

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 63 OF 2017

BETWEEN : **JAMES SATISH BACHU**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Ms. P. Chand [LAC] for the Applicant.
: Mr. J. Niudamu for the Respondent.

Date of Hearing : 24 January, 2018
Date of Judgment : 26 January, 2018

JUDGMENT

BACKGROUND INFORMATION

1. The Applicant was charged in the Magistrate's Court for one count of Obtaining Financial Advantage by Deception contrary to section 318 (1) of the Crimes Act. The Applicant had pleaded not guilty but after a trial the court found the Applicant guilty as charged and convicted him accordingly.

2. On 15th February, 2016 the Applicant was sentenced to 12 months imprisonment.
3. Being aggrieved by the decision of the Magistrate's Court the Applicant wanted to lodge an appeal but did not do so within time as required by section 248 (1) of the Criminal Procedure Act. The Applicant then made an application in this court seeking leave to appeal out of time.
4. On 3rd November, 2016 this court after considering the merits of the application seeking leave to appeal out of time granted the application on the condition that the Applicant files his Petition of Appeal within 14 days of the ruling that is by 17th November, 2016.
5. The Applicant did not comply with the order of this court. After a lapse of about seven (7) months on 6th June, 2017 the Applicant by Notice of Motion made an application seeking leave of this court to file his Petition of Appeal as follows:

“that the [Applicant] be granted leave to file Appeal Grounds under Order 8 Rule 2 of the High Court Rules 1988 and upon such terms and conditions as this Honorable Court deems just.”
6. The Applicant filed his affidavit sworn on 5th day of June, 2017 in support of his application. The application is opposed by the State although no affidavit has been filed, the State relies on the submission of counsel.
7. Both counsel have filed written submissions and also made oral submissions during the hearing for which the court is grateful.

8. The learned counsel for the State whilst opposing the application relies on the doctrine of *res judicata* submitting that the application now before the court has already been determined and that this court cannot hear the same application twice.

RES JUDICATA

9. The doctrine of *res judicata* is based on the principle that there must be an end to litigation and that a party should not be vexed twice over the same cause. The special character of *res judicata* is that after being pronounced by a court or tribunal having jurisdiction over the subject matter and the parties, it disposes finally and conclusively the matters in dispute or controversies such that other than an appeal that subject matter cannot be re-litigated between the same parties or their privies.
10. The principles of *res judicata* apply where there is an attempt to re-litigate issues that have previously been determined in proceedings. In *Blair & Perpetual Trustee Co. Ltd vs Curran* [1939] HCA 23; (1939) 62 CLR 464 the High Court of Australia when analyzing the principles of *res judicata* and issue estoppel at page 531-532 stated the following:

“A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared...”

11. The Applicant states in his affidavit that by the time the ruling in respect of his application seeking leave to appeal out of time was delivered he was already released from the Corrections Centre. When he approached the

Legal Aid Commission for assistance in respect of the filing of his Petition of Appeal he was told to submit evidence of his means.

12. Upon hearing this, the Applicant informed the legal aid counsel that he wished to engage a private counsel. The preferred private counsel refused to take instructions due to conflict of interest as a result the Applicant again contacted the office of the Legal Aid Commission for assistance. The Applicant was again told to submit his evidence of means since he did not have bus fare to go to the office of the Legal Aid Commission he could not submit his means in time to get legal assistance.
13. On 10th March, 2017 the Applicant finally managed to secure the services of the Commission. The grounds of appeal could not be filed since the order of the court to file the grounds of appeal had lapsed.
14. The Applicant also states that whilst he was at the Natabua Corrections Centre he suffered from major depressive disorder and was taken for treatment at the Lautoka Hospital. Before the High Court ruling on 3rd November, 2016 he was suffering from depression, eye and denture problems which still continue.

DETERMINATION

15. The application filed by the Applicant does not in my view seek to re-litigate issues already determined by this court accordingly the doctrine of *res judicata* does not apply. The current application is seeking leave to file Petition of Appeal since the order for its filing had lapsed after the Applicant did not comply with the order of this court. The application before the court is one of procedure therefore it is in the discretion of this

court to grant the order sought or not. The discretion must, however, be exercised judiciously after identifying special reasons for doing so.

16. The Applicant was fully aware of the orders made by this court which he failed and/or neglected to comply with, when court orders are made it is incumbent upon the person required to comply to act with urgency towards its compliance. Furthermore, the Applicant did not wish to comply with the requirements of the Legal Aid Commission but had opted to instruct a private counsel of his choice which did not materialize in his favour. The Applicant has only himself to blame for his laxity and no one else.
17. I also do not accept that the Applicant's major depressive disorder or his eye or denture conditions had anything to do with his non compliance of court order. The medical report annexed by the Applicant dated 14 October, 2016 does not state that the Applicant has continuing major depressive disorder.
18. The Applicant filed this application after a lapse of about seven (7) months which is a substantial delay. The reasons given by the Applicant does not create any special circumstances why this court should grant an extension of time to the Applicant to file his Petition of Appeal.


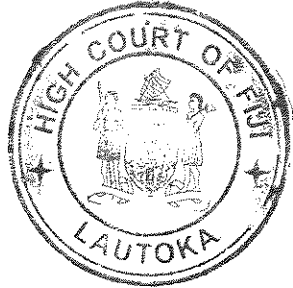
CONCLUSION

19. After carefully considering the evidence and the submissions made by counsel I am not satisfied that this application necessitates the exercise of this court's discretion in favour of the Applicant.

ORDERS

1. The application for leave to file Petition of Appeal is refused.
2. 30 days to appeal to the Court of Appeal.

At Lautoka
26 January, 2018



Sunil Sharma
Judge

Solicitors

Office of the Legal Aid Commission, Nadi for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.