

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 29 OF 2016

BETWEEN : NOA MAYA

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Mr M Fesaitu for the Appellant
Ms S Kiran for the Respondent

Date of Judgment : 23rd of January 2017

RULING

Introduction

1. The Appellant files this Notice of Motion seeking following orders, *inter alia*;
 - i) *An extension of time within which to appeal be granted to the Applicant,*
 - ii) *Leave be granted to the Applicant to file his grounds of appeal against his conviction and Sentence,*

iii) Any other orders the Honourable court deems just in the circumstance of this application,

2. The Notice of Motion is being supported by an affidavit of the Appellant, stating the grounds of this application. The Appellant deposed in his affidavit that he was not aware of the appealable time period until he was made aware of it by one of the fellow inmates in the prison. Therefore, he failed to file his appeal against the conviction and the sentence imposed on him by the learned Magistrate of Lautoka on the 10th of June 2014. The Appellant further contends that he did not fully comprehend the consequence of his plea of guilty and the learned Magistrate failed to exercise his judicial discretion in allowing the Appellant to withdraw his plea of guilty. Having stated that his plea of guilt was unequivocal, the Appellant urges the court that he has meritorious grounds for appeal against the conviction and the sentence, if he is allowed to proceed with his appeal.

3. Pursuant to the service of the Notice of Motion, the Appellant and the Respondent appeared in court on the 22nd of September 2016, where the learned counsel for both of the parties agreed to conduct the hearing by way written submissions. I accordingly directed them to file their respective written submissions, which they have filed as per the directions. Having carefully perused the affidavit of the Appellant, respective written submissions of the parties and the record of the proceedings of the Magistrates Court, I now proceed to pronounce my ruling as follows.

Background

4. The Appellant was charged together with three others in the Magistrates Court for one count of Robbery with Violence, contrary to Section 293 of the Penal Code on the 2nd of November 2007. The Accused did not plead guilty for the offence on the 21st of November 2007. Subsequent to several adjournments, the Appellant informed the court of his willingness to change his plea. He had then pleaded guilty for the offence on the 21st of November 2011. The learned Magistrate had convicted him accordingly.

5. The matter had then been adjourned for several times due to various reasons, mostly due to the non-production of the Appellant by the prison authorities and also due to the non-availability of the presiding Magistrate. The Appellant had then made an application to change his plea on the 22nd of October 2013. The learned Magistrate in his ruling dated 12th of May 2014 had refused the said application. The learned Magistrate had then sentenced the Appellant for a period of nine (9) years and one (1) month imprisonment with non-parole period of eight (8) years on the 10th of June 2014.

The Law and Analysis

6. Section 248 (1) (a) of the Criminal Procedure Decree as amended by the Criminal Procedure (Amendment) Decree 2014 states that any petition of appeal against any Judgment, Sentence or Order of the Magistrates' court must be filed at the Registry of the High Court within 28 days upon such decision. Section 248 (2) of the Criminal Procedure Decree has conferred the High Court with discretionary power to extend the time of appeal on the ground of any good cause. Section 248

(3) has provided some of the factors that the court could consider in order to determine the good cause as stated under Section 248 (2). Section 248 (2) and (3) of the Criminal Procedure Decree states that,

i) The High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.

ii) 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.

7. The Supreme Court of Fiji in **Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012)** has discussed the factors that the court should consider in an application of this nature, where it was held that;

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 court's 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. Having reaffirmed the above grounds as stipulated in **Kumar v State, Sinu v State (Supra)**, the Supreme Court of Fiji in **Rasaku v State [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013)** held that;

"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. In view of the observation made by the Supreme Court of Fiji in **Rasaku (supra)**, the court must always exercise the discretionary power given under Section 248 (2) of the Criminal Procedure Decree in order to ensure the fairness and justice to the proceedings and to the parties involved.
10. The Appellant submits that he was not aware of the limitation of the appealable time. However, the learned Counsel for the Respondent submitted that the

Appellant is not a novice in the legal system, but has exercised his right to appeal in many other occasions prior to the imposition of this sentence. On the 12th of January 2017, the learned Counsel for the Appellant and the Appellant himself conceded the fact that he has duly exercised his right to appeal in other cases in which he was involved with, prior to the imposition of this sentence. Accordingly, I do not find there is a reasonable explanation for the delay of more than two years in making this application.

11. The delay of more than two years is considered substantially a long period for an application of this nature. In the absence of a reasonable explanation for such delay, I do not find any reasonable good cause to grant an extension of time pursuant to 248 (2) of the Criminal Procedure Decree.
12. I now draw my attention to determine whether the proposed grounds of appeal are meritorious. The proposed grounds of appeal are mainly founded on the contention that the plea of guilt was equivocal. The Appellant submits that he was not aware of the consequence of his plea of guilt and the learned Magistrate erred in law by refusing leave to withdraw his plea of guilt.
13. According to the record of the proceedings of the Magistrate Court, the Appellant had initially pleaded not guilty for the offence. Subsequent to several adjournments he had informed the court about his intention of changing his plea. He had then pleaded guilty for the offence. The matter had then been adjourned for several occasions without imposing the sentence. During that period, the Appellant had made an application to withdraw his plea, but it had been refused by the court.

14. The Fiji Court of Appeal in Tuisavusavu v State [2009] FJCA 50; AAU0064.2004S (3 April 2009) has discussed the applicable approach in determining the issue of equivocal plea, where the Court of Appeal held that;

“The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see Bogiwalu v State [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea ‘with caution bordering on circumspection’ (Liberti (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.

Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered”.

15. The Appellant has not given any reason to the Magistrates Court in his application to windrow the plea. The Appellant had been given all of his rights and explained the charge and the summery of facts in a language that he chose to proceed. The learned Magistrate in his ruling dated 12th of May 2014 has correctly considered the applicable law and refused the application to withdraw the plea.
16. In view of the reasons discussed above, I do not find the proposed grounds of appeal have any possibility of success.

Conclusion

17. In conclusion, I refuse this Notice of Motion and dismiss it accordingly.

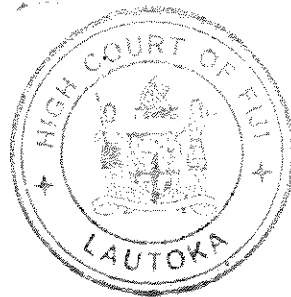
18. Thirty (30) days to appeal to the Fiji Court of Appeal.

R. D. R. Thushara Rajasinghe

Judge

At Lautoka

23rd of January 2017



*delivered
by
Madhyan J
23.01.17*

Solicitors : Office of the Director of Public Prosecutions

Office of Legal Aid Commission