

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: 81 OF 2014

BETWEEN: TANIELA KARURU COKANAWAI
Applicant

AND: STATE
Respondent

Counsel: Applicant in Person
Mr. Aman Datt for Respondent

Date of Hearing: 13 November 2014
Date of Ruling: 25 November 2014

RULING

1. This is an application for leave to appeal out of time.
2. The applicant was charged before the Magistrate Court of Ba with one count of Attempted Rape.
3. Applicant pleaded guilty to the charge convicted and sentenced on 6.2.2013 for 4 years imprisonment with a non-parole period of 3 years.
4. This application was filed on 28.4.2014, 1 year and 1 month and 24 days out of time.
5. The reasons given for the delay are:
 - (i) When the sentenced was passed no copy was given to him

- (ii) Applicant recently obtained a copy of the sentence with assistance of an in-mate who attended Ba Magistrates court, and previous letters to Court in this regard were not acknowledged by the registry of the Court.
- (iii) No prejudice caused to the respondent
- (iv) There is likelihood of success in his appeal grounds

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.*
- (v) 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 not represented at the trial or at this application. According to copy record a copy of the sentence was handed over to the applicant on the date the sentence was pronounced. The applicant has 13 previous convictions and therefore not a novice to the criminal justice system. There is no merit in the grounds for extension of time for appeal.
10. Considering the fact that the applicant was not represented at this application, this court considered the grounds of appeal on sentence 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 sentence are:

- (i) That the sentence of 4 years with non-parole period of 3 years is manifestly harsh and excessive in all the circumstances of the case.
 - (ii) That maximum sentence is 5 years as the starting point is an error of law.
 - (iii) No credit was allowed to guilty plea.
 - (iv) That the time elapsed between the plea of guilty and that of the sentence was not taken into consideration.
 - (v) That the sentence offends the totality principle.
 - (vi) That the learned Magistrate failed to take into consideration section 22(1) of the Sentencing and Penalties Decree.
 - (vii) That the learned Magistrate failed to take into consideration section 23 of the Sentencing and Penalties Decree and have the current sentence commence on the day it was imposed. (6 February 2013)
12. In ***Bae v State*** [1999] FJCA 21; AAU 0015u.98s (26 February 1999) the Court of Appeal held that:

*“It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself. (***House v The King*** [1936] HCA 40; (1936) 55 CLR 499)*

Ground 1

- 13. The first ground is that the sentence given is manifestly harsh and excessive in all the circumstances of the case.
- 14. The tariff for attempted rape is well settled since the Judgment of Hon. Madam Justice Nazhat Shameem in ***Aunima v State*** [2001] FJHC 105; HAC 0033J.2001S (27 June 2001) The tariff is 12 months imprisonment to 5 years imprisonment. Her ladyship observed:

“Applying all these principles, I find that the accepted tariff for Attempted Rape in the Fiji Courts ranges from 12 months imprisonment to 5 years imprisonment. A starting point should then be chosen according to the seriousness of the offending.

In the case before me, a starting point of 5 years imprisonment was not appropriate. This was not the most serious offence of its kind. There was no evidence of injuries, extreme youth or age of the victim, or of the use of weapons or gratuitous violence. However, it was clearly not the least serious of its kind, which might have justified the lowest starting point. The Appellant used subterfuge to lure the victim to a vacant house, he deliberately referred to a pastor to gain her confidence, he would have completed the offence if he had not been disturbed, and he used force to get the victim to lie down pulling her panties down to her knees. This was not a "borderline" indecent assault.

As such I consider a starting point of 4 years imprisonment to be appropriate. The Appellant was entitled to a reduction for his guilty plea of one year, but was not entitled to any further reduction for good character. In all the circumstances, I consider a sentence of 3 years imprisonment to be appropriate.”

15. Learned Magistrate had followed this correct tariff judgment and arrived at the sentence after considering mitigating factors. No discount was given to guilty plea as it was at a very late stage. The final sentence is within tariff. Considering the facts and circumstances of this case the sentence is not harsh or excessive. There is no merit in this ground.

Ground 2

16. The maxim punishment for the offence is seven years as correctly identified by the learned Magistrate. Thus starting point is not error of law. The learned Magistrate had stated that she will not add for any aggravating factors as the starting point taken is at the high end. There is no merit in this ground.

