IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO.: HAM 09 OF 2015

BETWEEN: **SUBRAMANI GOUNDAR**

Applicant

AND: **STATE**

Respondent

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

Date of Hearing: **24 March 2015**
Date of Judgment: **31 March 2015**

JUDGMENT

1. The Appellant was charged before the Tavua Magistrate Court under one count of Theft contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

2. The Appellant pleaded guilty to the charge and was convicted and sentenced on 3.11.2014 with 6 months imprisonment, suspended for 2 years and a fine of $300 with default term of 30 days.

3. This leave to appeal application against the sentence was filed on 15.1.2015 and was one month and 12 days out of time.

4. The grounds for the delay are:

   (i) The Applicant did not have money to pay the filing fees
   (ii) Then he had gone to Legal Aid Commission to get assistance
   (iii) He did not have the bus fare to come to Legal Aid Commission on the given date to give instructions.

5. 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 of 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.

6. 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?"

7. 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."*

8. The state had conceded that there is a ground which will probably succeed and further conceded that this Court could consider this application as an appeal against the sentence.

9. The grounds of appeal against the sentence are:

   (i) That the learned Magistrate erred in law and in fact in not taking into account that the petitioner is a social welfare recipient and he receives $60.00 a month and that the fine imposed of 3 penalty units of $300.00 and paid within 21 days is manifestly high and excessive in the circumstances.
   (ii) That the learned Magistrate erred in law and in fact in not taking into account that the petitioner does not have the means to pay the fine imposed as he is a social welfare recipient.
   (iii) That the learned Magistrate erred in law and in principle when he did not take into account the mitigating factors of the petitioner specifically that he is the sole breadwinner for his family and is a social welfare recipient.
   (iv) That the learned Trial Magistrate erred in law and in principle when he imposed a fine of $300.00, when the item was recovered and a 2 year suspended sentence imposed.
   (v) The fine of $300.00 imposed is harsh and excessive

10. The state in their submissions has conceded that the learned Magistrate should have held a means test before imposing the fine.

11. According to Section 31 (1) of the Sentencing Penalties Decree it was lawful for the learned Magistrate to order a fine in this case.

> *'31(1) If a person is found guilty of an offence the court may, subject to any specific provision relating to the offence, fine the offender in addition to or instead of any other sentence to which the offender may be liable.'*

12. The learned Magistrate had made the following remark in ordering a fine.

> *'In addition to the above, the offence of theft is prevalent in community and as a deterrent measure and in the public interest the imposition of a*

fine would be appropriate. I therefore order that you pay a fine of 3 penalty units ($300.00) which is to be paid within 21 days.'

13. However Section 32 of the Sentencing and Penalties Decree is as follows:

> *'32. — (1) If a court decides to fine an offender it must determine the amount of the fine and the method of payment by taking into account, as far as is practicable, the financial circumstances of the offender and the extent of the burden that its payment will impose.*
>
> *(2) A court is not prevented from fining an offender in circumstances where it is unable to determine the financial circumstances of the offender*
>
> *(3) In considering the financial circumstances of an offender the court must take into account any other order that it or any other court has made, or proposes to make —*
> *(a) providing for the forfeiture of the offender's property, or for its automatic forfeiture under any law; and*
> *(b) requiring the offender to make restitution or to pay compensation.*
>
> *(4) If the court considers —*
> *(a) that it would be appropriate both to impose a fine and to order restitution or compensation; but*
> *(b) the offender has insufficient means to pay both — the court must give preference to restitution or compensation, but may order the payment of a fine also*
>
> *(5) A court in fixing the amount of a fine to be paid by an offender may have regard to (among other matters) —*
> *(a) any loss or destruction of, or damage to, property suffered by any person as a result of the offence; and*
> *(b) the value of any benefit derived by the offender from the commission of the offence'*

14. In **Bokadi v State** [2002] FJHC 179; HAA 0075J.2002S (29 October 2002) Hon. Madam Justice Nazhat Shameem held:

> *'In **Haroon Khan -v- The State** 40 FLR 182, Pathik J, after referring to **R -v- King** (1970) 2 ALL ER 249 and **R -v- Lewis** (1965) Crim. L.R. 121, said that where a Magistrate failed to inquire into means before imposing a fine, the sentence was wrong in principle and would be quashed. In **Earle Underwood -v- Reg** Crim. App. No. 69 of 1983, Kermode J said:*

"Where a Magistrate proposes to impose what he considers might be a large fine for the person he has convicted, a lot of time, trouble and expense would be saved if he made inquiry of that person's means before imposing the fine."

In assessing means, the sentencing court should consider regularity of employment, expected and current wages, financial burdens on the offender, and other sources of income. Fines should not be ordered to be paid over excessive periods of time, and it is wrong in principle to order payment of fines expecting another person to pay it (other than the offender). The exception is the payment of a juvenile's fines by his parent or guardian. Lastly, in assessing the offender's means, a court is entitled to rely upon information given to it by the offender and is under no duty to conduct an independent means of inquiry. In ***Wright -v- R*** *(1977) Crim. L.R., the court said:*

"Although it is a fundamental principle of sentencing that financial obligation must be matched to the ability to pay, that does not mean that the Court has to set out on an inquisitorial function and dig out all the information that exists about the appellant's means. The appellant knows what his means are and he is perfectly capable of putting them before the court."

15. This background warrants this Court to exercise its powers in terms of Section 256 (2) (a) of the Criminal Procedure Decree to vary the sentence passed by the Magistrate and pass other sentence.

16. Given that no enquiry was made into means and given that the Applicant is a social welfare recipient, I quash the fine of $300 made against him. The suspended sentence remains intact.

17. Appeal is allowed. Sentence is varied.

HIGH COURT OF FIJI LAUTOKA

Sudharshana De Silva
JUDGE

At Lautoka
31 March 2015

Solicitors : Office of the Legal Aid Commission for the Applicant
Office of the Director of Public Prosecutions for Respondent