

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 29 OF 2022

IN THE MATTER of an Application for Leave to Appeal out of Time.

AND IN THE MATTER of an Appeal from the decision of the Lautoka Magistrate's Court in Criminal Case No. 113 of 2018: State v. Saiyad Faizal Khan.

BETWEEN: **SAIYAD FAIZAL ASLAM KHAN**

APPELLANT

AND: **STATE**

RESPONDENT

Counsel : Ms. Unaisi Baleilevuka for the Appellant
 : Mr. Taitusi Tuenuku for the Respondent

Date of Hearing : 11 October 2023

Date of Ruling : 15 March 2024

RULING

[1] This is an Application made by the Appellant by way of a Notice of Motion, filed on 26 July 2022, seeking Leave to Appeal Out of Time the Judgment delivered by the Resident Magistrate, Magistrate's Court of Lautoka, in Criminal Case No. 113 of 2018, on 12 October 2018.

- [2] The Notice of Motion is supported by an Affidavit in Support filed by the Appellant on 26 July 2022.
- [3] It is revealed when perusing the Case Record of the Magistrate's Court of Lautoka that the Appellant was charged (by way of an Amended Charge) before the Magistrate's Court of Lautoka, with the following offences:

1ST COUNT

Statement of Offence (a)

CONSPIRACY TO DEFEAT JUSTICE AND INTERFERENCE WITH WITNESS:

Contrary to Section 190 (a) of the Crimes Act 2009.

Particulars of Offence (b)

SAIYAD FAIZAL ASLAM KHAN alias Deniss Khan with another, between the 1st day of November 2017 to the 31st day of December 2017, at Lautoka, in the Western Division, conspired with **PETERO YASAU RAVOKA** to knowingly and maliciously accuse **TARIQ SADAT ALI BAHADUR** falsely for an offence of Sexual Assault.

2ND COUNT

Statement of Offence (a)

CONSPIRACY TO DEFEAT JUSTICE AND INTERFERENCE WITH WITNESS:

Contrary to Section 190 (a) of the Crimes Act 2009.

Particulars of Offence (b)

SAIYAD FAIZAL ASLAM KHAN alias Deniss Khan with another, between the 1st day of November 2017 to the 31st day of December 2017, at Lautoka, in the Western Division, conspired with **MOHAMMED NAFIZ KHAN** to knowingly and maliciously accuse **TARIQ SADAT ALI BAHADUR** falsely for an offence of Sexual Assault.

3RD COUNT

Statement of Offence (a)

BREACH OF BAIL CONDITION: Contrary to Section 25 (1) (b) and 26 (1) of the Bail Act No. 26 of 2002.

Particulars of Offence (b)

SAIYAD FAIZAL ASLAM KHAN alias Deniss Khan with another, between the 1st day of November 2017 to the 31st day of December 2017, at Lautoka, in the Western Division, breached the conditions imposed by the Lautoka High Court vide Case File No. HAC 63/16, by committing two counts of CONSPIRACY TO DEFEAT JUSTICE AND INTERFERENCE WITH WITNESSES.

- [4] The Appellant pleaded not guilty to the charges and the matter proceeded to trial. At the conclusion of the trial, the Learned Resident Magistrate held that the prosecution has proved the case against the Appellant beyond reasonable doubt. Accordingly, on 12 October 2018, the Appellant was found guilty and convicted of the first two counts of Conspiracy to Defeat Justice and Interference with Witness. The Learned Magistrate's Judgment is found at pages 10 to 19 of the Magistrate's Court Record.
- [5] On 7 December 2018, the Learned Magistrate pronounced his Sentence. Accordingly, the Appellant was sentenced to 11 months imprisonment, out of which 7 months to be served in custody and the balance period of 4 months was suspended for 3 years. The Learned Magistrate's Sentence is found at pages 6 to 9 of the Magistrate's Court Record.
- [6] It must be mentioned that the above Sentence was pronounced in the absence of the Appellant. At page 87 of the Magistrate's Court Record it is revealed that on 26 October 2018 the Appellant had not been present in Court and a bench warrant had been issued for his arrest. Later the same day, the Learned Magistrate had been informed that as per the information received from the Department of Immigration, the Appellant had left the country.
- [7] This is an application made by the Appellant seeking Leave to Appeal Out of Time the above Judgment delivered by the Resident Magistrate, Magistrate's Court of Lautoka, on 12 October 2018.

[8] However, on 19 June 2023, this Court decided that prior to taking up the Notice of Motion for Leave to Appeal Out of Time, Court wanted to hear submissions from both parties on the maintainability of this appeal in the absence of the Appellant, who is currently said to be overseas.

[9] This matter was taken up for hearing before me on 11 October 2023. Counsel for both the Appellant and the State were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[10] At page 88 of the Magistrate's Court Record it is recorded by the Learned Magistrate as follows: *"Court also finds that the accused is intentionally evading the Court proceedings by flying out of the country"*.

[11] At page 90 of the Magistrate's Court Record it is recorded as follows:

"Committal warrant issued on accused and same to be served on Immigration Department for him to be arrested on arrival.

This Court finds that the accused has left the country whilst there was a Stop Departure and as well (while) his passport has been surrendered to the Court. Therefore, it is evident that he has left Fiji by obtaining another passport. Court finds that these should be some strong factors or any; and for him to bypass all orders of Court.

Therefore, I order the Senior Court Officer to inform FICAC in writing to look into and investigate as to how he has managed to leave Fiji and or obtain number of passports and report back to this Court the same.

Senior Court Officer to carry out these orders as soon as possible and report to me personally".

[12] Considering the above, the primary concern of this Court was whether the Appellant had the right to file this application while he was intentionally absenting himself from Court. In the Affidavit in Support filed he has attempted to explain as to why Leave to Appeal should be granted out of time. Although, the Applicant does not specifically provide details as to his present whereabouts, he has stated that he was applying for

asylum as he personally believes that his human rights were breached and that he was subject to persecution.

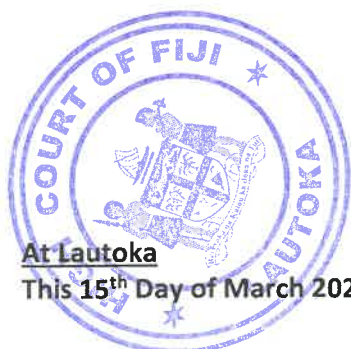
[13] However, my attention has been drawn to the recent Judgment of the Court of Appeal in *Saiyad Khan aka Dennis v. The State* [2023] FJCA 168; AAU67.2020 (30 August 2023). This was an appeal filed by the Appellant in the Fiji Court of Appeal in respect of his conviction and sentence in the High Court of Lautoka for the offence of Rape (High Court Lautoka Case No. HAC 63 of 2016). The matter in the High Court had proceeded to trial in the absence of the Appellant (in absentia). At the conclusion of the trial, the Appellant had been found guilty of Rape and was convicted. On 7 July 2020, the Appellant was sentenced to 10 years imprisonment, with a non-parole period of 7 years.

[14] The Appellant had filed an appeal against his conviction and sentence through his lawyers. The Court of Appeal had entertained the appeal and having considered the matter refused leave to appeal against conviction and sentence.

[15] Therefore, considering all the facts and circumstances of this case and the submissions made by both the Counsel for the Appellant and the State, I am of the opinion, in the interest of justice, that this application should also be determined on its merits.

FINAL ORDERS

[16] In light of the above, this Court makes order that the application made by the Appellant seeking Leave to Appeal Out of Time the Judgment delivered on 12 October 2018, by the Resident Magistrate, Magistrate's Court of Lautoka, in Criminal Case No. 113 of 2018, shall be decided on its merits.



Solicitors for the Appellant:
Solicitors for the Respondent:


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

Fortis Lawyers & Consultants, Nadi.
Office of the Director of Public Prosecutions, Lautoka.