

IN THE HIGH COURT OF FIJI
AT LAUTOKA
IN THE WESTERN DIVISION
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO.: HAM 99 OF 2016

BETWEEN: STATE

Applicant

AND: PITA DAU

Respondent

Counsel: Ms. S. Naibe for the Applicant
Mr. M. Anthony for the Respondent

Date of Hearing: 21st September, 2016

Date of Ruling: 25th October, 2016

RULING

INTRODUCTION

- [1] This is an application seeking extension of time within which to appeal against an order of acquittal by the Magistrates' Court in Lautoka in respect of Criminal Case No. 7/16.
- [2] The Respondent was charged with one count of Failing to Undergo Breath Analysis contrary to Section 103 (1) (1A) (i) of the Land Transport (Amendment) Decree No. 74 of 2012 and Section 114 of the Land Transport Act No. 35 of 2009.

- [3] The matter was handled by a Police Prosecutor in the lower court.
- [4] The Respondent pleaded guilty to the charge and accepted the summary of facts which was read out in Court. The learned Magistrate thereafter convicted him and adjourned the matter for sentencing.
- [5] On the 8th day of March 2016, the learned Magistrate, whilst pronouncing sentence, acquitted the Respondent on the basis that the charge was defective.
- [6] The State, being aggrieved by the order of acquittal, filed this application on the 19th of May 2016 for leave to appeal out of time.

GROUND RAISED BY THE APPLICANT/STATE FOR ENLARGEMENT OF TIME

- a. That the order of acquittal imposed by the learned Magistrate is wrong in law;
- b. The length of delay is not excessive;
- c. That the reasons for the delay are reasonable; and
- d. That there is sufficient merit for the Appeal to have a strong likelihood of success.

LAW

- [7] Section 248 of the Criminal Procedure Decree lays down the procedure to be followed in filing appeals in the High Court:

248.-(1) 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

—
(a) It shall be presented to the Magistrates Court from the decision of which the appeal is lodged.

- (b) *A copy of the petition shall be filed at the registry of the High Court; and*
- (c) *A copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.*

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

(3) *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.*

[8] The principles for an extension of time to appeal are settled. The Supreme Court in *Kumar v State; Sinu v State* [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

“Appellate courts examine five factors by way of a principled approach to such applications. These factors are:

(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 courts 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?"*

[9] In *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), the Supreme Court confirmed the above principles and said at paragraph [21];

"These 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 endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court."

ANALYSIS

LENGTH OF DELAY

- [10] This application was filed on the 19th of May 2016.
- [11] The Respondent was acquitted on the 8th of March 2016. Thereby a delay is about 42 days.

CAUSE OF DELAY

- [12] The Applicant submits that the delay in this matter was mainly due to the number of persons the file had to go through for the final documents to be filed.
- [13] This matter had all the time been handled by Police Prosecutions Office at the magistracy. After being dissatisfied with the decision of acquittal by the learned Magistrate, the Divisional Prosecution Officer/West had referred the file to the DPP's office. However, the file had been received by the DPP's Office on the 16th of March,

2016. Once the file reached the DPP's Office, it had been allocated to a legal officer to advise DPP who will then decide whether the matter should be appealed or not on the merits.

[14] The decision to appeal had been made on the 13th of May 2016 which was after the legal officer was able to finalize his analysis of the facts and law to the DPP.

[15] Once the decision to appeal was made, application documents had to be prepared and sent to the DPP who is based in Suva for sanction, and in doing so, the filing of the application had got delayed by approximately 42 days.

[16] I find that the reasons submitted by the Applicant are reasonable in the circumstances.

PREJUDICE

[17] There will be no prejudice caused to the Respondent if the application is allowed.

LIKELY SUCCESS ON APPEAL

Ground 1 – That the Learned Magistrate erred in law in acquitting the Accused after conviction had been entered and the matter was set for sentencing.

[18] The Magistrate in sentencing ruling stated in paragraph 8 and 9;

“[8]. The punishment for the charge before this court; as provided in the Statement of Offence, is provided in section 114 of the Land Transport Act No. 35 of 2009. The punishment is provided in Land Transport Act No. 35 of 1998 is provided as above. There is no such punishment as provided in section 114 of the Land Transport Act No. 35 of 2009.

[9]. *The charge against the accused is defective, I order for the accused to be acquitted and he is free to leave.*”

[19] From the above paragraphs it is clear that the learned Magistrate had picked up a defect only in the year of the Act in that it was supposed to be Land Transport Act No. 35 of 1998 instead of Land Transport Act No. 35 of 2009. This was the only basis that the learned Magistrate had indicated to justify his order of acquittal.

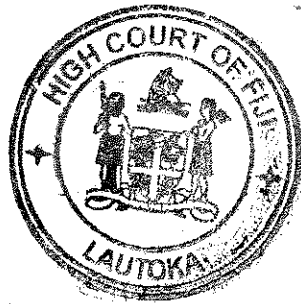
[20] The learned Magistrate acquitted the accused because the police officer had cited a wrong year in describing the Land Transport Act. It appears that the learned Magistrate erred in the sense that he should not have acquitted the accused on mere typing error by the Police.


[21] A charge is adequate if, among other things, it tells a defendant of the nature of the charges against him to enable him to prepare an adequate defense. Clearly the Prosecution had covered all the elements of the offence in the statement of offence. The year of the Act is immaterial because it does not embarrass or prejudice the accused. The Prosecution had incorporated the right particulars of the offence except the correct year of the Act. The statement of the offence covered all the essential elements of the offence. Accordingly, the learned Magistrate, having known that the year cited by the Prosecution was wrong, should have informed the Prosecution to amend the charge before reading out the same to the accused.

[22] Once the Court enters a valid conviction after a lawful hearing, it is *functus officio* and cannot reopen the case. Only option available to the learned Magistrate was to pass the sentence according to law. Instead of passing the sentence, learned Magistrate acquitted the accused. There is merit in this ground that requires serious judicial scrutiny.

ORDER

- [23] The delay is not unreasonable in the circumstances. There is a ground of appeal which merits serious judicial consideration that it will most probably be successful in appeal.
- [24] Therefore, application for leave to appeal out of time in respect of criminal case No.07 of 2016 is granted.




Aruna Aluthge
Judge

AT LAUTOKA

On 25th October, 2016

**Solicitors: Office of the Director of Public Prosecution for the State (Applicant)
A.C. Law for the Respondent**