

IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

Criminal Petition No. CAV0004 /14
(On Appeal from the Court of
Appeal No. AAU0032 of 2009)

BETWEEN : SAILOSI VOLIVALE

Petitioner

AND : THE STATE

Respondent

CORAM : Hon. Justice Sathyaa Hettige, Judge of the Supreme Court
Hon. Justice Buwaneka Aluwihare, Judge of the Supreme Court
Hon. Justice Suresh Chandra, Judge of the Supreme Court

COUNSEL : Mr. S. Waqainabete for the Petitioner
Mr. L. J. Burney for the Respondent

Date of Hearing : 9th April, 2015

Date of Judgment : 23rd April 2015

JUDGMENT OF THE COURT

SATHYAA HETTIGE, JA

1. The petitioner in this case was convicted by the High Court of Suva on 9th April, 2009 of murder of Vikash Chandra, Burglary and Robbery with violence committed

during a home invasion on 8th November 2004 , on a unanimous verdict of the three assessors.

2. The petitioner was sentenced to life imprisonment with a fixed minimum term of 18 years for murder before being eligible for parole, 2 years imprisonment for burglary and 10 years imprisonment for Robbery with violence to be served concurrently on 18th of June 2009.
3. On a perusal of the written submissions filed by the Office of the Director of Public Prosecutions it appears that the Registrar of the Fiji Court of Appeal received a document on 29th October 2009 with a heading "*Re Grounds on Late Appeal Application on case no. HAC 030/04/05*"(SC Record at page 17) which may be characterized as a Notice of appeal seeking leave to appeal or perhaps an application for enlargement of time.
4. It can be seen from the Ruling of the single Judge of the Court of Appeal dated 3rd may 2012 that the single Judge heard the said application characterizing it as an application for enlargement of time to appeal against conviction and sentence and dismissed the said application under section 35 (2) of the Court of Appeal Act since there were no arguable grounds of appeal against the conviction and sentence and the said application had no merits and chance of success.

Section 35 (2) of the Court of Appeal Act

5. It is relevant at this stage to consider the provisions contained in section 35 (2) of the Court of Appeal Act as amended which reads as follows:
"If on the filing of a notice of appeal or of an application for leave to appeal, a Judge of the court determines that the appeal is vexatious or frivolous or is bound

to fail because there is no right of appeal or no right to seek leave to appeal, the Judge may dismiss the appeal.”

6. Section 35 (1) (a) and (b) of the Court of Appeal Act deals with the power of a single Judge of the Court of Appeal. The jurisdiction under the above provisions includes the power to grant leave to appeal to the Court of Appeal and to extend the time within which notice of appeal or of an application for leave to appeal may be given.
7. It appears from a careful reading of the provisions in section 35(2) of the Act that a single Judge may dismiss an application only if the single Judge determines that the appeal is vexatious or frivolous or is bound to fail. There is no right of appeal or no right to seek leave to appeal after an application is dismissed in terms of section 35(2).
8. It can be argued that the power of a single Judge under section 35(2) is to be exercised in a summary way and therefore the question arises as to whether the dismissal of an appeal by a single Judge under section 35(2) is a final judgment of the Court of Appeal. (See the Judgment of Keith Mason J, Robert French J and Mark Weinberg J in *Penioni Tubuli v State* Crim. App. No. CAV0009/06 decided on 25thFebruary,(2008)
9. On an examination of the notice of appeal filed by the petitioner in the Court of Appeal in the case before this court it is manifest that the petitioner advanced only grounds in relation to the reasons for the petitioner's failure to file a timely notice of appeal rather than urging substantive grounds of appeal against the conviction and sentence and the learned single Judge found no arguable grounds of appeal and merits which can impeach the conviction. It can be seen that the petitioner's application in the Court of Appeal was an extension of time application for late filing of this Notice of Appeal. (**emphasis added**)

Jurisdiction of the Supreme Court

10. It is also pertinent to consider the provisions contained in section 98(3) (b) of the Constitution of Fiji of 2013 as it deals with the exclusive jurisdiction of the court.

“ The Supreme Court has exclusive jurisdiction , subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal.

Section 98 (4) of the Constitution reads as follows:

“ An appeal may be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.”.

Section 98 (5) provides that In the exercise of its appellate jurisdiction , the Supreme Court has power to review , vary, set aside or affirm decisions or orders of the Court of Appeal or make any other order necessary for the administration of justice, including an order for a new trial or an order awarding costs.

