

**IN THE SUPREME COURT OF FIJI**  
**ON APPEAL FROM THE HIGH COURT**

**CRIMINAL PETITION NO. CAV 0026 OF 2018**

(Court of Appeal Action No: AAU 0093 of 2014)

**BETWEEN** : **DAVID LOCKINGTON**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Chandra, RJA**

**Counsel** : **Ms S Nasedra for the Appellant**

**Mr L J Burney and Mr E Samisoni for the Respondent**

**Date of Hearing** : **21 August, 2019**

**Date of Ruling** : **15 October, 2019**

**RULING**

[1] The Applicant with two others were charged with one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act 2009. The Applicant with three others in the company of each other on 18 July 2013 at Lautoka robbed the complainant of assorted items and money with a total value of \$159,483.36. One of the four persons was never brought to trial. After trial, the third person, Sunia Roraquio was acquitted while the Applicant was found guilty and was convicted as charged. Timo who had pleaded not guilty initially pleaded guilty during the course of the trial.

- [2] On 30 June 2014 the Applicant was sentenced to 13 years imprisonment with a non-parole term of 12 years. Timo was sentenced to 12 years and 1 month with a non-parole term of 11 years and 6 months.
- [3] The Applicant filed a timely notice of appeal against conviction and was granted leave to appeal against conviction and sentence by a single Judge of the Court of Appeal.
- [4] The Applicant pursued his appeal against conviction and regarding his appeal against sentence he had moved to withdraw his appeal against sentence when his appeal was taken up for hearing before the Full Court of the Court of Appeal.
- [5] By Judgment delivered on 30 August 2018 the Applicant's appeal against conviction was dismissed by the Court of Appeal. He sought special leave to appeal from the judgment of the Court of Appeal from the Supreme Court and after hearing the Supreme Court by judgment delivered on 25 April 2019 refused his application seeking leave to appeal where he canvassed only his appeal against conviction.
- [6] The Court of Appeal dismissing his appeal against his sentence by judgment delivered on 30 August 2018 in consequence of his withdrawal of his appeal against sentence stated:

*“[33] As for Lockington’s appeal against sentence, the appellant signed an application dated 5 July 2018 for leave to withdraw his appeal against sentence. During the course of the hearing Lockington confirmed that he wanted to abandon his sentence appeal and that the decision to do so had been made voluntarily and of his own free will. He stated that as a result of having received legal advice he does not want to proceed with the sentence appeal. He confirmed that he understood the consequences for him in the event that his applications were granted. I would allow the application and dismiss the sentence appeal.”*

- [7] Although his appeal against sentence thus stood dismissed he has made an application seeking an enlargement of time in terms of Rules 5(a)(b) and (c) and 17(4) to appeal against his sentence on 20<sup>th</sup> August 2019 relying on an affidavit he had deposed to on 19<sup>th</sup> August 2019.

[8] In **Kumar v State; Sinu v State** [2012] FJSC 17; CAV0001.2009 (21 August 2012), the factors to be considered in applications seeking extension of time to appeal were set out as follows:

1. *The length of delay;*
2. *The reason for the failure to file within time.*
3. *Whether there is a ground of merit justifying the Appellate Court's Consideration.*
4. *Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
5. *If time is enlarged, will the Respondent be unfairly prejudiced?*

[9] In his affidavit, he has deposed that at the hearing before the Full court of the Court of Appeal he pursued his appeal against conviction only and abandoned his sentence appeal, that his abandoning the appeal against sentence was granted and his appeal against sentence was dismissed.

[10] The application seeking an enlargement of time has been made on the 20<sup>th</sup> August 2019 and in his affidavit the Applicant has deposed that his appeal is about 10 months out of time.

[11] As to the reasons for the delay he has stated in his affidavit that he feared possible enhancement of his sentence when his appeal was heard before the Court of Appeal and that he did not pursue it at the Supreme Court also in light of his fear that his sentence may possibly be enhanced.

[12] The Applicant has further deposed that he had recently come to know that his sentence appeal has merits and that was the reason to change his decision.

[13] The application seeking enlargement of time has been made after about 10 months and the reason adduced for the delay is not satisfactory.

- [14] In considering whether there is a ground which merit consideration, what has been deposed to by the Applicant is that he has come to know that his appeal has merits but has failed to set out any matters relating to such merits.
- [15] As there has been a substantial delay, it would be necessary to consider whether there is a ground of appeal that will probably succeed. The ground adduced in the petition attached to his affidavit is that the learned sentencing Judge erred in fact and in law in giving a non-parole period that is too close to the head sentence which is not in line with the rehabilitation principle under the Sentencing and Penalties Act of Fiji.
- [16] This proposed ground of appeal was not canvassed before the Court of Appeal as a result of his abandonment of his appeal against sentence which resulted in his appeal against sentence being dismissed as stated above. The Court of Appeal considered the abandoning of the appeal against sentence in accordance with the decision of the Supreme Court in **Masirewa v The State** (CAV 14 of 2008; 17 August 2010).
- [17] As a result of such dismissal the matter urged in relation to the proposed error of law of the sentencing judge could not be adjudicated upon by the full Court of the Court of Appeal. Therefore there is no merit in the ground of appeal nor is there any probability of that ground succeeding.
- [18] In the case of an appeal against conviction or sentence, such appeal may result in a dismissal after hearing before the Full Court of the Court of Appeal where the merits of such appeal would be adjudicated upon. In such an instance an appeal is available to the Supreme Court by way of an application of a special leave to appeal in terms of Section 7(2) of the Supreme Court Act, 1998.
- [19] However, in the case of an appeal being withdrawn either against conviction and or sentence, the Full Court of the Court of Appeal would consider such withdrawal after questioning the Appellant in terms of the procedure set out in **Masirewa** and would allow such withdrawal on being satisfied of such withdrawal. This would result in a dismissal of the appeal which had been originated by such an Appellant. In such a dismissal there would be no adjudication on the grounds of appeal relied on by such an Appellant in his original

appeal against conviction and or sentence. Such a dismissal would give rise to a situation where it would appear that there was no appeal against such an Appellant's conviction and or sentence.

[20] In my view if there is an appeal against such a dismissal or as in the present instance where there has been an application for enlargement of time to appeal against such a dismissal, it would be an instance of bypassing the Court of Appeal and appealing direct to the Supreme Court. Such an appellate procedure is not available in terms of the provisions of the Supreme Court Act, 1998.

[21] In view of the above reasoning there is no merit in the application of the Applicant nor is there any substantial possibility of the ground of appeal urged in the draft petition of appeal attached to the Applicant's affidavit succeeding.

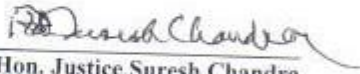
[22] As to prejudice to the Respondent, the delay and further appearances in the Supreme Court regarding this application would prejudice the Respondent as the appeal against sentence was dismissed in consequence of the abandonment of his appeal. The present application is an attempt to re-canvas his appeal against sentence for which there is no provision in law.

[23] For the above reasons, the application for enlargement of time of the Applicant is refused.

***Orders of Court:***

*The application for enlargement of time to appeal against sentence is refused.*



  
Hon. Justice Suresh Chandra  
RESIDENT JUSTICE OF APPEAL