

trial on 1st of August, 2016. Applicant was represented by a legal practitioner right throughout the trial.

3. At the close of the prosecution case, Applicant was put in his defence. He exercised his right to remain silent.
4. On 11th November, 2017, the Court found the Applicant guilty and on 28th November, 2017 he was sentenced to 2 years' and 6 months' imprisonment with a non parole period of 18 months.
5. Applicant engaged a different counsel and through his counsel he filed his petition of appeal in the High Court Registry on 3rd February, 2017. His application was 67 days out of time.

THE LAW

6. Section 248 of the Criminal Procedure Decree lays down the procedure to be followed in filing appeals in the High Court:

248.-(1) Every appeal shall be 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.*

7. The principles for an extension of time to appeal are settled. The Supreme Court in *Kumar v State; Simu 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. 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. Applicant’s appeal against sentence is based on the ground that his sentence was harsh and excessive in circumstances where there were no aggravating factors.

LENGTH OF DELAY

10. Applicant was sentenced on the 28th of November 2016. This application was filed on the 3rd of February, 2017. Therefore, the delay is approximately 2 months.

CAUSE OF DELAY

11. Applicant submits that his wife consulted Mr Nacolawa of Nacolawa & Co. on the 23rd of December, 2016 but it took an awfully long time to finalize everything that is to get everything in place since the Applicant was in custody and his wife, a housewife and lay person who is a diabetic and heart patient, and no one to advise her on the possible steps to explore for an appeal. The former Counsel did not provide any copy of the Judgment. The only document received from the former counsel was a copy of the sentence. Applicant's wife had to attend Court personally to get a copy of the judgment several weeks after it was delivered.
12. The applicant was represented by a private counsel from Iqbal Khan & Associates at the time the sentence was passed. The learned Magistrate informed that he can appeal the sentence within 28 days from the date of the sentence.
13. The Applicant's Counsel submits that Applicant's wife approached Nacolawa & Co. on the 23rd of December, 2016.
14. It has taken Applicant's wife almost a month to get another counsel appointed to file the Applicant's appeal. Even though Applicant's 3 children were living abroad his wife could have sought their assistance to retain a Counsel in a timely fashion. Applicant himself could have sought legal assistance from the Legal Aid Commission to file his appeal within appealable time.
15. Applicant has shown no good cause for leave to appeal out of time.

16. Considering the above, this Court finds that there is no reasonable ground for enlargement of time. However, the ultimate decision whether leave should be granted will depend on the merits of envisioned appeal.

PREJUDICE

17. A prejudice will be caused to the State if leave is granted.

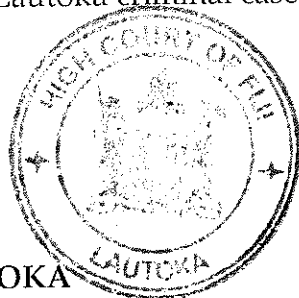
LIKELY SUCCESS ON APPEAL

18. Applicant submits that the sentence was harsh and there was nothing aggravating about the alleged offending.
19. The victim was 14 years old juvenile at the time of offending. He was watching TV at Applicant's house. Applicant started massaging his head as he complained of a headache. After a while Applicant forcibly took his hand and made him hold his penis and massage it. When the victim took his hand away, Applicant took victim's hand forcibly and hugged him. Applicant was a trusted elderly neighbour of the victim.
20. Learned Magistrate correctly considered two aggravating factors. He had considered the breach of trust situation and the vast age gap between the victim and the accused. In addition to those, the warning given by the accused to the victim not to reveal the offending to anyone and the fact that the victim was a juvenile could have been considered as aggravating factors and of course the use of force.


21. Furthermore, the sentence has been quite lenient given the aggravating circumstances described above and it falls within tariff between 2 and 8 years imprisonment for Sexual Assault set out in State v. Kaiyum (2012) FJHC 1274; Criminal Case 160.2010 (10 August 2012).
22. For this kind of cases, a suspended sentence is not warranted. In State v. Ratabacaca, Criminal Case No: HAC 252 of 2011 (Suva), Justice Madigan stated:
“Your counsel asks for leniency and that the sentence be suspended or an alternative sentence be imposed to keep you from imprisonment. Such leniency can only be afforded to a convict who expresses remorse by way of a guilty plea or some other expression of regret and there is none in this case...”
23. In this case, Applicant did not show any remorse or repentance.

CONCLUSION

24. The delay is unreasonable in the circumstances. There are no grounds of appeal which merit serious judicial consideration that they will most probably be successful in appeal. Therefore, application for leave to appeal out of time in respect of Lautoka criminal case No. 25 of 2016 is refused.



AT LAUTOKA
09th May, 2017


Aruna Aluthge
Judge

Solicitors: Nacolawa & Co. for Applicant
Office of the Director of Public Prosecution for Respondent