

**KAMLESH KUMAR v STATE; MESAKE SINU v STATE
(CAV0001 of 09S; CAV0001 of 10S)**

5 SUPREME COURT — APPELLATE JURISDICTION

GATES P, HETTIGE and EKANAYAKE JJ

9, 21 August 2012

10 **Practice and procedure — time limit extensions — reasons for failure to file within time — length of delay — whether there is ground of merit — probability of success — prejudice to respondent — Court of Appeal Act ss 26, 32(2), 35(2) — Supreme Court Act s 7(2) — Supreme Court Rules r 20(4), 46.**

15 The applicants applied for enlargement of time within which to bring their petitions of appeal against conviction. The first applicant's petition had been filed three years, four and a half months late, and the second applicant's petition was filed 11 months late.

Held –

20 Neither applicant had explained sufficiently the failure to proceed to the next tier court after the Court of Appeal expeditiously. In both cases, the delay is considerable. None of the grounds raised have such merit that they will probably succeed. The prejudice to the State would be considerable if time for appeal were enlarged.

Shaheed Mohammed v Reginam [1964] 10 FLR 68, followed.

25 Application for leave to appeal out of time was refused.

Cases referred to

Fernandopulle v Premachandra de Silva and Ors [1996] 1 Sri LR 70; *R v Sunderland* (1927) 28 SR (NSW) 26; *R v Williams* (1911) 6 Cr App Rep 158; *The State v Elik Mototabua* CAV0005.09 9th May 2012; *Varney v R* [1964] VR 143, cited.

30 *Josua Raitamata v State* CAV0002.07 25th February 2008; *Penioni Tubuli v State* CAV0009.06; *R v Brown* [1963] SASR 190, followed.

Petitioners in Person.

35 *M. Korovou* instructed by *Office of the Director of Public Prosecutions, Suva* for the Respondent.

S. Puamau instructed by *Office of the Director of Public Prosecutions, Suva* for the Second Respondent.

40 **[1] Gates P** Both applicants apply for enlargement of time within which to bring their Petitions of Appeal. In the case of Kamlesh Kumar, the petition had been filed 3 years and 4½ months late, and in the case of Mesake Sinu 11 months late. For convenience the court will deal with their cases in a single judgment, though their appeals had been heard and have been considered separately.

45 **[2]** Rule 20(4) of the Supreme Court Rules refers to the grant of an extension of time 'for good and sufficient cause shown'. This indulgence appears to be confined however to non-compliance with conditions of appeal or petition post lodging, and not to enlargement of time applications. Rule 46 has been thought to provide the necessary jurisdiction for the Supreme Court to permit
50 enlargement of time: *Josua Raitamata v The State* CAV0002.07 25th February 2008 at para 7. Rule 46 provides that the High Court Rules and Court of Appeal

Rules and forms prescribed apply with necessary modifications to the practice and procedure of the Supreme Court. Section 26 of the Court of Appeal Act grants the statutory power for that court to enlarge time. Though the High Court Rules do not apply to the Criminal Jurisdiction the court considered that the High Court's power to enlarge time where time prescriptions apply provided the basis for a general power for the Supreme Court to extend time: *Josua Raitamata* [supra at para 8].

[3] The Supreme Court is the final court of appeal, and the procedure, save where leave has been granted beforehand by the Court of Appeal, is by way of special leave to be sought upon petition. The decision to grant special leave to hear an appeal, whether timely or not, lies with the court. At this final level special leave could allow a late appeal in cases meeting the leave criteria of s 7(2) of the Supreme Court Act or where in a rare case there is irremediable injustice otherwise compelling the intervention of the Supreme Court: see *The State v Elik Mototabua* CAV0005.09 9th May 2012;; *Fernandopulle v Premachandra de Silva and Others* [1996] 1 Sri LR 70.

[4] Appellate courts examine five factors by way of a principled approach to such applications. Those 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 court's 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?

Reasons for the failure to comply

[5] Originally when asked at the hearing why it had taken him 3 years and 4½ months to file his appeal to this court, Mr Kumar said he had been unable to get a lawyer. He also added that he did not know how to go about the appeal. He said his fellow prisoners assisted him. Nevertheless he had filed a 6 page detailed written submission and in arguing his application he presented as an articulate person with an intelligent and ordered mind.

