

IN THE SUPREME COURT OF FIJI
CRIMINAL APPELLATE JURISDICTION

[Petitioner for Special Leave to Appeal
No. CAV0013/2013]
(Criminal Appeal No. AAU0095/2008)

BETWEEN : AKUILA DROMODOLE

Petitioner

AND : THE STATE

Respondent

CORAM : Hon. Chief Justice Anthony Gates, President of the Supreme Court
Hon. Mr. Justice Sathya Hettige, Justice of the Supreme Court
Hon. Madam Justice Chandra Ekanayake, Justice of the Supreme Court

COUNSEL : Petitioner in person
Mr. S. Perera for the Respondent

Date of Hearing : 6 August 2014

Date of Judgment : 19 August 2014

JUDGMENT OF THE COURT

Sathyaa Hettige, JA

- [1] This is an application for leave to appeal against the Ruling by a single Judge of the Court of Appeal dated 04th May, 2012 dismissing the application for leave to appeal under section 35 (2) of the Court of Appeal Act on the basis that all the grounds of appeal lacked any merit whatsoever and had no chance of success.
- [2] The petitioner was charged on an Amended Information dated 18th March 2008 with three other accused before the High Court at Suva for one count of Robbery with violence contrary to section 293 (1) (b) of the Penal Code Cap.17 for robbing the MH Superfresh Supermarket on 7th day of July 2007 at Samabula in the Central Division of \$21583.73 cash and immediately before the petitioner and other accused threatened to use personal violence on the cashiers and customers at the MH Superfresh Supermarket at Tamavua.
- [3] After trial before the High Court the assessors by a majority decision found the petitioner guilty of the offence and on the 10th of September 2008 the petitioner and other three accused were convicted of the offence as charged, by the High Court Judge. On 15th September 2008 the petitioner was sentenced to a term of 14 years imprisonment and the third and the fourth accused were also sentenced to a term of 14 years and the first accused was sentenced to a term of 13 years. The fourth accused's sentence of 14 years of which 5 years was made concurrent and 9 years was made consecutive to the existing sentence of imprisonment. There was no minimum sentence imposed on all the accused including the petitioner by the learned High Court Judge.
- [4] It is prescribed by law that the maximum sentence for Robbery with Violence is life imprisonment. However, the learned High Court Judge started with a sentence

of 12 years imprisonment and added 5 years in view of the aggravating factors involved and reduced 2 years for mitigating circumstances and one year for the period the petitioner spent in remand making it a total term of 14 years imprisonment.

[5] Being aggrieved by the said order of the trial court the petitioner filed a leave to appeal application in the Court of Appeal by a letter dated 29th November 2009 which was received in the Court of Appeal registry on 2nd December 2009 addressed to the Registry of the Court of Appeal against the conviction seeking that conviction be set aside and the case be sent back to the High Court for re-trial.

[6] The appeal of the petitioner was heard by a single Judge of the Court of Appeal and was dismissed under section 35(2) of the Court of Appeal Act on 4th May 2012 on the basis that the grounds of appeal of the petitioner were vexatious, frivolous and lacked any merit and had no chance of success.

[7] The petitioner filed the present application for special leave to appeal in the Supreme Court by a letter dated 25th of February 2013 which was received in the Registry of the Court on 5th of April 2013 against the Ruling of the single Judge of the Court of Appeal after 8 months and 10 days after the prescribed time limit within which the leave to appeal application should have been filed. In terms of section 6 (a) of the Supreme Court Rules an appeal must be filed within 42 days of the date of the decision from which the special leave to appeal is sought.

[8] Before I deal with the grounds of appeal filed by the petitioner it is pertinent to outline briefly the facts of the case.

OUTLINE OF BRIEF FACTS

- [9] On the 7th of July 2007 at about 5 p.m. the petitioner (second accused in the original case) with three other accused stormed into the MH Superfresh Super Market at Tamavua masked and armed with empty beer bottles, knives and a pinch bar. The Supermarket was full of customers, mostly women and children because it was a Saturday. All the cashiers at the Supermarket were women. The accused started breaking the bottles and throwing them at the cashier area threatening the customers and the employees of the Supermarket to get down. The people were terrified. The robbers ran out and made their getaway in a minivan that was parked outside at the exit door of the Supermarket. The robbers took away with them about six cash register tills which had cash takings amounting to about \$21,000.00. Some customers who were at the counters were also robbed of their cash and personal effects including mobile phones and jewellery.

