

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**MISCELLANEOUS JURISDICTION**

**CRIMINAL MISCELLANEOUS CASE NO: HAM 281 OF 2014**

**BETWEEN :** **HAROON AIYAZ ALI**

*Applicant*

**AND :** **STATE**

*Respondent*

**Counsel :** **Applicant in Person**  
**Ms. S. Kiran for Respondent**

**Date of Hearing :** **3 February 2015**  
**Date of Ruling :** **5 February 2015**

**RULING**

1. This is an application for leave to appeal out of time.
2. The applicant was charged before the Magistrate Court of Lautoka with one count of Act with intent to cause Grievous Harm.
3. He was convicted after trial and was sentenced for 30 months imprisonment with 10 months suspended for a period of 2 years on 2<sup>nd</sup> September 2014.
4. This application for leave to appeal out of time was filed on 2.12.2014, 2 months out of time.
5. The applicant had not given any reason for the delay.

6. The Section 248 of the Criminal Procedure Decree provides:

(1) Every appeal shall 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 or 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.

7. 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?"
8. More recently, 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. "*

9. The applicant was not represented at the trial. The learned Magistrate had clearly stated that the applicant has 28 days to appeal. There is no complaint from the applicant that he did not receive the Judgment or Sentence. The applicant had failed to give any ground for the delay of 2 months.
10. However, considering the fact that the applicant was not represented at the Magistrate court and in this application, this court considered the grounds of appeal on sentence in order to ascertain any substantial prejudice had been caused to the applicant or there are grounds of merit justifying this court's consideration.
11. The grounds of appeal against the sentence are:

*That the Learned sentencing Magistrate erred in law in taking into account aggravating factors not recognized by law to justify an enhance of sentence.*

*That the Learned sentencing Magistrate erred in law in selecting a starting point outside the tariff guidelines for starting points.*

*That the Learned sentencing Magistrate erred in law in failing to afford me a third discount of sentence for the guilty plea to reflect*

*the time saved, the vulnerable resources of the state saved and saving the complainant from giving evidence.*

*That the Learned trial Magistrate erred in law in failing to afford me a remedy of reduction of sentence for breach of my fundamental right to have this matter determined within reasonable and undue delay.*

*That no sufficient discount was given for my past good behavior.*

*That no sufficient discount was given for been a first offender.*

*That the sentence is harsh and excessive in all circumstances of the case.*

12. In **Bae v State** [1999] FJCA 21; AAU 0015u.98s (26 February 1999) the Court of Appeal held that:

*"It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself. (**House v The King** [1936] HCA 40; (1936) 55 CLR 499)*

13. The learned Magistrate had selected a starting point of 2 years for the count following correct guide line judgments.

14. Then the learned Magistrate had identified following aggravating factors:

- (i) Mental agony under went by the complainant after the attack
- (ii) The subsequent behavior of the accused after the crime as you evaded investigators
- (iii) The pain and loss suffered by the complainant due to prolong hospitalization after the attack.

One year was added for the above.

15.The following were identified as mitigating factors by the learned Magistrate:

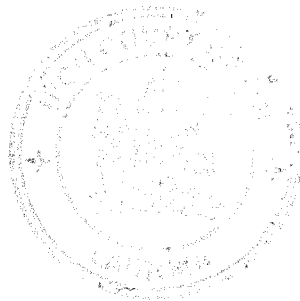
- (i) Applicant is married with two children
- (ii) Applicant is the sole bread winner of the family
- (iii) Applicant sought leniency

Six months were deducted for the above.

16.The learned Magistrate had considered the fact that the applicant was first offender and decided to suspend a part of the sentence.

17.The applicant had failed to satisfy this court that any substantial prejudice had been caused to the applicant or there are grounds of merit justifying this court's consideration.

18.Therefore the application for leave to appeal out of time is refused.



  
Sudharshana De Silva  
**JUDGE**

**At Lautoka**  
**5<sup>th</sup> February 2015**

**Solicitors: Applicant in person**  
**Office of the Director of Public Prosecutions for Respondent**