Court set out the five factors that Appellate Courts examine by way of a principled approach to such applications, as follows:

(i) The reason for the failure to file within time.

(ii) The length of the delay.

(iii) Whether there is 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.

See also: **Rasaku v State** CAV0009, 0013 of 2009; 24th April 2013 [2013] FJSA 4 where it was further held that-

> *"These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merits 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."

Respondent's Case

[10] The Respondent is unsure of the nature of the complaint in Ground 1 as it confirmed that there was no trial within a trial in this case. This negates the Appellant's argument that his guilty plea was equivocal since it was entered without an understanding of the nature of a trial within a trial. The ground is baseless.

[11] The Appellant argues that he was pressured to change his plea and attributes this to the pressure applied on him by his counsel. This complaint against the Appellant's counsel was not followed up by the Appellant in line with guidelines for dealing with complaints against counsel, who may appear or perceived to have acted against his/her client's interests during legal proceedings, including in the course of a criminal trial. The guidelines was established in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019), and as it is not being followed, the Respondent submits that, the Court cannot therefore deal with the allegation of trial counsel incompetency.

[12] On the Appellant's complaint that the learned trial Judge took into account his previous convictions which amounts to a grave injustice, the Respondent submits that it is not clear, why this is being complained of, as it was not disputed that the Appellant had previous convictions.

[13] The Appellant's complaint that the sentencing Judge should have given the directions on whether to give a consecutive or concurrent sentence, the Respondent submits that it is not clear what the complaint is given that the Appellant was given the benefit of the default position of a current sentence.

[14] On the Appellant's complaint against the remand period, the Appellant submits that the learned sentencing Judge had noted that the period was discounted for in an earlier case: HAC 117/2018). As such, to repeat the exercise (reduction) is not warranted. In the earlier

case, 6 moths was deducted while the Appellant was remanded. He was remanded for both matters consecutively and, there was no reason to again deduct 6 months for remand in this case.

[15] On the Appellant's argument that his sentence is harsh and excessive, although he had pleaded guilty, and compares this case to the other cases where he had received lesser sentences, and that the trial Judge had erred in applying the wrong tariff, the Respondent submits and concedes that the sentence in this case may warrant a review by the Full Court. In this case the Appellant was sentenced to 8 years and 9 months imprisonment with a non-parole period of 6 years and 9 moths.

The delay and its reasons

[16] The reasons for the delay are set out in paragraph [8] above. The first reason advanced by the Appellant that the plea was equivocal, is hardly a reason for the delay in the filing of his leave application. The second reason, that the Appellant is a lay person without any knowledge of law and legal procedure, has not been clearly explained by the Appellant. Whilst it may be true that the Appellant is a lay person, it is the Respondent's contention that, he is aware of the criminal procedures due to his past experiences, with the criminal justice system. For that reason, his second reason for the delay cannot be taken seriously.

[17] The third reason for the delay, that the Correction authorities had failed to forward to the Registry his notice of Appeal purportedly handed to them on 13th May 2019, cannot be verified, and no clear explanation had been given surrounding that event, and in any case, it is apparent that the Appellant had not made enquiries within a reasonable time to follow up with the authorities that the said Notice had been sent to the Registry. The delay is quite substantial and the Appellant had a duty to follow up, as it is in his interests to have done so.

[18] Complaints such as this, relevant to the handling/mishandling/ delay of transmission of appeal papers given to the Correction authorities by prisoners who are appealing their cases, and who are required to comply with the Court Rules and Procedures on, such as the filing of appeals, appeal within 30 days of the relevant decision appealed against, appear to be quite common. Consideration by the Full Court of the implications and effect on the Appellants in light of existing cases and authorities may assist in resolving issues that arise from such complaint, if validated, so as not to disadvantage a serving prisoner.

Whether there is a Ground of Merit

[19] Ground 1: The arguments in support are baseless. The Appellant argues that his guilty plea was equivocal since it was entered without an understanding of the nature of a trial within a trial. In fact, there was no trial within a trial or *Voir Dire* conducted in this case. At the hearing, the Appellant had conceded that there was in fact no trial within a trial and that the ground was abandoned. I agree with the Respondents submissions on this also. This Ground is not arguable.

[20] Ground 2: I agree with the Respondent's submissions. However, in view of the seriousness of the allegation and the interest of justice, this aspect require further scrutiny. This Ground is arguable.

[21] Ground 3: The Appellant also complains that the learned trial judge took into account his previous convictions which was grave injustice. It was not clear what the complaint is, given it was not disputed that the appellant had previous convictions. I agree with the Respondent's submissions on this aspect. The Ground is not arguable as it has no merit.

[22] Ground 4: The Appellant complained that the learned sentencing Judge should have given the directions on whether to give a consecutive or concurrent sentence. It is unclear what the complaint is, given he was given the benefit of the default position of a concurrent sentence. I agree with the Respondent's submissions on this aspect. The Ground fails, it is nor arguable.

[23] Ground 5: Firstly, the Appellant is disputing the nature of his guilty plea. He says it is equivocal. Secondly, no two cases are similar in all respects and each case is to be decided on their own merits. The Appellant has not demonstrated that Section 26 of the Constitution has been breached.

[24] Ground 6: Wallace v Wise (supra) is considered by Court as a guide only to arriving at an appropriate sentence, together with other authorities and the Sentencing and Penalties Act 2009.

Fresh Evidence (Refer to paragraph 6.0 above):

[25] The Appellant seeks to adduce the evidence of one Maika Tovagone to show he was present outside the courtroom when his counsel had made a plea bargain. I agree with the Respondent that, for such an application, the Appellant needs to provide Notice to adduce fresh evidence in terms of the Supplementary Powers of the Court in section 28(a) of the Court of Appeal Act. The principle of law followed in Fiji in such application was outlined in **Mudaliar v State** [2008] FJSC 25; CAV0001 of 2007; (17 October 2008) wherein the Supreme Court remarked:

> *"The application to adduce further evidence before the Court of Appeal was based upon section 28 of the Court of Appeal Act. That section relevantly provides that the Court of Appeal may, if it thinks it "necessary or expedient in the interests of justice" receives such evidence".*

[26] The Supreme Court had quoted with approval **Ladd v Marshall** [1954] EWCA Civ1; [1954] 3 All ER 745, where the Court of Appeal in England stated three preconditions to the reception of new evidence on appeal, namely:

(i) the evidence could not have been obtained prior to the trial by reasonable diligence;

(ii) it must be such as could have had a substantial influence on the result, and

(iii) It must be apparently credible.

[27] In this particular case, in his affidavit, one Maika Tovagone says he clearly heard the Legal Aid counsel pressure the Appellant. This is one side of the story. It would be wholly proper for the court to call for the two defence counsels, should they be available, to give their affidavits in response to the allegations. In any event, this will be a matter for the Full Court to consider and decide upon.

Conclusion:

[28] The application for leave to appeal out of time against conviction succeeds. Enlargement of time sought to appeal against sentence is allowed.

Orders of Court:

1. *Application for Enlargement of time to appeal against conviction is granted.*
2. *Application for Enlargement of time to appeal against sentence is granted.*

COURT OF APPEAL FIJI

Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL