

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 80 of 2013
High Court Criminal Case No. HAC 1279 of 2011]

BETWEEN : THE STATE

Appellant

AND : TIMOCI TIKINA
EPARAMA KAITANI
APISALOME KOLINIVALU
ILIESA VIRIBALE

Respondents

Coram : Chandra, RJA

Counsel : Mr. S Vodokisolomone for the Appellant
Mr. S Waiqainabete for the Respondent

Date of Hearing : 27 July, 2018

Date of Ruling : 4 December, 2018

R U L I N G

- [1] This is an application made pursuant to section 35(1) of the Court of Appeal Act, seeking leave to appeal out of time.

- [2] The Respondents were jointly charged with one count of Aggravated Burglary contrary to section 313(1) of the Crimes Act, 2009 and one count of Aggravated Robbery contrary to section 311(1) of the Crimes Act, 2009.
- [3] The matter was remitted by the High Court to the Magistrate's Court at Nasinu under extended jurisdiction in terms of section 4(2) of the Criminal Procedure Act.
- [4] The Respondents were convicted for the two offences on 15th May 2013 and on 10th July 2013, the Respondents' sentences were withheld for three years and they were bound over in the sum of \$1000 for the next three years and fined \$500.
- [5] The Appellant filed an application seeking leave to appeal out of time with a supporting affidavit from Josaia Niudamu of the Office of the Director of Public Prosecutions sworn on 29th August 2013 and setting out the following grounds of appeal:
1. That the learned trial Magistrate erred in law in strictly applying the provisions employing section 44 of the Sentencing and Penalties Decree, 2009 when sentencing all of the respondents for the serious offences of Aggravated Robbery and Aggravated Burglary.
 2. That the learned trial Magistrate failed to apply section 4(2)(b) of the Sentencing and Penalties Decree No.42 of 2009 which requires the sentencing Court to have regard to the current sentencing practice and the terms of any applicable guideline judgment.
 3. The sentence is manifestly lenient in light of the circumstances of this case.
- [6] In an application seeking leave to appeal out of time, the following principles as set out in the Supreme Court decision of **Kamlesh Kumar v. State** [2013] factors have to be considered:
- i. The length of the delay;
 - ii. The reason for the failure to file within time;

- iii. Whether there is a ground of merit justifying the appellate court's consideration;
- iv. Where there has been substantial delay, nonetheless is there a ground that will probably succeed?
- v. If time is enlarged, will the Respondent be unfairly prejudiced?

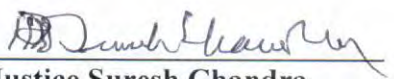
- [7] In the present instance, the sentence was imposed on 10th July 2013 and the application seeking leave to appeal is 21 days out of time.
- [8] The reasons for the delay as set out in the affidavit filed in support of the application states that the delay was due to internal administrative processes, and it is deposed that the delay is not totally excessive and that the appeal has high prospect of success given the sentencing tariff for the offence. The delay is not excessive.
- [9] The grounds of appeal focus on the leniency of the sentence meted out to the Respondents. The offences for which the Respondents were convicted were the most serious types of robbery which was as a result of home invasion at night. The tariff for such offence is 8 to 16 years (**Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) which the learned Magistrate has failed to apply.
- [10] It was submitted on behalf of the State that the seriousness of the offence outweighs the general principle of rehabilitation of first offenders and therefore the learned Magistrate have erred in law and principle in strictly applying the provisions employing section 44 of the Sentencing and Penalties Act, 2009 when sentencing the Respondents for the serious offences of Aggravated Robbery and Aggravated Burglary.
- [11] The offences were committed in a home invasion at night where the Respondents had broken into the house of the complainant, terrorized him and stolen cash amounting to \$10,000.00.
- [12] The sentences imposed by the learned Magistrate has failed to consider the established tariff and is manifestly lenient. Therefore there is merit in the grounds of appeal.

- [13] Although 5 years have gone by after the Respondents have been convicted by the learned Magistrate, the seriousness of the offences committed by them far outweigh any prejudice that would be caused to them.
- [14] In the above circumstances leave to appeal out of time is granted on the grounds of appeal adduced as they are arguable.

Order of Court:

Leave to appeal out of time on the grounds of appeal set out in the application is allowed.




Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL