

IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section
246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

STATE

Appellant

CASE NO: HAA. 16 of 2022

Vs.

[Suva Magistrate's Court Criminal. Case No. C/F 1782/20]

SUNIL SHARMA

Respondent

Counsel : Ms. S. Shameem for the Appellant
Mr. A. Khan, Mr. A. Prasad & Ms. R. Walolo for the Respondent

Hearing on : 18th May, 2023
Judgment on : 19th June, 2023

RULING

[Application for leave to appeal out of time]

Introduction

1. The respondent was charged in the Magistrates court at Nasinu on one count of assault causing actual bodily harm contrary to section 275 of the Crimes Act, 2009 and another count of damaging property contrary to section 369(1) of the Crimes Act, 2009.
2. According to the court record the plea was taken on 26th January 2021 and the matter was fixed for hearing for the 22nd February 2021.

3. This was fixed for trial on 22 February 2021 and the police prosecutor had applied for an adjournment on the ground that he was not ready to proceed particularly because the witnesses had not been summoned. The Magistrate had refused an adjournment and directed the prosecution to call evidence. As the prosecutor could offer no evidence, the Magistrate acting under section 178 of the Criminal Procedure Act, found that there was no evidence for the respondent to answer and the learned Magistrate dismissed the case and acquitted the Respondent.
4. The State aggrieved by this decision of the Magistrate's Court filed a Notice of Motion and supporting affidavit of Kiran Lata Singh sworn on 9th August 2022 seeking an enlargement of time to appeal the decision of the Magistrate's Court. The Petition of appeal by the DPP endorsing this appeal against the Acquittal was filed therewith.
5. The application is opposed by the Respondent by way of an affidavit in response.
6. Both counsel tendered written submissions and also made oral submissions during the hearing.

The Legal Position

7. 248 (1) (a) of the Criminal Procedure Act provided 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 of such decision. Section 248 (2) of the Criminal Procedure Act has conferred the High Court with discretionary power to enlarge the limitation of 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 good cause as stated under section 248 (2). Section 248 (2) and (3) of the Criminal Procedure Act states that:

“(2) ... 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."*
8. As determined in **Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012)** five factors Appellate courts may examine to approach applications for Appeals out of time 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 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?*
9. In *State vs. Ramesh Patel, criminal appeal no. AAU 0002 of 2002 (15 November, 2002)* the Court of Appeal opined that good cause for a late appeal was not the only factor to be considered in such applications. The merits of the appeal, the practicality of the remedy sought and the prejudice to the opponent are other relevant factors that may be considered.
10. Then in *Rasaku v State [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013)* at paragraph 21 stated 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 endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court"*

Consideration of the Application

11. The Respondent was acquitted by the Magistrates Court on 22nd February 2022 and the application for extension of time was filed on 9 August 2022, the State's application is out of time by about one year five months and seventeen days.

Reasons for the Failure to Comply

12. The State submits that due to an administrative error the appeal papers were filed in the wrong forum the Court of appeal however within the appealable time. Upon this coming to light before the single Resident Justice of Appeal, the DPP filed papers for the summary dismissal of the same and also filed this application on the 9th of August 2022 for leave to appeal out of time. Pursuing the remedy in the wrong forum was the reason for the delay in filing a timely appeal.
13. Respondent by his response filed by way of an Affidavit submits that the reasons given for the delay in lodging the appeal is not satisfactory; the proposed grounds of appeal has no merit. The Magistrate had exercised his discretion judicially and that the Respondent will be prejudice as he was acquitted correctly under section 178 of the Criminal procedure Act over 500 days prior to this application and he has settled his life and is involved in his business on the basis that he is acquitted. He also submits that this application has caused great anxiety and distress to him and his family.

Meritorious Ground Justifying the Appellate Court's Consideration

14. The granting of an adjournment is a matter of discretion which must be exercised judicially so that no injustice is caused to any of the parties. The proposed ground of appeal relied upon by the State is that the learned Resident Magistrate failed to properly exercise her discretion on granting an adjournment of trial as it was the first date of trial and this was the first application for a vacation of this trial.
15. When refusing the application for an adjournment the learned Magistrate said that “*No good cause for adjournment. Difficulties state faces obtund making. Adjournment denied. Lead your evidence*” and the reasons were that the witnesses not been summoned and the delay in sending the file from the Divisional Police Prosecution were not accepted.
16. The charges involved were of assault causing actual bodily harm contrary to section 275 and of damaging property contrary to section 369(1) of the Crimes Act. Public interest requires and demands that that the charges be determined after hearing evidence. There is also the interests of a victim that which was not taken into account when the learned Magistrate refused adjournment. The fact that the absence of the

witnesses was due to not being informed, as the date of hearing was fixed within a short period and there been a delay in the file been forwarded to the police prosecutor. It appears to me that the learned Magistrate had failed to properly direct his mind to the issue if the refusal to grant an adjournment would cause injustice. In my view the trial been fixed within 21 days and the refusal grant an adjournment on the first date of trial. On the first time the Police Prosecutor had asked for an adjournment is not just and reasonable.

