

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO: AAU 002 OF 2014
(High Court Criminal Case No: HAM 083/ 2011[LTKA])
(Magistrate's Court at Nadi Criminal Case No: 766/09)

BETWEEN : **KELEMEDI TURAGA**
Appellant

AND : **THE STATE**
Respondent

Coram : **Chandra S, JA**
Prematilaka C, JA
Fernando A, JA

Counsel : **Mr M. Fesaitu for the Appellant**
Mr S. Babitu for the Respondent

Date of Hearing : **15 February 2018**

Date of Judgment : **08 March 2018**

JUDGMENT

Chandra JA

[1] I agree with the reasons and conclusions of Fernando JA.

Prematilaka JA

- [2] I have read in draft the judgment of Fernando JA and agree with the reasons and conclusions thereof.

Fernando JA

- [3] This is an appeal under section 22(1) of the Court of Appeal Act, from a decision of the High Court dismissing the Appellant's application seeking an extension of time to Appeal and Leave to Appeal from a decision of the Magistrate's' Court at Nadi in Criminal Case No 766 of 2009.
- [4] A single Judge of this Court had granted the Appellant, out of the five grounds of appeal raised; leave to appeal on grounds 1 and 2 by his Ruling dated 15th July 2016.
- [5] The two grounds of appeal on which leave have been granted are as follows:
- "1) *The Learned Appellate Judge erred in law when he dismissed the Applicant's application without hearing the Applicant contrary to section 256(1)(a) of the Criminal Procedure Decree.*
 - 2) *The Learned Appellate Judge erred in law when he failed to give a written ruling stating the reasons for the dismissal of the Applicant's application seeking leave to appeal out of time contrary to section 27 of the High Court Act Cap.13 (formerly Supreme Court Act Cap 13)."*
- [6] As regards grounds 3-5 the learned Justice of Appeal had stated that: "*Grounds 3-5 concern merits of the appeal to the High Court. If the Full Court allows this appeal, the application for an enlargement of time to appeal against sentence will be remitted to the High Court for re-hearing*".
- [7] Grounds 3-5 are a challenge to the sentence passed by the learned Magistrate on the ground that the learned Magistrate had erred in not giving the Appellant an appropriate

discount for his guilty plea and show of remorse; that he took into consideration the deprivation of property of the victim as an aggravating factor and that the totality principle in sentencing had not been properly taken into account.

- [8] The proceedings of the High Court on Thursday the 11th day of August 2011 at 9.00 a.m. before the learned High Court Judge sitting at Lautoka found in the appeal brief is as follows:

“Mr. I Whippy for Respondent

I.W. Adjourned for State to clarify issues. Accused sentenced to two separate files on ten counts. Total 10 years 7 years non parole. Previous convictions into account. Appeal no merit and objection to leave.

Court: Leave to appeal out of time is dismissed.” (verbatim from the High Court record)

- [9] The decision of the learned High Court Judge cannot be considered as a Summary Dismissal of Appeal under section 251 of the Criminal Procedure Act 2009, as there is no certification that *“the Judge has perused the record and was satisfied that the appeal has been lodged without any sufficient ground of complaint”* as required by the said section.

- [10] Section 256 (1) of the Criminal Procedure Act 2009 states: *“At the hearing of an appeal, the High Court shall hear-*

- a) The appellant or the appellant’s lawyer; and*
- b) The respondent or the respondent’s lawyer (if the respondent appears); and*
- c) The Director of Public Prosecutions or the Director’s representative (if there is an appearance by or for the Director)”.* (emphasis added)

- [11] Section 27 of the High Court Act 1875 states: *“It shall be lawful for any decision of the Court or a judge to be delivered by the effect thereof being pronounced, in Court or in*

chambers, as the case may be, provided that the full terms of such decision shall have been reduced to writing and that a copy thereof is made available to the parties".

[12] It is clear from the provisions of section 256 (1) of the Criminal Procedure Act 2009 and section 27 of the High Court Act 1875, set out in paragraph 7 above, that there has been a clear breach of the provisions of the said sections by the learned High Court Judge and we therefore have no hesitation in allowing the appeal on grounds 1 and 2.

[13] Counsel for the respondent conceded on both grounds of appeal.

[14] This would mean that the case has to be remitted to the High Court for re-hearing of the application for an enlargement of time to appeal against sentence, as correctly stated by the learned Justice of Appeal who granted leave to appeal.

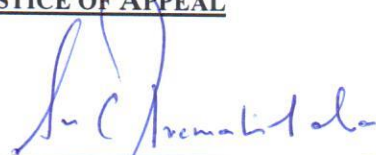
Orders of Court:

- 1) *Appeal against the dismissal of the application for an enlargement of time to appeal is allowed.*
- 2) *Case remitted to the High Court to hear the said application.*





Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL



Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL