IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 41 OF 2023

(Sigatoka Criminal Case No. 87 of 2016)

BETWEEN: **SUNNY RITESH NAND**
APPLICANT

AND

STATE

RESPONDENT

Counsel : Mr F. Daveta for Applicant

: Mr M.I. Rafiq for Respondent

Dates of Hearing : 18 January 2024
Date of Ruling : 30 January 2024

RULING

1. This is an application for leave to appeal out of time. The Applicant was convicted of Arson on 29 March 2023 and sentenced on 27 April 2023 to a term of imprisonment of four years by the Learned Magistrate at Sigatoka.

2. Being aggrieved by the said judgment and the sentence, the Applicant filed his grounds of appeal on 7 July 2023 against the conviction and the sentence. The grounds of appeal

against the sentence were later abandoned. The abandonment was later confirmed in his written submission filed on 3 November 2023.

3. The Applicant was supposed to file his notice of appeal within 28 days of his sentence. However, the appeal is out of time by 01 month and 10 days for which leave is required.

4. The law relating to leave to appeal out of time is settled. Section 248(2) & (3) of the Criminal Procedure Act provides as follows:

> (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 —
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> *(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;
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> *(b)* any case in which a question of law of unusual difficulty is involved;
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> *(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;
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> *(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.

5. The Supreme Court in **Kumar v State; Sinu v State**[1] summarized the test applicable to any appellate court in granting an application for enlargement of time. The Court stated in paragraph [4] as follows:

> 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.

[1] [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012)

(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?

6. In **Rasaku v State**[2], the Supreme Court confirmed the above test and said in paragraph [21] as follows;

> 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.

7. The Applicant appears to rely on limb (a) and (d) of Section 248(3) of the CPA to satisfy this Court that he had a 'good cause' warranting an enlargement of time.

8. There is no dispute that the Applicant was unrepresented at the trial before the Magistrate. He is a layperson without any legal knowledge to formulate grounds for appeal. He submits that he was supported by the inmates to file his appeal. Being in incarceration, he would have had limited access to legal resources, a copy of the judgment, the record and faced difficulties in the preparation of the appeal within a reasonable time. The Applicant is only one month and 10 days out of time. The delay is not considerable. In view of that, the State concedes that the enlargement of time is warranted in that regard.

9. However, those difficulties do not justify setting aside the requirements of the Acts and the Rules[3]. The explanation for the delay will not by itself, ordinarily lead to the conclusion that an enlargement of time should be granted. It is usually necessary to consider whether the appeal has significant merit to excuse the appellant's non-compliance with rules. The appellant must show his appeal grounds have sufficient merit to excuse the delay and to be considered by the appellate court.

Reasonable Prospect of Success

10. At the argument stage, the Applicant confined his appeal to two grounds of appeal.

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[2] [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013)
[3] Fisher v State (2016) FJCA) 57 AAN 132 (20 April 2016)

11. Ground 1: That the Learned trial Magistrate erred in law and in fact on the ground that the verdict was unreasonable or cannot be supported having regard to the evidence. Ground 2: that the Learned Magistrate erred in law and fact when he shifted the burden of proof to the Applicant by requiring the Applicant to provide his innocence through his credibility and forthrightness.

Ground :1

12. The Learned Magistrate had correctly identified the elements of the offence of Arson and that the only contentious issue was the identification of the accused. The Prosecution had led evidence of two eyewitnesses, PW 1 and PW 2, to prove that it was the accused (Applicant) that had set fire to the dwelling house of the complainant (PW2). The Learned Magistrate had carefully analysed the evidence of both witnesses and rejected that of the complainant (PW 2) on a valid ground. He solely relied on the evidence of PW 1 and concluded that the Prosecution proved beyond reasonable doubt that it was the Applicant who had initiated the fire.

13. As the trier of fact, the Learned Magistrate was at liberty to accept some parts of the Prosecution evidence which he believed to be true and reject the other part. Evidence of only one witness is sufficient if it could prove the charge. What matters is not the quantity but the quality of visual identification.

14. PW 1 was 9 years of age at the time of the incident. He stated that, on the day in question, when he was going towards the kitchen, he saw through the window Sunny (the Applicant) standing outside, holding a bottle. Sunny poured a lot of liquid into the bottle, lit a match and threw it into the house. He called out to his mother and shouted that Sunny was outside and then the mother came.

15. In the cross-examination, it was the reliability rather than the honesty or the credibility of PW 1 that had been challenged by the Applicant in his cross examination. PW1 is the son of PW 2. It had been revealed in Prosecution evidence that the Applicant was the (ex) boyfriend or the partner of PW 2 and that there had been a bitter relationship between the two at that time resulting in a DVRO being obtained against the Applicant. Despite the DVRO being in place, the Applicant had visited the house sometime before 6 p.m. on the same day, only to be chased away by PW1's uncle.

16. The Applicant in his evidence had not disputed that he had visited the house before the fire and that he was chased away. The Applicant had admitted that he ran away from the fire and was stopped by a police vehicle at Bilalevu. His position had been that he and PW 2 were always in a good relationship and that it was PW 2's brother, who disliked their relationship, was the one who chased him away. His explanation for running away from the house that was on fire was that he feared an attack by PW2's brother.

17. There had been no suggestion by the Applicant that PW1 was coached by PW2 or that the evidence was fabricated by PW1 and PW2 because of the bitter relationship PW2 said they had. The evidence of the Applicant had been that his relationship with PW 2 had always been good. Then why would PW2 ever want to implicate the Applicant falsely?

18. In that context, it was open for the Learned Magistrate to conclude that the Applicant ran away from the fire, without helping to put it out, because he was the one who initiated it. It was also open for the Learned Magistrate to conclude that the Applicant was stopped by a police vehicle soon after the fire because they had received information about his involvement in the fire. There had been no time within which PW1 could fabricate evidence against the Applicant before his arrest.

19. The Applicant alleges that the evidence of PW1 is not consistent with that of PW2. As I said before, the Learned Magistrate had not relied on the evidence of PW2 at all in coming to his conclusion as to identification. Even if he did, the inconsistencies highlighted by the Applicant are not material to discredit the evidence of PW1. In his examination in chief, PW1 had not stated that the Applicant was in the kitchen cooking food with his mother. He had only said Sunny was present in the house before 6 p.m. but not thereafter as he was chased away by his uncle. Inconsistency in the details as to timing is not material as the identification was made from the light shown from a tube light.

20. The Learned Magistrate had the benefit of observing the demeanour of the witnesses which is denied to this Court. The Learned Magistrate stated: *"PW1 appeared to be confident and clear in his demeanour when giving the said evidence"* and concluded that PW1 was telling the truth. Nothing is present before this Court to dismiss the Learned Magistrate's finding on PW1's credibility.

21. In evaluating PW1's evidence against reliability, the Learned Magistrate vigorously applied the Turnbull guidelines on visual identification to satisfy himself that PW1's visual identification was not mistaken. It was a case of recognition rather than one of identification. There was no dispute that the Applicant was PW1's mother's ex-boyfriend who had been living together in the same house. PW1 had seen the Applicant visiting the house, clad in black clothes, in the same evening before 6 p.m., a short while before the fire. When the observation was made, PW1 had seen the Applicant wearing the same clothes that he wore when he left the house before 6 p.m. He had observed the Applicant from a distance of about 5-7 metres for 10 seconds which the Learned Magistrate thought to be a reasonable distance and time to capture all the said observations. A tube light was shining towards the window through which the observation was made. There had been no impediment, except the gores wire which offered minimal obstruction. Having had the benefit of observing the height of PW1, the photographs and the sketch plan of the house presented in evidence, the Learned Magistrate was satisfied that a 9-year-old witness could have recognised the Applicant from where he was at that time.

22. The Applicant appears to have taken inconsistent defences when he cross-examined the Prosecution witnesses on the basis that an electrical fault had caused the fire and at the same time the identification was mistaken. The evidence of the Crime Scene Investigator (PW 3) who had examined the alleged crime scene perused the Fire Report Examination and ruled out any accident or electric fault. He had found a bottle-smelling Zoom beside the burnt house. There is nothing to suggest that the finding of the Learned Magistrate was unreasonable or could not be supported having regard to the evidence led in the trial. Ground one must fail.

23. Ground 2: that the Learned Magistrate erred in law and fact when he shifted the burden of proof to the Applicant by requiring the Applicant to provide his innocence through his credibility and forthrightness. This ground seems to be based on a misconceived notion.

24. The Learned Magistrate started his analysis part of his judgment emphasising that the State bears the burden of proving the charges beyond reasonable doubt. Again, towards the third paragraph of the judgment, it was stated ... *Therefore, with the evidence adduced, Prosecution has proven the elements 2,3 and 4 beyond reasonable doubt.* In respect of identification, which he described as the 4th element, the Learned Magistrate

concluded that ....*Considering all of the evidence that is before the Court, I am satisfied that Prosecution has proven beyond reasonable doubt that it was the Accused (sic) had willfully and unlawfully cause (sic) fire to PW2's dwelling house on the night in question.*

25. At the end of the Prosecution case, the Learned Magistrate had given the options available to the Applicant in his defence. There is nothing in the judgement to suggest that the Applicant was required to give evidence or prove his innocence. The Applicant had elected to give evidence under oath and call his father as a defence witness.

26. The Learned Magistrate analysed the evidence of the defence witnesses which he was bound to and was not satisfied that they were telling the truth. Having rejected the evidence of the Defence the Learned Magistrate was satisfied that the overall burden of proof was discharged by the Prosecution beyond reasonable doubt.

If time is enlarged, will the respondent be unfairly prejudiced?

27. In view that the Applicant has failed to disclose any ground of appeal that is likely to succeed, it is prejudicial to the Respondent if time is enlarged to permit the appeal to proceed.

CONCLUSION

28. 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 Sigatoka criminal case No. 87 of 2016 is refused.

29. The Application is dismissed.

Aruna Aluthge

Judge

At Lautoka

30 January 2024

Solicitors: Pillai and Naidu and Associates for Applicant

Office of the Director of Public Prosecution for Respondent