

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**MISCELLANEOUS JURISDICTION**

**CRIMINAL MISCELLANEOUS CASE NO.: HAM 118 OF 2014 & HAM 140 OF 2014**

**BETWEEN:** STATE

*Applicant*

**AND:** JOHN WILLIAM MICHEL

*Respondent*

**Counsels:** Ms. L. Latu for the Applicant  
Ms. S. Nasedra for the Respondent

**Date of Ruling:** 31.7.2014

**RULING**

1. The respondent was charged before the Ba Magistrate Court with five charges of Indecent Assault contrary to Section 154 (1) of the Penal Code and two charges of Attempted Rape contrary to Section 151 of the Penal Code. The offences were committed over period of 11 years and involved 3 victims.
2. After trial he was convicted and sentenced for 3 years imprisonment with a non-parole period of 2 years for all the charges on 4.4.2014.
3. The State filed their petition of appeal against the sentence on 6<sup>th</sup> May 2014 and the same was rejected on the basis it was filed out of time. It was out of time by three days. Leave to appeal out of time application was filed by the state on 15.5.2014. Mr. Michael Delaney had filed an affidavit in support explaining the delay.
4. The respondent through his counsel had strongly objected for leave being granted on the basis the explanation given by the state cannot be accepted.
5. The grounds of appeal against the sentence are:
  1. The Magistrate erred in failing to consider fully or at all the principle of concurrent and consecutive sentencing. All 5 charges of Indecent Assault were committed against 3 victims over a period of 11 years. Both charges of Attempted Rape were 6

years apart in time and against 2 of the 3 aforementioned victims of the Indecent assault.

2. The Magistrate failed to consider that the legislature increased the maximum sentence for Attempted Rape after the first of the two charges of Attempted Rape was committed. Notwithstanding the change of maximum sentence the Magistrate approach to sentence was the same in respect of both charges.
3. The Magistrate erred and gave a 12 month discount for good character for the Attempted Rape which is wrong in principle when the offences span a period of years (6) and further on account of the disproportionate period of discount compared with the starting point of 3 years.
4. The Magistrate erred and gave a 6 month discount for good character for the Indecent Assaults which is wrong in principle when the offences span a number of years (11) and further on account of the disproportionate period of discount compared with the starting point of 2 years.
5. The Magistrate erred and gave a discount of 12 months for both the 5 Indecent Assaults and the 2 Attempted Rapes. Such a discount being manifestly excessive and disproportionate to the starting points.
6. The Magistrate erred and made no attempt to assess the individual criminality attaching to the Indecent Assaults. In particular, the fact that the victims ages varied from 9 years old in the first charge to 24 years old in Charge 7.
6. The respondent had also filed an application seeking leave out of time against his conviction on 3.6.2014. His conviction was on 4.3.2014. Therefore he is out of time by two months. He had filed a supporting affidavit giving the reasons for the delay.
7. The reasons for the delay are:
  - (i) He was represented by Legal Aid Commission, Ba and therefore all the Court documents were with their office,
  - (ii) The Applicant had filed a timely appeal and submitted to the Namosau Correctional Center and Prison Authority had either misplaced or did not send the appeal. This was 18 - 21 April 2014.
8. The grounds of appeal against the conviction are:
  - (i) THAT the second learned trial Magistrate erred in law by adjourning the trial for over a period of 3 years without a good reasonable cause.

- (ii) **THAT** the second learned trial Magistrate erred in law and in fact by failing to exercise its judicial discretion to declare the trial de-novo and start the trial afresh due to the fact that she did not heard the Prosecution's witnesses giving evidence therefore it would be unfair in the interest of justice for her court to decide on the demeanor and credibility of the Prosecution witnesses.
- (iii) **THAT** the second learned trial Magistrate erred in law by failing to direct herself on the evidence of recent complaint.
- (iv) **THAT** the second learned trial Magistrate erred in law and in fact by failing to direct herself that the charges against the Appellant were of more than 13 years old in some counts and given the tender age of the complainants' at that time and the time lapsed to give evidence, was it possible for the witnesses to recall the said alleged incidents date, month and year and what actually occurred as alleged?
- (v) **THAT** the second learned trial Magistrate erred in law and in fact by failing to direct herself that the Appellant was charged under the Penal Code and for the Appellant to get convicted, the law required corroboration.
- (vi) **THAT** the second learned trial Magistrate erred in law and in fact by failing to direct herself that each of the alleged charges against the Appellant must be decided separately and also if the Appellant is found guilty on one count it does not mean he is guilty on other counts.
- (vii) **THAT** the second learned trial Magistrate erred in law in fact by failing to direct herself that the Appellant was out of the country under UN Mission when alleged count 1 and 3 to have taken place.

9. 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.

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]:

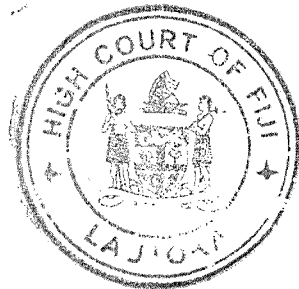
*"Appellate courts examine five factors by way of a principled approach to such applications. These factors are:*

- (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. The respondent was represented at the trial. Even if his affidavit is believed still he is out of time. There is no supporting affidavit from the Legal Aid Commission explaining the delay on their behalf. This Court accepts reasons given by Mr. Michael Delaney in explaining the delay.
13. The appeal grounds submitted on both conviction and sentence are arguable and cannot be decided without perusal of the case record.
14. Considering the fact that the respondent was not represented at the time of filing the papers for appeal out of time against the conviction and there is an appeal against the sentence by State, this Court is of the view that interests of Justice will be served by granting leave for both parties.
15. Applications are allowed. State application for appeal against the sentence out of time allowed. The respondent's application to appeal out of time against the conviction also allowed.



  
Sudharshana De Silva  
JUDGE

At Lautoka  
31<sup>st</sup> July 2014

Solicitors : Office of the Director of Public Prosecution for State  
Office of the Legal Aid Commission for Accused