IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0041.2016
(On Appeal from Court of Appeal No: AAU 0053.2011)

BETWEEN : **MESAKE LIGAVAI**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court**
Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court
Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme Court

Counsel : **Petitioner in Person**
Mr. Y. Prasad for the Respondent

Date of Hearing: **6 July 2017**

Date of Judgment: **20 July 2017**

JUDGMENT

Marsoof J.

[1] The Petitioner, was convicted upon his own plea by the High Court of Fiji in Lautoka for the offence of robbery contrary to section 293(1)(a) of the Penal Code, Cap. 17, on 11th May 2011, and sentenced to 9 years imprisonment with a non-parole period of 7 years.

[2] In his application lodged in the Supreme Court dated 15th October 2016, the Petitioner has sought to appeal against the judgment of the Court of Appeal dated 27th February

2015, which affirmed his sentence. He seeks to appeal only against his sentence. However, the said application, which was received in the Registry of this Court only on 1st November 2016, is out of time.

Time limit for filing applications seeking leave to appeal

[3] The exclusive jurisdiction of this Court to hear and determine appeals from all final judgments of the Court of Appeal is derived from section 98(3)(b) of the Constitution of the Republic of Fiji. It is noteworthy that the aforesaid provision follows the language used in the corresponding provisions of the Administration of Justice Decree of 2009 and the Constitution (Amendment) Act of 1997, which Act had been repealed by section 2 of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009.

[4] Section 98(4) of the Constitution of the Republic of Fiji provides that an appeal 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.

[5] While there is no provision in the Constitution or any other law providing for any time limit for bringing an application seeking special leave to appeal from this Court, it is provided in Rule 6(a) of the Supreme Court Rules of 1998, that such an application must "be lodged at the Court registry within 42 days of the date of the decision from which special leave to appeal is sought."

[6] These Rules have since been replaced by the Supreme Court Rules 2016 (Legal Notice No. 84) published in the Extraordinary Government of Fiji Gazette supplement bearing No. 34 dated 31st October 2016. Rule 5(a) of the said Rules of 2016 also require the lodging of the application for leave to appeal within 42 days of the decision appealed against.

[7] Admittedly, the Petitioner has failed to lodge his application for special leave to appeal within the aforesaid time limit. However, since section 98(4) of the Constitution of the Republic of Fiji expressly provides that an appeal may not be brought to this Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to

appeal, this Court shall extend to the Petitioner the leniency and indulgence it customarily extends to incarcerated persons with no access to legal advice, and will consider, in the course of this judgment, the grant of enlargement of time for leave to appeal despite the absence of a prayer for enlargement of time to apply for leave to appeal.

Enlargement of Time

[8] Despite the absence of any provision in the Constitution of the Republic of Fiji or any other Act or Decree that seek to confer on the Supreme Court the power to enlarge time, it is trite law that this Court has an inherent jurisdiction to grant enlargement of time in appropriate cases. See, *The State v Ramesh Patel* Criminal Appeal No.AAU0002 of 2002S (15 November 2002), *Enele Cama v The State*, [2012] FJSC 4; CAV0003.09 (1 May 2012), *Kamalesh Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), *Volivale v The State* [2015] FJSC 1; CAV0004.2014 (23 April 2015), *Tiritiri v. The State* [2014] FJSC 15 CAV9.2014 (14th November 2014) and *Nabainivalu v State* [2015] FJSC 22; CAV027.2014 (22 October 2015) and *Tukana v State* [2016] FJSC 23; CAV 0024.2015 (22 June 2016).

[9] In paragraph 4 of his judgment in *Kamalesh Kumar v State; Sinu v State, supra*, [2012] FJSC 17; CAV0001.2009 (21 August 2012), Chief Justice Anthony Gates enumerated the factors that will be considered by a court in Fiji for granting enlargement of time 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 substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the Respondent be unfairly prejudiced?

[10] As his Lordship the Chief Justice went on to observe in paragraph 4 of the said judgment, the abovementioned 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". However, it is convenient to consider the application of the Petitioner in the light of the five-fold aspects outlined by his Lordship the Chief Justice in the *Kamalesh Kumar* case.

(i) Reason for failure to file within time

[11] It appears from the docket maintained in the Registry of this Court that the first application to be received in this Court from the Petitioner in connection with his conviction and sentencing for robbery in the instant case is dated 15th October 2016, which have been sent to the registry by the Corrections Department with a letter dated 25th October 2016, and received on 1st November 2016.

[12] In his said application dated 15th October 2016, the Petitioner has pleaded for "review of the Fiji Court of Appeal's decision". However, in the said document there is no application for enlargement of time to make an application for leave to appeal to this Court, nor is there any explanation provided for the delay in lodging the application for leave to appeal.

[13] The Petitioner has filed his amended grounds of appeal dated 5th May 2017. He has also filed his written submissions on the amended grounds of appal dated 12th May 2017. He has stated in paragraph 4 of his said written submissions that he had made an initial "application for appeal to the Supreme Court on March 2015 (sic), which was forwarded to the correction reception for despatch". However, there is no record in the Supreme Court docket relating to the case of the lodgement of any such appeal.