THE GROUNDS OF APPEAL

- [10] The petitioner's letter dated 25th February 2013 which was received in the Court of Appeal registry on 5th of April 2013 contained 3 grounds of appeal.

i) *Original documents* - The prosecution produced only photocopies of the documents and failed to prove original document at the trial court. The petitioner also complains that the court failed to grant an adjournment of the case till the arrival of the Investigating Officer who was serving in Sudan to locate the original document. The petitioner alleged that no diligent search was made to locate the original document.

ii) *Confession* - The petitioner complained that the confession obtained through police interrogation had no probative value. The court should have rejected the confession for a fair trial.

iii) *Defence* - the petitioner was denied the right of preparing the defence before the trial. All the disclosures were handed over to the Legal Aid Commission on the advice of the court. However, The disclosures were returned and the request for legal assistance was refused.

[11] With regard to the complaint of the petitioner that the original document on the caution interview evidence was not proved. It seems that the petitioner's allegation on the admissibility of the photocopy of the cautioned interview statement is based on the use of alleged assault and oppressive conduct by the police and the record of the interview statement was only a photocopy which should not have been admitted into evidence without the original document being proved.

[12] However, it is pertinent to state that the principle espoused on the photocopy evidence in the case of **R. v Vincent Lobendahn** (1972) 18 FLR 1 is relevant.

In the above case the court considered as to whether the photocopy of a cautioned interview was admissible in a case as evidence against the petitioner.

The trial judge stated in the instant case that he was satisfied beyond reasonable doubt that the original statement made by the petitioner was lost and a true and a faithful copy was admissible in the respondent's possession. The trial Judge further said that he was satisfied that a diligent search for the original document had been conducted by the police and held the photocopy was admissible in evidence.

[13] It is relevant to note that in paragraph 26 (Page 36 of the SC record) of the case record the trial Judge by referring to the sworn testimony of Cpl. Ana Vuniwaqa in his Ruling has said as follows:

"The State called Cpl. Ana Vuniwaqa. Cpl. said in July 2007 she was based at Samabula Police Station. She provided administrative support for the Strike Back Unit. She typed and photocopied hand recorded caution statements of the accused persons. She photocopied the statements from the originals and placed

them in a folder. The originals were kept by the Investigating Officer who was currently on an overseas mission. She searched for the originals but could not locate them. She conducted her search in the exhibit room and the lockers at the Samabula Police Station. Constable Maria assisted her to search for the documents. The Originals are missing.”

[14] On a perusal of the Ruling by the trial Judge it can be seen that the trial Judge has further said the witness has further testified saying that she was the one who made the photocopies and the statements were the true copies of the originals.

[15] The factors to be considered in order to admit a photocopy of the cautioned interview statement were clearly laid down in the above case of **Lobendahn** (supra) which are reproduced below.

- “i) The prosecution must prove that the original formerly existed which would have been admissible in itself;*
- ii) that the copy tendered is a true and faithful reproduction of the original;*
- iii) that the original must be proved to have been lost or destroyed;*
- iv) If lost, that a diligent search was conducted;*
- v) That it must be shown as to what happened to the original up to the time when it was lost and the original was kept safely before it was photocopied and a copy made from it.”*

[16] Having considered the above position it can be seen that sufficient and sworn evidence had been adduced to establish before trial court that the photocopy of the cautioned interview statement was a true and faithful reproduction of the original and therefore, I do not find any error in the Ruling and the ground of appeal that the original document was not proved as alleged by the petitioner fails due to lack of merit and should be dismissed.

[17] Now I will deal with the 2nd and 3rd grounds of appeal together. The second ground that the confession should have been rejected by the trial Court for a fair trial. The 3rd ground was that the petitioner was denied of his right of preparing for his defence.

