

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: 237 OF 2014

BETWEEN : **MOSESE VAKATALE**
Applicant

AND : **STATE**
Respondent

Counsel: **Applicant in Person**
Ms. Wakesa Elo for Respondent

Date of Hearing: **21 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 Lautoka with one count of Theft and one count of Breach of order suspending sentence.
3. Applicant pleaded guilty to the both charges convicted and sentenced on 15th August 2013 for 12 months imprisonment for the 1st count of theft and the suspended sentence of 2 years imprisonment restored to run consecutively with a non-parole period of 2 years and 6 months.
4. This application was filed on 6.10.2014, 1 year and 24 days out of time.

5. The applicant had not given any reasons for his delay.

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 not represented at the trial or at this application. As the applicant had failed to adduce any ground for delay this application could be dismissed on that ground. Further applicant is not a novice to the criminal justice system as he has several previous convictions.
10. However 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 learned sentencing Court had failed in law in not observing the principles embodied in section 22 (1) of the Sentencing and Penalties Decree, 2009 regarding concurrency and by failing to do so resulted in the sentence being passed on error of law.
 - (ii) That the learned sentencing Magistrate erred in law in failing to give me opportunity to be heard why a non-parole period should not be given pursuant to section 18 (1) of the Sentencing and Penalties Decree. By failing to do so resulted in my opportunity not to have a non-parole term imposed being infringed.

- (iii) That the sentence of breach of order of suspending sentence is harsh and excessive. Being in mind no reduction of sentence was credited for the guilty plea, mitigating factors and true remorse.
- (iv) That the sentence imposed is in disparity with the sentences imposed by this high court in regards to indictable offences of Burglary and Aggravated Burglary, more serious offences prescribed by law.

Ground 1

12. The first ground is that the sentence given for first count should run concurrent to the sentence for the 2nd count according to section 22(1) of the Sentencing and Penalties Decree.

13. The breach of order suspending sentence is governed by section 28 of the Sentencing and Penalties Decree. The section 28 is as follows:

28. - (1) *If at any time during the operational period of a suspended sentence of imprisonment, the offender commits another offence punishable by imprisonment, the offender is guilty of an offence against this section.*
- (2) *A proceeding for an offence under sub-section (1) may be commenced at any time up to 3 years after the date on which the offence is alleged to have been committed.*
- (3) *Upon charging an offender with an offence under sub-section (1) a warrant to arrest the offender may be issued.*
- (4) *If on the hearing of a charge under sub-section (1) the court finds the offender guilty of the offence, it may impose a fine not exceeding 100 penalty units and in addition the court must restore the sentence or part sentence held in suspense and order the offender to serve it, but of the court considers that exceptional circumstances exist that make this unjust, the court may instead—*
- (a) *restore part of the sentence or part sentence held in suspense and order the offender to serve it; or*
 - (b) *in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order under this sub-section; or*
 - (c) *make no order with respect to the suspended sentence.*

(5) Any order for an offender to serve a term of imprisonment under sub-section (4) must be served -

(a) immediately; and

(b) unless the court orders otherwise, consecutively on any other term of imprisonment previously imposed on the offender by that court or any other court.

14. According to section 28 (5) the sentence should be served consecutively unless the court orders otherwise. Therefore there is no merit in this ground.

Ground 2

15. According to section 18 (1) of the Sentencing and Penalties Decree the Court must fix a non- parole period if the sentence is 2 years or more. Section 18 is as follows:

18. (1) Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.

(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).

(3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.

(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

(5) If a court sentences an offender to be imprisoned in respect of more than one offence, any non-parole period fixed under this section must be in respect of the aggregate period of imprisonment that the offender will be liable to serve under all the sentences imposed.

(6) In order to give better effect to any system of parole implemented

under a lawmaking provision for such a system, a court may fix a non-parole period in relation to sentences already being served by offenders, and to this extent this Decree may retrospective application.

(7) Regulations made under this Decree may make provision in relation to any procedural matter related to the exercise by the courts of the power under sub-section (6).

16. As the aggregate sentence is 3 years the learned Magistrate must fix a non-parole period. The period of 2 years and 6 months is in accordance with section 18 (4). There is no merit in this ground.

Ground 3

17. According to section 18 (4) of the Sentencing and Penalties Decree the Court must restore the sentence or part of the sentence held in suspense and order the offender to serve it. But if the **Court considers that exceptional circumstances exist that make this unjust**, the Court may instead-

(a) restore part of the sentence or part sentence held in suspense and order the offender to serve it; or

(b) in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order under this sub-section; or

(c) make no order with respect to the suspended sentence.

18. There were no exceptional circumstances adduced by the applicant in this case. Therefore the learned Magistrate was correct in restoring the full suspended sentence. There is no need to consider mitigating factors, guilty plea and remorse again. The only requirement is to consider whether there are exceptional circumstances. There is no merit in this ground.

Ground 4

19. The sentence is within the tariff for the offence of theft as given in **Ratusili v State**.

20. In Ratusili v State [2012] FJHC 1249; HAA 011.2012 (1 August 2012) Hon. Mr. Justice Paul Madigan summarized the tariff judgments for the offence of Theft.

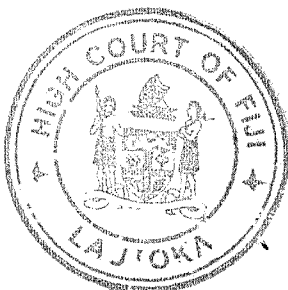
'From the cases then the following sentencing principles are established:

- (i) *For an offence of simple theft the sentencing range should be between 2 and 9 months*
- (ii) *Any subsequent offence should attract a penalty of at least 9 month*
- (iii) *Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences up to three years*
- (iv) *Regard should be had to nature of the relationship between offender and the victim*
- (v) *Planned thefts will attract greater sentences than opportunistic thefts*

21. The applicant has previous convictions. Therefore the sentence of 12 months for theft is well within the tariff. There is no merit in this ground.

22. 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.

23. 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