[6] Mr Sinu said he had been in Maximum Security and admitted frankly he had 'just left it for a while'. In view of the fact that a week after his conviction the Supreme Court judges were dismissed along with the entire judiciary and it was another 16 months before there was again a Supreme Court to hear final appeals, may appear to mitigate to some extent the delay of 11 months. In reality that is not the case. Petitioners must comply with the Rules and be prepared for hearings even if there are difficulties beyond theirs or the judiciary's control in convening courts.

[7] The rights of appeal are granted by statute within a framework of rules. Enlargement normally can only be granted because of specific powers granted to the appellate courts. No doubt because of a need to bring litigation to finality, once there is non-compliance, the courts can only exercise a limited discretion. *Viliame Caubati* AAU0022.03S 14th November 2003 at 5.

[8] In *Rhodes* 5 Cr App R 35 at 36 it was said:

'A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons.'

[9] The approach was explained shortly in *R v Brown* [1963] SASR 190 at 191:

“The practice is that, if any reasonable explanation is forthcoming, and if the delay is, relatively, slight, say for a few days or even a week or two, the Court will readily extend the time, provided that there is a question which justifies serious consideration.”

5 [10] Neither applicant has explained sufficiently the failure to proceed to the next tier court after the Court of Appeal expeditiously: *Shaheed Mohammed v Reginam* [1964] 10 FLR 68 at 70F and G.

The length of the delay

10 [11] In both cases before us, the delay is considerable, more so in that of *Kamlesh Kumar* (3 years and 4½ months late). In *Brown* (supra at p 191) the Court said:

15 ‘In the cases cited the delay ranged from a little over a month (in *R v Rhodes*(9)) to more than three months (in *R v Cullum*(10)). In *R v Marsh* (11), where the delay was about two months, the rule laid down is that, where the delay is substantial, extension will not be granted unless the Court is satisfied that there are such merits that the appeal will probably succeed.’

20 [12] In *R v Sunderland* (1927) 28 SR (NSW) 26 the Full Court of New South Wales said that ‘in view of the delay’ which was in that case of six months duration, ‘very exceptional circumstances would have to be established before the court would be justified in granting an extension’, vide also *R v Williams* (1911) 6 Cr App Rep 158 cited in *Varney v R* [1964] VR 143 at 144.

25 Whether Grounds Meritorious?

[13] Kamlesh Kumar told the court he was not involved in any violence. He had no intention to commit the offence, apart from the robbery. At the time of the knifing by one of his Co-Accused, he said he was in the deceased’s van looking for money. He was not part of any joint enterprise to assault the victim, he said.

30 [14] However the Summary of Facts in the High Court Proceedings gave the following account of what happened when the 3 Accused had hired the deceased’s van to take them from Lautoka to Nadi.

35 ‘At Nadi the accused (Kamlesh Kumar) and his friends directed the deceased to follow Bila Road before Saunaka Road junction. About 25 chains into Bila Road the deceased was told to stop. He was then forcefully pulled out of the driver’s seat and demanded with money. The deceased then ran away but was caught and punched repeatedly.

40 The accused (Kamlesh Kumar) then struck the deceased on the head with a cross-shaped wheel spanner from the vehicle whilst his two friends held both hands of the deceased.

The deceased was then dragged into a cane field and stabbed repeatedly with a penknife. The accused and his two friends left the deceased there in the cane field and drove off in his van registration number CF037.’

45 ‘The accused (Kamlesh Kumar) confessed to the killing of the deceased when interviewed by police.’

[15] At the High Court trial Kamlesh Kumar pleaded guilty to a single count of murder. After the Summary of Facts was tendered he [as Accused 1] agreed with those facts. The court said:

50 ‘On his own plea and subsequent upon his agreement with the Facts, I convict Accused 1 of murder as charged.’

[16] At all times during his trial, Mr Kumar was represented by counsel. He was sentenced to the mandatory term of life imprisonment. However the learned judge acceded to counsel's plea not to fix a non-parole period. In doing so his lordship was lenient since the murder was shocking, unnecessary for the purposes of robbery, and brutal.

[17] The applicant's record of events now may be the result of the passage of time upon his memory. Set against the court record, it is implausible.

[18] The initial grounds of appeal to the Court of Appeal were confused. They referred to lack of representation which was not correct, the inadmissible evidence (unspecified), and a failure to sentence taking into account the plea and mitigating factors.

[19] Unsurprisingly, the then President of the Court of Appeal dismissed the appeal under s 35(2) on the ground that there was no right to appeal. There was no right of appeal against conviction on a guilty plea nor against a mandatory term of imprisonment.

[20] The applicant in his petition for special leave to this court purported to raise numerous grounds, not raised in the court below. Such an approach will not find favour with this court unless the omitted ground is compelling and meets the criteria for special leave of s 7(2). The court finds nothing compelling, or of that category, in the informal petition.

[21] Ward P did not specifically set out the grounds for dismissal under s 35(2). The sub-section reads:

(2) "If on the filing of a notice of appeal or of an application for leave to appeal, a judge of the court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal."

[22] In effect His Lordship found the appeal to be vexatious or frivolous and bound to fail. In *Penioni Tubuli v State* CAV0009.06 per *Mason, French and Weinberg JA* this court held:

"As it is clear that an appeal may lie to this Court against a decision of dismissal under s S35(2), it is not only desirable, but necessary, that the Judge exercising that power of the Court of Appeal make clear the basis upon which it was exercised. If an appeal is being dismissed as vexatious or frivolous then there should be a short statement of the reasons for that characterization. If an application for leave to appeal out of time is refused, as appears to have been the case here, or that it is out of time and leave has not been sought, or it does not involve a question of law only, that should be made clear."

[23] Guidance was given at page 26 on the extent of reasoning that should accompany such an order:

"Reasons need not be extensive. Half a page statement will be sufficient. The unsuccessful appellant should be given an opportunity to understand why the appeal was dismissed and to consider whether there is any basis upon which a special leave application may be made to the Supreme Court,. Failure to provide reason is itself not a ground of granting special leave where such grounds do not identify any error of the High Court nor adoption or acceptance by the High Court or any error apparent from the Magistrate's decision."

[24] None of the grounds raised have such merit that they will probably succeed.

Prejudice to Respondent

[25] Clearly the prejudice to the State if time for appeal were enlarged would be considerable. Whilst that involved no consideration of the prosecution's ability to call its case again, there is no evidence either of an unfair trial or of
5 meritorious grounds demanding such consideration. Kamlesh Kumar's application for enlargement of time lacks merit and must be refused.

Mesake Sinu

[26] The matter that was troubling the applicant Mesake Sinu was not to do
10 with the grounds filed. It was to do with the calculation of the effective total number of years to be served in prison from the combined effect of the instant case and of several others. Calculation of the total term of several warrants is an administrative matter for the Commissioner of Prisons and his staff.

[27] However the court prevailed upon Ms Paumau who appeared for the State
15 to work with the Corrections Department to resolve the warrants dispute. It is to be hoped that the truth of the matter as discovered will find general acceptance.

[28] On 1 February 2007 Mr Sinu had pleaded guilty to all charges in four cases. They consisted of a series of robberies with violence. The robberies were carried out by groups of men including Mr Sinu in balaclavas armed with cane
20 knives, bottles, stones, and in one instance with pinch bars and iron rods. They involved home invasions at night and in one case a bold attack on a roadside resort on the Coral Coast. Some violence was meted out. Monies and jewellery were stolen. The applicant had a bad history of offending and could expect no discount in sentencing.

[29] The offending could be described as a spate of robberies. The applicant
25 was sentenced to 10 years on each count concurrent to each other but consecutive to an earlier sentence [No 640/05]. The sentences were made concurrent to all other terms now serving. The applicant accepted that his sentences in many respects were lenient for these highly unpopular robberies. His argument was that
30 the Prisons Department calculations had made the 10 year terms consecutive to yet another term. It is to be hoped this misunderstanding will be resolved. The court is grateful for Ms Paumau's offer to assist.

[30] The application to enlarge time lacks merit. There was no unfairness in the
35 High Court proceedings or in the decision of the Court of Appeal. The grounds such as they are, do not meet the criteria for leave and Mr Sinu's application for enlargement also must be refused.

Hettige J I agree.

40 **Ekanayake J** I agree.

Application refused.

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