Ground 3

17. The learned Magistrate had given reasons why no credit was given to guilty plea. *‘No discount is allowed for your guilty plea as this was done nearly 4 years after the first call date.’*

18. In **Basa v State** [2006] FJCA 23; AAU 0024.2005 (24 March 2006) the Court of Appeal held that:

“The appellant suggests that the reference to the fact the plea of guilty was entered late means he was not given full credit for it. Whenever an accused person admits his guilt by pleading guilty, the court will give some credit for that as a clear demonstration of remorse. However, the amount that will be given is not fixed and will depend on the offence charged and the circumstances of each case. The maximum credit is likely to be given for offences such as rape and personal violence because it saves the victim having to relive the trauma in the witness box. At the other end of the scale, little or no credit may be given if the evidence is so overwhelming that the accused has no real option but to admit it. Where, as here, the accused has admitted the offence and the receipt of his share of the money, the delay in pleading guilty must reduce the value of the plea considerably.”

19. At was held in **Naikелеkelevesi v State** [2008] FJCA 11; AAU 0061.2007 (27 June 2008) that *“Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case.”*
20. The learned Magistrate is justified in not giving a discount considering the very late guilty plea. There is no merit in this ground.

Ground 4,5,6 & 7

21. The learned Magistrate had ordered the sentence to run consecutive to the 15 years sentence served by the applicant for a charge of Rape.

‘As per his previous conviction records he holds 13 convictions with last conviction for the offence of rape. He is currently serving an imprisonment term of 15 years with 13 years as non-parole.

Considering the offence being committed and the safety of the community at large and taking into account the totality principle in sentencing I find it is only proper for you to serve this 4 years term imprisonment consecutive to your current term.’

22. The Section 22(1) of the Sentencing and Penalties Decree was given a wide interpretation by the Fiji Court of Appeal in Vukitoga v State[2013] FJCA 19;AAU 0049.2008 (13 March 2013)

"[22] The situation that presents itself to the Court therefore, and a proposition advanced by counsel for the appellant is this: there being no guidance from authorities of higher courts on concurrent or consecutive sentencing, we are left only with the legislation (Sentencing and Penalties Decree) which states that subsequent sentences must be served concurrently with existing sentences.

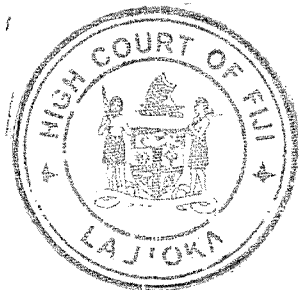
[23] Guidance for this situation can still be gleaned from the earlier decision of the Supreme Court in Joji Waqasaga v State [2006] FJHC 6 CAV 0009U.2005S (8 June 2006) by analogy. If the Court said (and it did) that where the "default" position was consecutive, then a Court would have to give "reasoned justification" to depart from that position in making sentences concurrent, then a Court must now when the "default" position is concurrency make a reasoned justification to depart from the "default" position in making sentences consecutive or partly consecutive."


23. In Lanyon v The State [2004] FJHC 126; HAA 0042.2004 (4 August 2004) Hon. Mr. Justice Gerald Winter held that:

'Repetitive, recidivist offending must inevitably lead to longer sentences of imprisonment unless the offender can demonstrate special circumstances that motivate the court to sentence otherwise. This principle meets three of society's needs. Firstly it might act as a deterrent to the offender and others who fall into a pattern of semi-professional crime to support themselves. Second, society is entitled to sideline or warehouse repeat offenders out of the community for longer periods of time so that at least during the term of incarceration they cannot wreak havoc on the lives of law abiding citizens. Third, offenders deserve punishment that fits the circumstances of the crime.'

24. The learned Magistrate had given reasoned justification why the sentences are made concurrent. There is no merit in this ground.

25. The applicant had failed to satisfy this Court that any substantial prejudice had been caused to the applicant or there are grounds of merit justifying this court's consideration.
26. Thus application for leave to appeal out of time against the sentence is dismissed.




Sudharshana De Silva
JUDGE

At Lautoka

25th November 2014

Solicitors: Applicant in person

Office of the Director of Public Prosecutions for Respondent