Section 98(6) of the Constitution provides further that *Decisions of the Supreme Court are, subject to subsection (7) binding on all other courts of the State.*

S.98 (7) provides that *“The Supreme Court may review any judgment, pronouncement or order made by it.”*

11. Section 7 (2) of the Supreme Court Act of 1998 deals with the jurisdiction of the Supreme Court with regard to granting of special leave to appeal application which provides as follows:

“ In relation to a criminal matter , the Supreme Court must not grant special leave to appeal unless:

(a) A question of general importance is involved;

- (b) *A substantial question of principle affecting the administration of criminal justice is involved ; or*
- (c) *Substantial question and grave injustice may otherwise occur.”*

12. In the case of *Penioni (supra)* the Supreme Court observed that a decision under section 35(2) of the Court of Appeal Act made by a single Judge dismissing a leave to appeal application, having considered the above constitutional provisions contemplated in section 98(4) of the Constitution is a final judgment of the Court of Appeal.

13. In the case of **Native Land Trust Board v Narava** Appeal No. CBV0007/2002S decided on 21/05.2004 the Supreme Court has discussed the scope of the terms “*final judgment of the Court of Appeal*”

“The term “all final judgments” appears in section 122 of the Constitution and defines the jurisdiction of the Supreme Court in relation to appeals from the Court of Appeal. There is no discretion available under the Constitution to allow the Supreme Court to entertain applications for leave to appeal against decisions of the Court of Appeal which are not final. The construction of the term “all final judgments” in section 122 is not linked to a case management regime that will mitigate the injustice or inconvenience that might otherwise be worked by the fine distinctions developed under the existing case law. Having regard to its use as a constitutional term and its functions in defining the jurisdiction of the Supreme Court, the term, “ final judgment” may require a wider interpretation than that which has evolved under rules of court in various jurisdictions.”

14. The Supreme Court has discussed in several decisions the issue of “final judgment” of the Court of Appeal made by a single judge dismissing an appeal under section 35 (2) assuming the decision so made by a single judge is a final judgment. (See also **Railumu v Commander Republic of Fiji Military Forces** Civil Appeal No.CBV0008 of 2003S, **Simione Raura v State** Crim. Appeal No. CAV0010 of 2005S and **Joji Waqasaqa v The State** Crim. Appeal No. CAV0009 of 20005S).
15. It can be inferred from the decisions referred to above that it is a power exercised by a single judge of the Court of Appeal on consideration of the Notice of Appeal in a summary way that the appeal is vexatious or frivolous or bound to fail. It is also to be noted that the single Judge under section 35 (2) acts and determines on a power conferred upon the single Judge of the Court of Appeal.
16. The Supreme Court being the final court of appeal in Fiji entertains an application for Special Leave to Appeal out of time or not on the basis that the decision of the single Judge of the Court of Appeal under section 35 (2) is a final judgment and whether the criteria stipulated in section 7 (2) of the Supreme Court Act is satisfied or where there is irremediable injustice otherwise compelling the intervention of the Supreme Court .
(See para 3 in **Kamalesh Kumar v State; Sinu v State** (2012) FJSC 17; CAV 0001 of 2009 decided on 21 /08/2012.)
17. It is necessary now to consider briefly the facts of the case and the application of the petitioner before this court in the light of the legal position discussed above.

Factual Matrix

18. On the 8th of November 2004 between 12.30 and 2.30 a.m., Navin Chandra and his family were sleeping in his house at No. 134 Ragg Avenue, Namadi. They had seen three men inside their bed room. When he switched on his bed side light and he had seen 2 men in his room and a third at the door of his son's (deceased) bed room. His son was Vikash Chandra. The men were armed with pinch bar and knives. They told Navin Chandra that they were robbers, they were sorry but they had to rob. They held the weapons in a threatening manner and said "give us the money." He gave them all the money in his wallet. He then saw Vikash (the deceased) come out of his bed room and saw him fall down. The men thereafter left the house. Navin Chandra, the deceased's father attended to the son and saw the deceased wounded and he had a heavy cut on the stomach. The deceased, Vikash was taken to hospital where he was later found to be dead. A post mortem examination was held and found the cause of death to be :

"Hemorrhagic shock as a result of incised wound on the right iliac vein due to penetrating stab wound on the abdomen."

Five months after the death of Vikash, the Petitioner was arrested by the police on 2nd March 2005 when he was walking in Nina Street and was taken to the Samabula Police station where the petitioner gave a statement under caution.

19. In the charge statement made by the petitioner to the police on 3/03 /2005 he admitted the offence and said as follows:

" I admit what I have been charged for, we went to that house to steal that were myself, Noa Yasa and Tukai Seru. It is true that I stabbed that Indian man but I didn't mean for him to die." However, the petitioner claimed that he acted in self-defence.