[18] In the trial court, the petitioner had given evidence and testified that the police fabricated the statement and his signature was forged and the police officers assaulted him and subjected him to inhumane treatment in the cell after their arrest. However, the evidence of police officers shows that that the cautioned interview statement was given freely and voluntarily and police officer correctly recorded what the petitioner said.

[19] The petitioner was arrested by police on 26th July 2007 at 10 am. The interview had commenced at 11.30 a.m. on the same day at Samabula Police Station. The evidence shows that the interview was conducted by DC Alipate Matai and was witnessed by D/Cpl. Viliame Sovalevu. In his interview the petitioner admitted that he was involved in the MH Superfresh Super Market robbery. He described in detail how the robbery was carried out and how he brought one cash register till out from the super market. It can be seen from the evidence that the petitioner assisted the police in the recovery of cash register tills. The police advised the petitioner of his right to silence and to consult a lawyer or a family member to be present during the interview. The petitioner waived his right to legal representation. (see page 186 of the SC case record.)

[20] In the trial court at the voire dire the prosecution witnesses the petitioner and other accused persons gave evidence. The petitioner testified and complained of severe beating by the police. However, the police officers denied any form of assault, intimidation or

oppression. It must be stated that whether the confession was made voluntarily is a question of law to be determined by the trial Judge at the voire dire trial.

[21] The trial court Judge was satisfied beyond reasonable doubt, having considered the demeanor of the witnesses and evidence, that the caution interview statement was obtained voluntarily and not by unfairness and oppression. There was no threat or assault made to the petitioner by the police.

[22] In my view none of the grounds relied on by the petitioner has any merit and I do not find any error in the Ruling of the Court of Appeal delivered by the single Judge and therefore I dismiss all the grounds of appeal submitted by the petitioner.

The Extent of Ruling Under Section 35(2) of The Court of Appeal Act

[23] The petitioner was unsuccessful in the Court of Appeal as the single Judge of the Court of Appeal had refused the leave to appeal application on 4th May 2012 under section 35(2) of the Court of Appeal Act due to lack of any merit in the grounds of appeal of the petitioner.

[24] It is also pertinent to consider the extent of section 35(2) of the Court of Appeal Act at this stage. The power given under section 35(2) of the Act is one exercisable only where it appears from the notice of appeal that the appeal is vexatious, frivolous or bound to fail as there is no right of appeal or right to seek leave to appeal. The following judgment decided in Fiji has considered and explained the extent of section 35(2) of the Court of Appeal Act.

[25] In Simione Raura CAV0010.2005 decided on 4th May 2006 it was held as follows:

"In our opinion the power given by this sub-section is one generally intended to be exercised in a summary way on a consideration of the notice of appeal. It is a power exercisable only where and when it appears from the notice of appeal 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. These are the pre-conditions for the exercise of the power. The power enables a judge to terminate an appeal without a hearing and without prior notice to the petitioner, and for this reason it is a power that should be used sparingly and only in cases where one of the pre-conditions is plainly met. In Sashi Suresh Singh v. Reginam (1983) 29 FLR 86 at 88 a like view expressed by the Court of Appeal about a similar statutory provision. That decision also demonstrates that an appeal may lie from an Order of dismissal if one of the pre-conditions for the exercise of the power is not met."

Special Leave to Appeal

[26] The petitioner by his letter dated 25th February 2013 which was received in the Court of Appeal registry on 5th of April 2013 initiated a special leave to appeal application with three grounds of appeal which can be treated as an application for special leave from the Supreme Court challenging the Ruling of the single Judge of the Court of Appeal dated 4th May 2012.

JURISDICTION OF THE SUPREME COURT

[27] It seems that the petitioner's application to the Supreme Court seeking leave is also an application for enlargement of time for leave to appeal as the petitioner's application dated 25th February 2013 is out of time by 8 months and 10 days after the appealable period lapsed.

