**IN THE HIGH COURT OF FIJI**
**AT LABASA**
**[APPELLATE JURISDICTION]**

**CRIMINAL APPEAL NO. HAA 16 OF 2019**

**IN THE MATTER** of an Appeal from the decision of the Magistrate's Court of Fiji at Labasa, in respect of Criminal Case No. 677 of 2017.

**AND IN THE MATTER** of an Appeal brought pursuant to Section 246 (1), Section 248 (2), Section 249 and Section 256 (2) of the Criminal Procedure Act 2009.

**BETWEEN:** **LAND TRANSPORT AUTHORITY**

**APPELLANT**

**AND**: **NASOQO INVESTMENT LIMITED**

**RESPONDENT**

**Counsel** **:** Mr. Gabriel Stephens for the Appellant
Mr. Ami Kohli for the Respondent

**Dates of Hearing :** 26 and 27 September 2019

**Date of Judgment:** 19 March 2020

# JUDGMENT

**[1]** This is an Appeal made by the Land Transport Authority (LTA) against the decision made by the Magistrate's Court of Labasa, in Criminal Case No. 677 of 2017, acquitting the Respondent Company.

**[2]** This Appeal has been filed by way of a Notice of Motion to Appeal out of Time. The Notice of Motion is supported by an Affidavit in Support filed by Emele Dauvere, the Senior Legal Officer, of the Land Transport Authority.

**[3]** Luke Matavura Naitaka, the Director of the Respondent Company, filed an Affidavit in Opposition to this application.

**[4]** The Respondent Company was charged before the Magistrate's Court of Labasa, with the following offence:

***Statement of Offence***

**PERMITTING ANOTHER PERSON TO DRIVE A MOTOR VEHICLE WITH NON-CONFORMING MASS PLUS LOAD:** Contrary to Section 80 (9) (d), 87(1) (a) of the Land Transport Act 1998 and Regulation 122 of the Land Transport (Vehicle Registration and Construction) Regulation 2000.

***Particulars of Offence***

**NASOQO INVESTMENT LIMITED,** on the 21st day of June 2017, at Vunivau, Bua, in the Northern Division, being the owner of motor vehicle registration No. IB 635 at Vunivau, Bua, permitted Mr Osea Baleyasavu Sakumeni to carry logs with weight of 41.34 tons when the vehicle permissible to gross weight is 26.8 tons. The excess weight of the vehicle is 14.54 tonnes.

**[5]** The Respondent pleaded not guilty to the charge and the matter proceeded to trial.

**[6]** At the conclusion of the case for the prosecution, a No Case to Answer application was made by the Respondent. On 12 June 2018, the Learned Resident Magistrate found that the No Case to Answer application had merit and accordingly acquitted the Respondent of the charge.

**[7]** Aggrieved by this Order the Land Transport Authority filed a timely Appeal before the High Court of Labasa [High Court of Labasa Criminal Appeal No. 21 of 2018].

**[8]** However, being an Appeal filed against an order of acquittal, since no sanction in writing had been obtained from the Director of Public Prosecutions (DPP) in terms of

the provisions of Section 246 (2) of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act), the High Court of Labasa dismissed the Appeal on 17 April 2019.

**[9]** Thereafter, on 19 June 2019, the Land Transport Authority filed the instant Appeal. Since the Appeal is filed out of time it has been filed by way of a Notice of Motion to Appeal out of Time.

**[10]** This matter was taken up for hearing on 26 and 27 September 2019. Counsel for both the Appellant and the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

**PROPOSED GROUNDS OF APPEAL AGAINST THE ORDER OF THE RESIDENT MAGISTRATE**

**[11]** Following are the proposed Grounds of Appeal filed by the Appellant the Land Transport Authority:

(a) **THAT** the Learned Magistrate erred in law in allowing and in holding a no case to answer application against the Appellant when he acquitted the Respondent of the Count of Permitting Another Person to Drive a Motor Vehicle with Non-Conforming Mass plus Load, contrary to Section 80(9) (d), 87(1) (a) of the Land Transport Act 1998 and Regulation 122 of the Land Transport (Vehicle Registration and Construction) Regulation 2000.

(b) **THAT** the Learned Magistrate erred in law and in fact in holding that the accused/defendant has no case to answer when he had a case to answer, and that the Learned Magistrate, failed to properly evaluate the prosecution evidences, and further failure to consider the requirements of Criminal Procedure Act 2009.

(c) **THAT** the Learned Magistrate erred in law and in fact when he failed to give direction that the accused/defendant was charged for a prescribed offence contrary to Regulation 80(9) (d), 87(1) (a) and 122 of the Land Transport (Vehicle Registration and Construction) Regulation 2000 ("the principal offence") and not under Regulation 86 (6) and 90 (3), ('the additional offence'). And further erred in holding that the

Appellant/Plaintiff/Prosecutor breached Regulation 86 (4) (6) and 90 (3) ('the additional offences') by failing to inform the driver of vehicle registration number IB 635 to unload, when the additional prescribed offence was not on issue here.

(d) **THAT** the Learned Magistrate erred in law and in fact in holding that under Regulations 86 (4) and 90 (1) (3) ('the additional offence'), the Appellant/Plaintiff Authorized Officer must exercise his discretion and there was no evidence that he did.

(e) **THAT** the Learned Magistrate erred in law and in fact when he implied and holds in his ruling, in concurring with the defence counsel submission, that the established procedure followed by the enforcement Officers of the Appellant/Plaintiff/Prosecutor at the time of issuing the Traffic Infringement Notice by first weighing the truck and issued the TIN for excess plus load (without giving time for the accused to undo his wrong by unload), as mandated by the Land Transport Act 1998, the Land Transport (Vehicle Registration & Construction) Regulations 2000, and the Land Transport (Traffic Infringement Notice) Regulations 2017, is not the correct procedure.

(f) **THAT** the Learned Magistrate erred in law and/or in fact in holding that the TIN No. 3150045 issued on 21 June 2017 was wrongly issued to the company and not to the driver, and that the prosecution has to prove that NIL/accused gave permission and authority to the driver to drive truck in access load.

**PRINCIPLES RELATING TO ENLARGEMENT OF TIME FOR FILING OF APPEALS**

**[12]** It has now been well established that there are several factors that a Court needs to take into consideration when dealing with such applications.

**[13]** In ***Kamlesh Kumar v. State; Mesake Sinu v. State*** [2012] FJSC 17, CAV0001.2009 (21 August 2012), His Lordship Chief Justice Anthony Gates has elaborated on the

principles to be applied or considered by the appellate courts when exercising its discretion in such matters. These factors are:

(i) The reasons 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?

**The Law and Analysis**

**[14]** Section 246 of the Criminal Procedure Act deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

*"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*

*(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*

*(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*

*(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

*(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.*

*(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of*

*any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.*

*(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.*

**[15]** Section 248 (1) of the Criminal Procedure Act provides that "*Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant's lawyer, and (filed) within 28 days of the date of the decision appealed against."*

**[16]** However, Section 248 (2) of the Criminal Procedure Act sets out that "*The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section."*

**[17]** Section 248 (3) of the Criminal Procedure Act stipulates:

"*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."*

**[18]** Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"*(2) The High Court may —*

*(a) confirm, reverse or vary the decision of the Magistrates Court; or*

*(b) remit the matter with the opinion of the High Court to the Magistrates Court; or*

*(c) order a new trial; or*

*(d) order trial by a court of competent jurisdiction; or*

*(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*

*(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

*(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."*

**[19]** In terms of ***Kumar v. State; Sinu v. State*** (supra), in the Affidavit filed in support of this application, the reasons for the delay in filing this Appeal have been clearly explained by the Appellant. It is stated therein that due to the recent amendments to the LTA Act the prosecution no longer files the charge, but the Respondent has to file an application to defend the charge within the prescribed 90 days after being served. In this case the Respondent filed a motion to defend the charge on 10 November 2018, which was said to be three months after the prescribed 90 day period.

**[20]** The reasons stated as to why the LTA did not first seek the consent of the DPP prior to filing the appeal in HAA 21 of 2018 was said to be due to the recent amendments to the LTA Act 1998, whereby Sections 92 and 93 of the Act were amended, which involved questions of law causing unusual difficulty for the LTA. The previous procedure for instituting Traffic Infringement Notices (TIN) has been removed and consequently the LTA are no longer the prosecutor. The new procedure mandated the Minister to make regulations concerning all proceedings for Traffic Infringement Notices, including the manner, form and time frames within which TIN must be issued, the actions a person may undertake upon receipt of a TIN, and the penalties a person to whom a TIN has been issued is liable to.

**[21]** It is stated that upon the receipt of the judgment of the High Court on 19 April 2019, the LTA could not dispatch its letter to the Office of the DPP until 25 April 2019, as it was the Easter weekend.

**[22]** There was no oversight by the Counsel in terms of the time required for filing of the Appeal as the LTA had to await the consent from the Office of the DPP before it could re-file this Appeal. The sanction to Appeal against acquittal was received from the DPP on 24 May 2019.

**[23]** This is stated as the reasons as to why the LTA was not able to file a timely Appeal against the acquittal.

**[24]** It is further submitted that LTA never delayed when it was prosecuting this matter in the Magistrate's Court and that the LTA is of the opinion that the Appeal has reasonable prospects of success on its merits.

**[25]** The charge against the Respondent refers to an offence committed on 21 June 2017. The order of acquittal by the Learned Resident Magistrate was made on 12 June 2018. A timely Appeal was filed by the LTA against that order. However, on 17 April 2019 the Appeal was dismissed by the High Court as no sanction in writing had been obtained from the DPP prior to filing of the Appeal. This instant Appeal was filed on 19 June 2019, which was 63 days later.

**[26]** As can be observed, it has taken over one year to file this Appeal from the date the Learned Resident Magistrate made his order of acquittal.

**[27]** This Court cannot accept the reasons provided by the LTA as valid justification for the failure to file this Appeal within time. In any event, the length of the delay, which is over one year, is unjustifiable.

**[28]** I am conscious of the fact that as stated in ***Kumar v. State; Sinu v. State*** (supra), even where there has been substantial delay in filing of the appeal, nonetheless Court has to consider whether there is a ground of appeal that will probably succeed.

**[29]** However, it is the opinion of this Court that this factor must be evaluated with prejudice that could be caused to the Respondent if leave is granted to file this Appeal out of time.

**[30]** At paragraph 21 of the Affidavit deposed by Luke Matavura Naitaka, the Director of the Respondent Company, it is stated in detail the prejudice that the Respondent will suffer if leave was to be granted for the filing of this Appeal out of time.

**[31]** This Court cannot disregard or ignore the aforesaid prejudice that would be caused to the Respondent if leave is granted to file this Appeal out of time at this stage.

**[32]** For all the reasons aforesaid, I conclude that leave to file this Appeal out of time should not be granted and that the Appeal should stand dismissed.

**FINAL ORDERS**

**[33]** In light of the above, the final orders of this Court are as follows:

1. Leave to file Petition of Appeal out of time is disallowed.
2. The Appeal is dismissed.
3. There will be no order for costs.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

**At Labasa**
**This 19th Day of March 2020**

**Solicitors for the Appellant:** **Office of the Land Transport Authority, Suva.**
**Solicitors for the Respondent:** **Kohli & Singh, Barristers & Solicitors, Labasa.**