20. After a trial within trial on the caution Interview statement High Court Judge Justice Shameem ruled as admissible the contents of the petitioner's caution interview statement consisting inter alia, statement of admission on 20th March 2009.
21. In the Ruling of the single Judge of the Court of Appeal observed that " There is no doubt that Sailosi Volivale had a fair trial .He was found guilty because the learned trial Judge found the statement to be admissible and then considered that she was satisfied beyond reasonable doubt that the stabbing was not the result of self-defence because Sailosi Volivale was being strangled to death by Vikash,"(see Paragraph 6 of the Ruling)
22. The single Judge of the Court of Appeal dismissed the application seeking time extension to appeal under section 35(2) of the Court of Appeal Act on 3rd of May 2012 since there were no arguable grounds of Appeal against conviction and sentence and the intended appeal was 3-4 months late. The single Judge also held that there were no merits at all and the appeal had no chance of success.
23. The petitioner addressed a document dated 21/04/2014 Honourable Chief Justice which was received in the Chief Justice's Chambers on 22/04/2014 with a heading "*application for permission to appeal my conviction.*" (SC Record at page 1-3)

Enlargement of time

24. The single Judge of the Court of Appeal dismissed the petitioner's application since there were no arguable grounds against conviction and sentence. He also refused to extend time because the intended appeal was 3-4 months late whereas the notice of appeal should have been filed within 30 days in terms of section 26(1) of the Court of Appeal Act as amended.

25. The period of delay in filing the document dated 22/04/2014 by the petitioner in the Supreme Court seeking permission to appeal is 22 months, which this court cannot consider as a reasonable period in filing appeals, since the petitioner has failed to file his notice of appeal within 42 days from the date of the decision of the Court of Appeal in terms of section 6 (a) of the Supreme Court Act.

26. Section 6 of the Supreme Court Act provides as follows:

“A petition and affidavit in support must be lodged at the court registry within 42 days of the date of the decision from which special leave to appeal is sought.”

27. However, the document filed by the petitioner on 22/04/2014 initiating an application for enlargement of time and an appeal for leave out of time is to be considered by this court in view of the fact that the petitioner was unrepresented at the time of filing the said document.

28. It is also important to note that in the written submissions filed in the Supreme Court Registry on the 9th April 2015 learned counsel appearing for the appellant states that there was no substantial delay in this application which Counsel withdrew at the hearing.

29. Rule 20 (4) of the Supreme Court Rules deals with extension of time “*for good and sufficient cause shown*”. However, it must be stated that the extent of the application of the provisions in Rule 20(4) of the said Rules is limited to non-compliance of conditions of appeal or petition post lodging and not to enlargement of time applications.

30. In **Josua Raitamata v The State** CAV0002 of 07 25th February 2008 at paragraph 7 it was observed by court that Rule 46 of the Supreme Court Rules may confer the required jurisdiction on the Supreme Court to deal with enlargement of time applications.(see also section 14 of the Supreme Court Act of 1998.)

Rule 46 of the Supreme Court Rules reads as follows:

“The High Court Rules and Court of Appeal Rules and the forms prescribed in them apply with necessary modifications to the practice and procedure of the Supreme Court”

31. Section 26 (1) of the Court of Appeal Act as amended grants statutory power for the Court of Appeal to extend time within which notice of appeal or notice of an application for leave to appeal may be given at any time.

32. In **Kamalesh Kumar v The State** and **Mesake Sinu v The State** CAV0001/09 21st August 2012 His Lordship the Chief Justice observed in paragraph 3 by referring to the Judgments in **The State v Elik Mototabua** CAV 0005 of 09 9th May 2012 and a Sri Lankan case in **Fernandopulle v Premachandra de Silva and Others** 1996 1 Sri L.R 70 that the Supreme Court as the final Court of Appeal could allow a late appeal in cases meeting the leave criteria of section 7 (2) of the Supreme Court Act or where in a rare case there is irremediable injustice otherwise compelling the intervention of the Supreme Court.

33. As it was observed in **Kamalesh Kumar** case (supra) there are five factors to be examined in order to consider and determine as to whether a late application for extension of time for leave to appeal out of time should be allowed or not as follows:

- (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 a substantial delay, nonetheless is there a good ground of appeal that will probably succeed?
- (v) If time is enlarged will the respondent be unfairly prejudiced.

Reason for failure to file within time

34. The petitioner's application when filed in April 2014 was 22 months out of time. The reason given by the appellant was that he was a lay person unlearned and unskilled, his lack of legal knowledge and lack of resources available to him while in custody. It must be stated that the reasons given by the petitioner are not acceptable and were not a reasonable explanation.

35. It has been held in an array of judgments in Fiji and other jurisdictions that the courts as appellate courts exercise a limited discretion with regard to granting extension of time (see **Villame Caubati** AAU 0022.03S 14th November 2003 at p. 5.)

Length of the delay

36. In the **Kamalesh Kumar** case (supra) the delay was 3 years and 4 ½ months which was a considerable delay. In **Queen v Brown** (1963) SASR 190 at 191 the court said:

"The practice is that, if reasonable explanation is forthcoming and if the delay, relatively, slight, say few days or even a week or two, the court will readily extend time, provided that there is a question which justifies serious consideration."

The court further said “In the cases cited the delay ranged from a little over a month (in *R v Rhodes* (1910) 5 Crim. App. R.35 to more than three months (in *R v Cullum* (1942) Crim. App. R 150,(In *R. v Marsh* where the delay was about two months, the rule laid down is that, where the delay is substantial, extension will not be granted unless the court is satisfied that there are such merits that will probably succeed.”

37. In *R. Rhodes* (supra) it was observed by court that “ *When the time prescribed by the Act has expired the party convicted has lost his right of appeal , and it is for the court to say whether , taking all the circumstances into account , it is in the interests of justice he should be permitted to institute and pursue his appeal. This is the rule and practice of the Court of Criminal Appeal in England.*”

38. In *Julien v Miller* Crim. App. AAU0076 of 2007 23rd October 2007 where the delay was 12 ½ months John Byrne J observed that “ *The courts have said time and again that the rules and time limits must be obeyed , otherwise the lists of the courts would be in a state chaos. The law expects litigants and would be appellants to exercise their rights promptly and certainly as far as notices of appeal are concerned , within the time prescribed by the relevant legislation* “

In *Revici v Prentice Hall Incorporated and Others* (1969) 1 All. E. R. 772 Lord Denning MR at p. 774 has observed (Edmund Davies L. J. and Widgery, L.J. agreeing)

“ ... Nowadays we regard time very differently from what they did in the nineteenth century . We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not.(I should imagine it was considered) Moreover, (and this is important)not a single ground or excuse is put forward to explain the delay and why

he did not appeal. The plaintiff had 3 and half months in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time anymore.”

Whether grounds are meritorious

39. The petitioner’s allegation was that the trial Judge erred in convicting him solely on the evidence of confession without any other corroborative evidence. However it can be seen from the record that this contention was not raised before the Court of Appeal.
40. The single Judge of the Court of Appeal said “when interviewed the police say he admitted being involved in the robbery and stabbing Vikash but claimed self defence saying Vikash grabbed his neck and was trying to strangle him...on the other hand a credible confession is a strong evidence of guilt”.
41. In the sentencing judgment the High Court Judge said “ *.In the course of committing robbery you stabbed Navin Chandra’s son Vikash Chandra, with a kitchen knife . You claimed that you acted in self defence but your claim was rejected by the assessors and the trial judge. (para.3).....I find the killing in this case a wanton disregard for a human life. You terrorized the victim’s family with a group of men by invading his home at night time when the family was asleep. You robbed the family and then stabbed the victim to death.*”(para.6)
42. The learned trial Judge in her summing up to the assessors at page 36 of the SC Record stated what the petitioner said in his charge statement.

“ I admit what I have been charged for, we went that house to steal that were myself, Noa Yasa, Waisea and Tukai Seru . It is true that I stab the Indian man but I didn't mean for him to die,”

43. In paragraph 49 of the summing up the trial Judge directed the assessors on the prosecution case where she said

“ the prosecution invites you to accept the contents of the accused's statements to the police not only because they were obtained without assault and oppression , but also because they are consistent with the post mortem report , photographs and the evidence of Navin Chandra and Hasumathi Chandra.”

44. The petitioner's application to this court is against the Ruling of the single Judge of the Court of Appeal dismissing the application for time extension under section 35 (2) of the Court of Appeal Act since there were no arguable grounds of appeal and the petitioner's intended appeal had no chance of success. The Judge further said that the grounds put forward by the appellant were unarguable and found that it had no merits.

Prejudice to the Respondent

45. If enlargement of time is granted to the appellant the prejudice that would be caused to the respondent would be considerable and that the petitioner's application for enlargement of time is without any merit and we cannot agree with submissions of the petitioner.

Grounds for leave to appeal

46. As it is reflected in the document tendered in April 2014 of the petitioner the only substantive ground of appeal if any, is that the learned Judge erred in law in convicting the petitioner solely on the confession without any corroborative evidence. However, this ground of appeal was never raised in the Court of Appeal.