[14] In paragraph 5 of his said written submissions he states as follows:

> "Upon inquiry I was informed by the reception that my appeal has been forwarded to the registry. After waiting for nearly 18 months for my date, I requested the Correction Department for an inquiry regarding my date. It was then regarding my date. It is then I was told by our officer in charge that no such application has been received by the Court of Appeal registry".

[15] In the covering letter dated 17th May 2017, addressed to the registrar of the Supreme Court by A. Turaganivalu, Assistant Superintendent of Correction, it is stated as follows:

> "The submission made by the said inmates are either misplaced or lost in the process in despatching from our end as records does not clearly state. In trying to locate such documents back in 2015 our current administration staff are all new transfer in this year to our office as it is hard to locate such submission".

[16] No affidavit has been filed in this case supporting these factual assertions, and it may become necessary for this Court to insist that such factual assertions must be supported by affidavits as required by the Supreme Court Rules.

(ii) The Length of Delay

[17] Since the decision of the Court of Appeal sought to be appealed from was pronounced on 27th February 2015, and the application of the Petitioner was lodged in the Registry of this Court on 1st November 2016, the length of delay is approximately 1 year and 8 months, which is indeed a considerable period of time.

(iii) Is there any Ground of Merit?

[18] In these circumstances it becomes necessary to consider whether there is any ground of merit to consider grant of enlargement of time. When embarking on a detailed

assessment of the merits of the application of the Petitoner for leave to appeal against his sentence, this Court has to be mindful of the following observation of this Court in paragraph 14 of its judgment in *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013):-

> "It is remarkable that this Court has in the generality of cases assumed that it possessed jurisdiction to grant enlargement of time in appropriate cases, *but had shown considerable reluctance to grant relief to petitioners seeking enlargement of time for making belated applications for special leave to appeal.* See, *The State v Ramesh Patel* Criminal Appeal No.AAU0002 of 2002S (15 November 2002); *Enele Cama v The State,* [2012] FJSC 4; CAV0003.09 (1 May 2012); *Kamalesh Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012); and *Native Land Trust Board v Khan* [2013] FJSC 1; CBV0002.2013 (15 March 2013)."(*Emphasis added*)

[19] In paragraph 15 of its judgment in *Rasaku v The State*, supra, this Court made it clear that a Petitioner seeking a belated appeal in a criminal case, must *at the lowest*, be able to meet the stringent leave criteria of section 7(2) of the Supreme Court Act, No. 14 of 1998.

[20] The grounds of appeal set out in the Petitioner's application dated 15th October 2016, were sought to be amended by the Petitioner by his subsequent Notice of Amended Grounds of Appeal dated 12th May 2017. The amended grounds are

(a) The Learned trial Judge erred when his Lordship failed to sentence the petitioner in accordance to the tariff and instead had accepted the tariff of robbery with violence when in fact; the petitioner was convicted for the offence of robbery and not robbery with violence;

(b) The learned trial judge erred when His Lordship took into account impermissible aggravating factors to enhance the petitioner's sentence by 3 years when in fact those factors are already subsumed in the ingredients of the offence;

(c) Wrongful assessment of sentence; and

(d) The sentence is harsh and excessive.

[21] Ground (a) advanced by the Petitioner is that the learned trial Judge erred by failing to sentence the petitioner in accordance with the applicable tariff and instead had accepted the tariff of robbery with violence when in fact the Petitioner was convicted for the offence of robbery and not robbery with violence.

[22] The Petitioner was charged and convicted on his own plea for the offence of robbery contrary to section 293(1)(a) of the Penal Code. This was a rather extreme case of aggravated robbery committed on 11th September 2007, at about 10.15 pm when the Petitioner with two other persons invaded the dwelling house of Prakash Garana at 13 Sugar Street, Lautoka and robbed him of many items. Mr. Garana was at home watching a movie along with his brother and sister-in-law. At the time, the security guard called for help and Mr. Garana on opening the door to investigate was confronted by a masked man running towards him, armed with a pinch bar. He was forced to sit down as three other masked men entered the house. The victim was asked where his safe was, and when they were told there was no safe, they searched the house taking the items referred to in the charge. They ripped earrings from the ears of the sister-in-law causing injury to her ears. They soon left the premises with the stolen goods, climbing over the fence and getting into a getaway car.

[23] Considering the seriousness of the offence, and the fact that the maximum sentence prescribed in the now repealed Penal Code for the offence was life imprisonment, the sentence imposed on the Petitioner was not excessive and was within the permitted tariff. In *Wise v State* [2015] FJSC 7; CAV0004.2015 (24 April 2015), a comparative case of aggravated robbery involving a home invasion at night, this Court considered the tariff for aggravated robbery under section 311(1) of the Crimes Decree, which set a maximum sentence of 20 years of imprisonment for the offence, and observed in paragraph 25 of its unanimous judgment as follows:-

"We believe that offences of this nature should fall within the range of 8-16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either that the robbery was committed in company with one or more other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them."

