

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO: 401 OF 2013

BETWEEN : SURESH LAL

Applicant

AND : STATE

Respondent

Counsel : Applicant in Person
Mr. F. Lacanivalu for Respondent

Date of Hearing: 27 November 2013

Date of Ruling: 5 December 2013

RULING

1. This is a leave to appeal against sentence application filed out of time.
2. The applicant was charged before Tavua Magistrate Court with one count of Obtaining Financial Advantage by Deception contrary to Section 318 of the Crimes Decree No. 44 of 2009.
3. The particulars of the offence was that the applicant told the complainant that he is running a restaurant in Suva and wanted to buy goat's meat. Applicant promised complainant that he will give a boat and chain saw. Applicant had taken goats from the complainant and sold those. Nothing was paid to the complainant. Applicant was arrested and caution interviewed. Applicant had admitted the offence.
4. The applicant pleaded guilty and convicted. He was sentenced on 1st July 2013, for 15 months consecutive to any other sentence already serving.
5. The applicants appeal dated 5th July 2013 was received by the prison officials only on 27.9.2013. Therefore the appeal is out of time by about 2 months.
6. The grounds of appeal against the sentence are that:
 - (i) The learned Magistrate erred in law in failing to give proper effect to the provisions of the Section 22(1) of the Sentencing and Penalties Decree and by doing so resisted in the sentence being passed on an error of law.

- (ii) That the learned Magistrate erred in law in failing to give proper effect to the provision at Section 23 (1) of the Sentencing and Penalties Decree to have sentence commenced on the day it was imposed, by doing so, the sentence rescued in being harsh and been passed in an Error of law.

7. Section 248 of the Criminal Procedure Decree provides:

- (1) Every appeal shall in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against-
 - (a) it shall be presented to the Magistrates Court from the decision of which the appeal is lodged;
 - (b) a copy of the petition shall be filed at the registry of the High Court; and
 - (c) a copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.
- (2) The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.
- (3) For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include-
 - (a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court
 - (b) any case in which a question of law of unusual difficulty is involved;
 - (c) a case in which the sanction of the Director of Public Prosecutions or of the commissioner or the Fiji Independent Commission Against Corruption is required by any law;
 - (d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents, and for that reason requires further time for the preparation of the petition;

8. The principles for an extension of time to appeal are settled. The Supreme Court in *Kumar v State; Sinu v State* [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

"Appellate courts examine five factors by way of a principled approach to such applications. These 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 courts 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?"

9. More recently, in *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), the Supreme Court confirmed the above principles and said at paragraph [21]:

"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 endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court."

10. Applicant was not represented at the Magistrate court. Length of delay is less than two months. The points raised by the applicant are arguable points.
11. State had filed submission and conceded that the delay is not excessive and the points raised by the applicant are arguable.
12. For the reasons given above the application for leave to appeal against sentence out of time is allowed.

Sudharshana De Silva

JUDGE

**At Lautoka
05th December 2013**

**Solicitors : Applicant in person
Office of the Director of Public Prosecutions for Respondent**