47. The law on the admissibility of confessions is well settled. There was a trial within trial which commenced on 16th March 2009 since the caution interview statement was challenged by the petitioner alleging police assault, oppression threats and inducements and he was forced to sign the statement. The prosecution relied on the caution interview and charge statement evidence as they were crucial to the prosecution case. The trial Judge considered all the evidence at the voice dire inquiry and was satisfied beyond reasonable doubt that the that the petitioner was not assaulted, oppressed or coerced into signing a false confession. Ruling was given by the trial Judge on the 20th March 2009 allowing the caution interview and charge statement to be led in evidence.

Threshold criteria

48. The Supreme Court derives power to deal with special leave to appeal application under section 8 (2) of the Administration of Justice Decree of 2009 which was repealed by the present Constitution of Fiji 2013 and provided that:

“ An appeal may not be brought from a final judgment of the Court of Appeal unless:

(a) The Court of Appeal gives leave on a question certified by it to be of significant public importance; or

(b) The supreme Court gives special leave to appeal”

Section 98 (3) of the Constitution of Fiji (2013) provides for exclusive jurisdiction to deal with and determine appeals from all final judgment of the Court of Appeal.

Section 98(4) provides that “An appellant may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.”

49. The Counsel for the respondent submitted that the document filed in April 2014 does not raise any question of law which justifies consideration by this court.
50. It appears from the application filed in April 2014 the petitioner has filed a rolled up application for leave to appeal out of time and for the court to deal with application for enlargement of time and leave to appeal at the same time.
51. The ultimate and appellate jurisdiction of the Supreme Court has been conferred on by the Constitution of Fiji to hear and determine all final judgments of the Court of Appeal.” It has been held that the Judgment of the single Judge of Court of Appeal under section 35 (2) of the Court of Appeal Act is a final Judgment for the purposes of the Constitution (see Penioni case (supra)).
52. The Supreme Court may grant special leave to appeal only if the criteria for leave under section 7(2) of the Supreme Court Act are met. Where the appellant could satisfy court under the above provisions in section 7(2) with one or more criteria the Supreme Court may grant leave. It has been observed by court in several judgments in Fiji that it is an extremely stringent task to cross the threshold requirement.

In **Dip Chand v State** CAV0014.2012 9th May 2012 the Supreme Court said in para.34 that

“ Given that the criteria set out in section 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent , and special leave to appeal is not

granted as a matter of course, the fact that the majority of grounds relied upon by the petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the petitioner of crossing the threshold requirements for leave even more difficult.

53. We observe that there is no legal issue contained in the petitioner's grounds of appeal for this court to consider. The grounds of appeal the petitioner urged before this court have not met the threshold criteria encapsulated in section 7(2) of the Supreme Court Act and therefore the ground of appeal for leave also fails.

54. It is important to state that in the application for enlargement of time and leave to appeal, we do not observe any question of law which justifies any serious consideration by the Supreme Court. It is clear from the document dated which could be treated as an application for enlargement of time and leave to appeal out of time lack any merit. We strongly observe that the petitioner has completely disregarded the appeal process contained in the Supreme Court. The failure on the part of the petitioner to observe rules is fatal to his case and cannot be permitted by court.

Conclusion

55. The petitioner's application for enlargement of time and leave to appeal can be treated as a rolled up application since the petitioner seems to have wanted this court to consider both matters together. This court proceeded to take up the petitioner's application for time extension and leave to appeal together.

56. In the circumstances of this case this court is not inclined to grant any relief and conclude that there is no question of general importance involved in this matter nor is there any substantial question and principle affecting the administration of criminal justice.

57. In the circumstances we are of the considered view that the petitioner's application for enlargement of time and leave to appeal should be refused.

58. Accordingly the court makes the following orders:

- (1) Application for enlargement of time is dismissed
- (2) Application for leave to appeal is dismissed.
- (3) Ruling of the Court of Appeal dated 3rd May 2012 is affirmed.

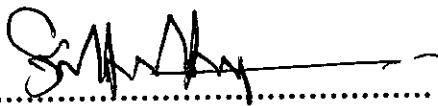
Aluwihare JA

I agree with the reasoning and the judgment of Hettige JA.

Chandra JA

I am in agreement with the reasoning and the judgment of Hettige JA.




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Hon. Mr. Justice Sathya Hettige
Judge of the Supreme Court


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Hon. Mr. Justice Buwanake Aluwihare
Judge of the Supreme Court


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Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court

Solicitors:

Petitioner in person.

Office of the Director of Public Prosecutions for the Respondent.