17. As regards the exercise of discretion in respect of granting of adjournments in **the State v Agape Fishing Enterprises**, Criminal Appeal Case No. HAA 011 of 2008 (15 February, 2008) Goundar J. observed as follows:

“The granting of an adjournment is a matter of discretion. The discretion must be exercised judicially so that the rights of the parties are not defeated and that no injustice are done to one or other of the parties (see McCahill v State, Criminal Appeal No. 43 of 1980; Chand v State, Criminal Appeal No AAU 0056 of 1999S).”

18. The learned Magistrate had discretion to grant or refuse an adjournment, and it is settled law that the discretion must be exercised judicially so that the rights of the parties are not defeated and no injustice is caused to any of the parties including the victim. The Magistrate has not considered this aspect and has thus erred when he failed to exercise his discretion properly. Thus, to my mind there is merit in the proposed ground of appeal.

Will the Respondent be unfairly prejudice if time is enlarged?

19. That being so it is necessary to consider if the Respondent would be unfairly prejudiced if time is enlarged. According to the respondent he has now arranged his life on the premise that he is acquitted and he is getting about his life accordingly. This application if allowed would cause prejudice to him. Notice of Appeal preferred to the Court of Appeal was served on the Respondent. As such he was aware of the fact that the process was in motion and a purported appeal against his acquittal was pending. To that extent he was on notice of the possible reversal of his acquittal. If an Accused has been wrongly acquitted reversal of such an order will not be unlawful prejudice. There is no evidence before this court to show how the Respondent will be prejudiced in his defence. I note that the date of alleged offences is 2020, however, the Respondent has a

Constitutional right under section 14(2)(g) to have his trial begun and concluded without unreasonable delay.

Reason for the failure to file within time and the length of delay

20. The reason for the failure to file within time and the length of delay are matters that require consideration now. The Respondent submits that pursuing the wrong remedy is not a valid ground or an excuse for the delay. In support he refers to the case of Narayan v Fiji Gas Limited [2013] FJHC 574 in which an appeal was filed in the wrong forum and the applicant was a layman who claimed to be unaware of the rule. The court in that case has opined that the applicant should have been more diligent in finding in which court he should have filed his appeal and the enlargement for time to appeal was finally dismissed. The respondent submits that if a layman is unable to plead ignorance of rules the Applicant certainly should not be entitled to rely on this ground.

21. According to the Applicant the reason for filing papers in the wrong forum is not directly stated. In the affidavit it is stated that it was so filed “unfortunately”. In the written submissions it is stated as being an “administrative” error. On the perusal of the original Notice of Appeal filed in the Court of Appeal it has been specifically addressed to the Court of Appeal and for all purposes it is an appeal preferred to the Court of Appeal with reference to the provisions of the Court Appeal Act. No doubt this is unfortunate but as to how it is an administrative error is not clear. It appears that this was due to either ignorance or an unpardonable error that has caused this application to be preferred to the wrong forum. The delay caused by this error is almost 500 days. It is 1 year 5 months and 17 days to be precise.

22. The ground of appeal as proposed merits and justifies the appellate court’s consideration and such ground may succeed. However, considering the nature of the offence this application for appeal out of time as if granted would cause unfair prejudice to the Respondent and also and violate his right to a speedy trial without delay due to remissness or carelessness of officer of the office of the Director of Public Prosecutions.

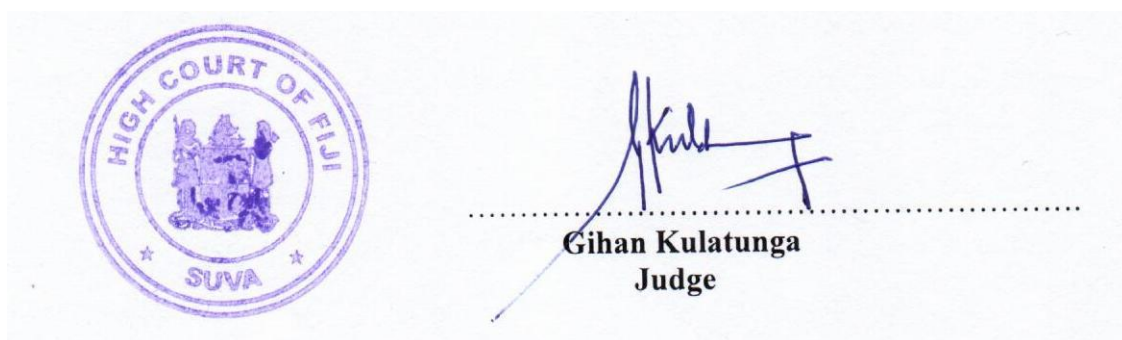
CONCLUSION

23. Upon consideration of the totality of the grounds I am satisfied the application for extension of time if allowed will cause prejudice to the Respondent and it is in the interest of justice to refuse this leave to the State in respect of extension of time.

24. Application is refused and struck out.

Orders of Court

(1) The application for leave to appeal out of time is refused and struck out.



At Suva

19th June, 2023

Solicitors:

Office of the Director of Public Prosecutions for the State
M.A. Khan ESQ. for the Respondent.