

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 23 OF 2018
(Magistrates' Court Case No. 23 of 2018)

BETWEEN : **SURESH PRASAD**
APPELLANT

AND : **FIJI REVENUE & CUSTOMS SERVICE**
RESPONDENT

Counsel : **Mr M Yunus for the Appellant**
Ms B Malani for the Respondent

Date of Hearing : **27 June 2018**

Date of Judgment : **28 June 2018**

RULING

- [1] The appellant seeks an enlargement of time to appeal against his conviction and sentence and bail pending appeal.
- [2] On 5 April 2018, the appellant was convicted in absentia on 19 counts of failing to file tax and VAT returns between 2010 and 2015 and sentenced to 12 months' imprisonment on each count, to be served concurrently. The total sentence was 12 months' imprisonment.
- [3] On 4 May 2018, the appellant was arrested and committed to serve his prison sentence.

[4] On 14 May 2018, this application for an enlargement of time to appeal against conviction and sentence and bail pending appeal was filed.

[5] Section 248(1) of the Criminal Procedure Act states that:

Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against.

[6] At the hearing, Mr Yunus on behalf of the appellant submitted that the statutory appeal period runs from the date the appellant was arrested and not the date of the decision appealed against. This submission cannot be sustained in light of the clear statutory provision that states that every appeal shall be within 28 days of the decision appealed against. The date of the decision appealed against is 5 April 2018. The statutory appeal period expired on 3 May 2018. The notice to appeal was given on 14 May 2018. The appeal is out of time by eleven days.

[7] Section 248(2) of the Criminal Procedure Act states that:

The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.

[8] Section 248(3) defines good cause as follows:

For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include —

(a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;

(b) any case in which a question of law of unusual difficulty is involved;

(c) a case in which the sanction of the Director of Public Prosecutions or of the commissioner of the Fiji Independent Commission Against Corruption is required by any law;

(d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents.

[9] The following common law factors are also considered:

- (1) The reason for the failure to file within time.
- (2) The length of the delay
- (3) Where there has been substantial delay, nonetheless is there a ground that will probably succeed?
- (4) If time is enlarged, will the respondent be unfairly prejudiced? (*Kumar v State* unreported Cr App No. CAV 0001 of 2009; 21 August 2012).

[10] The principal reason for the delay is that the appellant was unaware of his conviction and sentence until he was arrested on 4 May 2018. The length of the delay is eleven days. The question is whether there is merit in the appeal?

[11] As for the application for bail, the presumption in favour of grant of bail is displaced when a person has been convicted. Section 17(3) of the Bail Act sets out the factors to consider:

- (a) The likelihood of success in the appeal.
- (b) The likely time before the appeal.
- (c) The proportion of the original sentence which will have been served by the appellant when the appeal is heard.

[12] So far the appellant has served about 1 ½ months in prison. The appeal can be heard by mid-August 2018. By that time the appellant will have served about one fourth of his total sentence. The real issue is the likelihood of success in the appeal. Bail is granted only if

the appeal has a very high likelihood of success (*Zhong v The State* unreported Cr App No. AAU44 of 2013; 15 July 2014). The two remaining factors set out in section 17(3) are less significant when the threshold of a very high likelihood of success has not been met (*Seniloli & Oths v State* Cr App No. AAU 0041/04s; 23 August 2004).

[13] Both parties have made detailed oral and written submissions. The appeal raises jurisdictional issues. At this stage, it not necessary to make any express findings on the proposed grounds of appeal. The grounds are arguable but I am not satisfied the appeal will be highly likely to succeed. I would grant an enlargement of time to appeal but refuse bail pending appeal.

[14] Orders of the Court are:

- (a) Enlargement of time to appeal is allowed.
- (b) The Petition of Appeal must be filed and served on the respondent by 6 July 2018.
- (c) The court records to be filed and served on the parties within 28 days.
- (d) The appeal is listed for mention in the High Court at Suva on 27 July 2018 2.30 pm to fix a hearing date.
- (e) Bail refused.



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Hon. Mr. Justice Daniel Goundar

Solicitors:

MY Law for the Appellant

Fiji Revenue & Customs Service for the Respondent