[28] Supreme Court derived jurisdiction to deal with special leave to appeal application under section 8 (2) of the Administration of Justice Decree of 2009 which provides as follows:

“An appeal may not be brought from a final judgment of the Court of Appeal unless:

a) The Court of Appeal gives leave on a question certified by it to be of significant public importance; or

b) The Supreme Court gives special leave to appeal”.

Section 98 (3) of the present Constitution of 2013 provides for exclusive jurisdiction of the Supreme Court to deal with and determine appeals.

[29] The petitioner in this case appears to have filed this appeal under section 7(2) of the Supreme Court Act which reads as follows:

“In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless:

(a) A question of general legal importance is involved ;

(b) A substantial question of principle affecting the administration of criminal justice is involved; or

(c) Substantial and grave injustice may otherwise occur.”

[30] The threshold criteria as encapsulated in Section 7(2) of the Supreme Court Act as mentioned above needs to be complied with in order to be entitled to obtain leave to appeal.

[31] The above provisions in section 7(2) requires this court to be satisfied that one or more of the criteria set out therein is made out before special leave to appeal is granted. In Dip Chand -v- State CAV 0014/2012 (9th May 2012) the Supreme Court held in paragraph 34 that:

(27) “Given that the criteria set out in section 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent, and special leave to appeal is not granted as

a matter of course, the fact that the majority of the grounds relied upon by the petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the petitioner of crossing the threshold requirements for special leave even more difficult.”

[32] In paragraph 36 of the judgment in **Dip Chand** case (supra) Supreme Court further said that:

“The Supreme Court has been even more stringent in considering the applications for special leave to appeal on the basis of grounds of appeal not taken up or argued in the Court of Appeal. In Josateki Solinakoroi –v- The State Criminal Appeal No.CAV0005 of 2005 the Supreme Court of Fiji in an exceptional case took into consideration the principles developed by (the) Privy Council in similar situations and in particular relied on the following observation In Kwaku Mensah –v- the King(1946) AC 83:

“Where a substantial and grave injustice might otherwise occur the Privy Council would allow a new point to be taken which had not been raised below even when it was not raised in the petitioner’s printed case.”

[33] On 6th August 2014 when this matter was heard before this court the petitioner filed his written submissions with new grounds of appeal which had not been taken up in the Court of Appeal. The new grounds of appeal were on the basis that the petitioner did not receive a fair trial in the trial court by reason of the failure of the prosecution to furnish disclosures of the witness statements and voire dire disclosures and the trial Judge’s failure to adjourn the case in order to read, study and familiarize himself with the bundle of disclosures before the hearing.

[34] However, this court refused to allow the petitioner’s new grounds of appeal and allowed the written submissions filed by the petitioner on the hearing day on the grounds of appeal already submitted to court by the letter dated 25th February 2013.

LENGTH OF THE DELAY

- [35] By referring to some of the authorities both local and from other jurisdictions it can be explained how the courts have considered the length of delay when filing appeals.

In **Queen v Brown** (1963) SASR at page 191 (Napier CJ, Millhouse and Hogarth JJ) the court observed that *“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 there is a question which justifies serious consideration. But, whilst that is so, petitioners are expected to act promptly”*.

- [36] Section 6(a) of the Supreme Court Rules has specifically stated that the time frame within which a petition and affidavit has to be filed by an aggrieved party against the decision of the Court of Appeal when seeking special leave to appeal. Section 6 of the Supreme Court Act provides as follows:

“A petition and affidavit in support must

a) be lodged at the court registry within 42 days of the date of the decision from which special leave to appeal is sought;...”

- [37] The Ruling of the single Judge of the Court of Appeal was delivered on 4th May 2012 and the 42 days period granted by Supreme Court Rules lapses on 15th June 2012. The petitioner's letter dated 25th February which was received by the court registry on 5th of April 2013 initiating a leave to appeal was filed 11 months after the delivery of the Ruling of the Court of Appeal.

- [38] The petitioner failed to explain the delay in filing the late appeal and no reasons whatsoever have been given to court.

[39] It can be seen from the petitioner's application seeking leave that a relief is also sought by the petitioner for enlargement of time to appeal. The court has already considered the petitioner's application for leave on the grounds of appeal already submitted to court as there was no relief sought for enlargement of time on the face of the appeal papers filed.