[24] In these circumstances, there is no likelihood that ground (a) would succeed if leave to appeal is granted.

[25] Ground (b) taken up by the Petitioner is that the learned trial judge erred by taking into account impermissible aggravating factors to enhance the Petitioner's sentence by 3 years when in fact those factors are already subsumed in the ingredients of the offence. This aspect of the matter was considered by the Court of Appeal in its impugned judgment and noted in paragraphs [66] and [67] thereof that while the first Appellant before that Court, Noa Maya had been sentenced by the High Court to a term of 11 years and 9 months imprisonment with a non-parole period of 9 years, the Petitioner Mesake Ligavai was treated leniently by the trial judge on account of his guilty plea and sentenced to a term of 9 years imprisonment with a non-parole period of 7 years.

[26] It is noteworthy that in paragraph [75] of its judgment, the Court of Appeal took the view that learned trial judge had not erred in law by taking 9 years as the starting point of his computation of sentence in this case, but in paragraph [82] of its judgment, the Court of Appeal accepted that aggravating factor (i) group invasion, and factor (ii) brandishing (but not use of) pinch bars, were already pleaded as particulars of the offence which are necessary ingredients to prove a charge of robbery contrary to section 293(1)(a) and therefore there was double counting in determining the final sentence.

[27] However, after considering the policy behind the Sentencing and Penalties Decree of 2009, particularly the objective of deterrence, at paragraph [87] of its judgment the Court of Appeal held that since the trial judge had taken into account a lower figure in determining the starting point for the computation of the sentence for aggravated

robbery, the interim figure prior to the deductions for mitigating factors had been placed more towards the lower end of the accepted tariff, and therefore no prejudice has been caused to Maya and the present Petitioner Ligavai by reason of the "double counting" in this case.

[28] The matter has since been considered by the Supreme Court in *Maya v State* [2015] FJSC 30; CAV009.2015 (23 October 2015), wherein this Court observed that though the first two of these factors considered by the trial judge were elements of the offence in section 293(1)(a) of the Penal Code, the overall sentence which was imposed in that case on the co-accused of the Petitioner was not too long. In these circumstances, in my view, no purpose will be served by granting enlargement of time to the Petitioner to seek leave to appeal from this Court on the basis of ground (b).

[29] In my view, the other two grounds urged by the Petitioner, namely respectively, (c) wrongful assessment of sentence; and (d) the sentence is harsh and excessive, need not be considered separately by this Court as they are subsumed in the first two grounds urged by the Petitioner. In the result, I conclude that there is no basis for granting the Petitioner enlargement of time for leave to appeal since he has not brought his case within the threshold criteria set out in section 7(2) of the Supreme Court Act.

(iv) Is there a Substantial Delay, if so is there a ground of appeal which will probably succeed?

[30] This is no doubt a case of substantial delay since the Petitioner has no evidence in the form of affidavit or otherwise to establish that he filed an appeal in this Court in March 2015. The Petitioner did not even have a copy of his alleged appeal he says he filed in March 2015, and was not even certain about its exact date. In any event, as already noted there is no ground of appeal that would probably succeed.

(v) If time is enlarged will the Respondent be unfairly prejudiced?

[31] I have no difficulty in answering this question in the affirmative.

Conclusions

[32] The grant of extension of time for a belated application for special leave to appeal is a matter for the discretion of Court. In exercising this discretion, the Court would look at the totality of the circumstances that led to the delay, the length of the delay, whether the grant of time would be futile due to the unmeritorious nature of the grounds of appeal advanced by the applicants and the possible prejudice to the Respondent, and balance these factors against the need to preserve the sanctity of the rules and the need to have finality in litigation.

[33] I have endeavoured to assess the circumstances of this case in the light of the various factors that should be considered in deciding whether it is appropriate to grant an enlargement of time in this case, and in my view the Petitioner who has neither prayed for enlargement of time nor advanced any plausible excuse for his delay, should nonetheless be treated with sympathy by reason of him being a serving prisoner whose access to justice is limited. However, on further examination, it is manifest that the Petitioner's grounds for seeking leave to appeal against his sentence were lacking in merit, and hence no useful purpose would be served by granting the enlargement of time sought by him.

[34] I would therefore refuse the application for enlargement of time and dismiss the Petitioner's application for leave to appeal.

Chandra J.

[35] I have had the opportunity of perusing the draft judgment of Marsoof J. and agree with his reasons and conclusions.

Ekanayake J.

[36] I have read the judgment of Marsoof J. in draft, and I agree with his reasoning and conclusions

Orders of Court:

1. *Application for enlargement of time is refused.*
2. *Petitioner's application is dismissed.*

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Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

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

.....
Hon. Madam Justice Chandra Ekanayake
Judge of the Supreme Court

Solicitors

Petitioner in Person

The Office of the Director of Public Prosecutions for the Respondent