

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 11 OF 2014

BETWEEN : RAJESH KUMAR
Applicant

AND : STATE
Respondent

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

Date of Hearing : 27 March 2014
Date of Ruling : 1 April 2014

RULING

1. This is an application for leave to appeal out of time.
2. The applicant was charged before the Magistrate Court of Nadi with one count of Indecent Assault.
3. He was convicted after trial and was sentenced for 2 years and 2 months on 15.8.2013 with a non parole period of 7 months.
4. This appeal was filed on 10.1.2014, 4 months out of time.
5. The reasons given for the delay are that:
 - (i) The applicant is without the knowledge of law
 - (ii) The applicant was under intense family stress due to separation in family
 - (iii) That the documents were not in applicant's possession.
6. The 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, and for that reason requires further time for the preparation of the petition;
 - (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.
7. 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?"*

8. 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. “

9. The applicant was represented at the trial by Legal Aid. The learned Magistrate had clearly stated that the applicant has 28 days to appeal. There is no complaint from the applicant that he did not receive the Judgment or Sentence. Therefore, there is no merit in the grounds for delay. The fact that the applicant was under intense family stress due to separation in family cannot be considered as a justifiable ground to extend the appealable period by 4 months. There is no merit in these grounds for delay.
10. However, considering the fact that the applicant was not represented at this application, this court considered the grounds of appeal on conviction in order to ascertain any substantial prejudice had been caused to the applicant or there are grounds of merit justifying this court’s consideration.

11. The grounds of appeal against the conviction are:

- (i) The learned Magistrate was so biased, unfair and unethical in denying the application to bring his witness to court
- (ii) The learned Magistrate did not take the written evidence which was given by applicant’s religion group
- (iii) The learned Magistrate erred in law and in fact in convicting the applicant without any proper proof as there was no medical report to proceed that the complainant was indeed indecently assaulted
- (iv) That the learned trial Magistrate was biased and one side while hearing the matter
- (v) That the learned trial Magistrate erred in law in failing to direct the prosecution that the applicant shall not be liable to be convicted of the said offence through lack of evidence.

12. First and second grounds of appeal against the conviction.

The applicant alleges that he was not given opportunity to call witnesses or to submit documents in defence. According to the Judgment the accused and his wife have given evidence on behalf of the defence. Further accused was represented by Legal Aid counsel at the trial. If the applicant’s rights in defence was not properly given the Legal Aid counsel should have filed an appeal with a supporting affidavit. There is no merit in these grounds and those fail.

13. The third ground is that there was no proper proof of the charge in the absence of a medical report. The applicant had alleged to have asked the complainant to take off her top and bra. Then he had squeezed her breast and put some ashes taken from fire place on her breast. Then the complaint was directed to hold the applicant tightly. All this was done as a part of pretended healing process. The complainant had immediately told her grandmother about what happened.
14. In these circumstances there is no need for a medical report for the proof of charge against the applicant. Thus there is no merit in this ground.
15. The fourth ground against the conviction is that the learned Magistrate is biased at the time of hearing the matter. There is no evidence or material to support this allegation. I have carefully perused the judgment of the learned Magistrate. The learned Magistrate had considered the evidence given by the applicant and his wife. He had given reasons why he is rejecting the defence version. There is no merit in this ground.
16. The fifth ground of appeal against the conviction is the lack of evidence against a conviction. The learned Magistrate had considered all the evidence and come to the conclusion that the available evidence is sufficient to establish that the applicant had unlawfully and indecently assaulted the victim by fondling her breasts. He had stated that the prosecution has proven each element of the charge beyond reasonable doubt. There is no merit in this ground as well.
17. Considering all above, leave to appeal out of time against the conviction is refused.

Sudharshana De Silva
JUDGE

**At Lautoka
1st April 2014**

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