

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO: 411 OF 2013

BETWEEN : **MOHAMED IMTIAZ ALI**

Applicant

AND:

STATE

Respondent

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

Date of Hearing: **5 December 2013**

Date of Ruling: **6 December 2013**

RULING

1. This is a leave to appeal against sentence application filed out of time.
2. The applicant was charged before Nadi Magistrate Court with one count of Burglary contrary to Section 312 (1) and one count of Theft contrary to Section 291 (1) of the Penal Code, Cap 17.
3. The particulars of the offence were that between 31.1.2012 and 14.2.2012, you with company of another broke and entered into dwelling house of Brian Collis and stole therein assorted items including safe, all to the value of \$11,300.00. Items worth \$ 9,500.00 were recovered.
4. The applicant pleaded guilty and convicted. He was sentenced on 16th March 2012, for 3 years imprisonment with a non-parole period of 18 months.
5. The applicant had handed over an appeal to the prison authorities on 12.4.2012. This position was confirmed by a copy of the Dispatch book. The original of the same book was called to the Court and examined. Thus the applicant had handed over a petition of appeal within time to prison authorities, which never reached this Court. This application was filed on 18th September 2013, 1 year and 4 months out of time.
6. The main ground of appeal against the sentence is that, the learned Magistrate erred in calculation of the sentence.

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;

10. 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?

11. 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.

12. Applicant was not represented at the Magistrate court. Applicant had handed over a petition of appeal within time to prison authorities. The point raised by the applicant is arguable point and applicant may probably succeed.
13. State had filed submission and had objected for the application. However after the original of the dispatch book was called, state conceded for the application.
14. For the reasons given above the application for leave to appeal against sentence out of time is allowed.

Sudharshana De Silva
JUDGE

**At Lautoka
06th December 2013**

Solicitors for the Applicant:	In Person
Solicitors for the Respondent:	Office of the Director of Public Prosecution