ENLARGEMENT OF TIME

[40] In this case the petitioner is not directly seeking enlargement of time to appeal. However, it is important to state that the petitioner's application initiating an appeal is filed on the 5th of April 2013 out of time. In view of the circumstances specifically the fact that the petitioner was unrepresented the court considered the petitioner's application as one to be treated as an enlargement of time application as well.

[41] Rule 20(4) of the Supreme Court Rules deals with extension of time "*for good and sufficient cause shown*". However, it must be stated that extent of application of the above provision in section 20(4) of the Rules is limited to non-compliance of conditions of appeal petition post lodging, and not to enlargement of time applications.

[42] In the case of **Josua Raitamata v The State** CAV0002.07 the court observed that Rule 46 of the Supreme Court Rules may confer the required jurisdiction on the Supreme Court to deal with enlargement of the time applications.

Rule 46 of the Supreme Court Rules reads as follows:

"The High Rules and the Court of Appeal Rules and the forms prescribed in them apply with necessary modifications to the practice and procedure of the Supreme Court."

[43] It is relevant to emphasize and state that even though there is no direct and specific provision conferring jurisdiction on the Supreme Court in the Supreme Court Rules the Rule 46 thereof and the inherent power of the Supreme Court can be made use of to permit and deal with enlargement of time applications where in an exceptional case the Supreme Court's intervention is needed being the apex court in the country.

[44] In the case of **Kamalesh Kumar v The State** Crim. App. No.000/09 decided on 21st August 2012 the petition was filed 3 years and 4 1/2 months late and in the case of **Mesake Sinu v The State** Crim. App. No. 0001 of 10 decided on 21st August 2012 the court observed that there are five factors to be examined by way of a principled approach to enlargement of time applications :

- (i) *The reason for the failure to file within time.*
- (ii) *The length of the delay*
- (iii) *Where there is a ground of merit justifying the appellate courts' consideration.*
- (iv) *Where there has been a substantial delay, nonetheless is there a good ground of appeal that will probably succeed?*
- (v) *If time is enlarged, will the respondent be unfairly prejudiced?*

[45] In the present case before us the petitioner failed to file his leave to appeal application within the appealable period of 42 days from 4th May 2012 on which the Ruling was delivered dismissing his appeal.

[46] The petitioner's letter initiating an appeal filed in the Supreme Court on 5th April 2013 is 8 months and 10 days late after the appealable period of 42 days. It is a substantial period of delay which has not been explained and no reasons for the delay whatsoever has been given by the petitioner.

- [47] It has been observed time and again in several judgments in enlargement of time applications that the difficulties encountered by a litigant without legal advice to formulate the grounds of appeal should not be a basis to set aside the statutory requirements and the Rules of court. (see **Josua Raitamata v State** (2008) FJSC 32: CAV0002.2007)
- [48] In **Julien v Miller** Crim. App. AAU0076 of 2007 decided on 23rd October 2007 where the delay was 12 and half months Justice John Byrne observed that “ *The courts have said time and again that the rules and time limits must be obeyed, otherwise the lists of the courts would be in a state of chaos. The law expects litigants and would be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned, within the time prescribed by the relevant legislation.*” (emphasis added)
- [49] “*When the time prescribed by the Act has expired the party convicted has lost his right of appeal, and it is for the court to say whether, taking all the circumstances into account, it is in the interests of justice he should be permitted to institute and pursue his appeal. Thisis the rule and practice of the Court of Criminal Appeal in England.*” (See **R.v Rhodes** (1910) 5 Crim. App.R.35 p. and **R v Cullum** (1942) Crim. App. R.150 p.
- [50] In the present case before this court the delay is 8 months and 10 days after the appealable period which has not been explained and no reasonable explanation was forthcoming with regard to the delay. Therefore this court is unable to accept the arguments contained in the written submissions of the petitioner.

[51] It is pertinent to state that in the grounds of appeal for enlargement of time and leave to appeal there is no question of law which justifies any serious consideration by the Supreme Court. It was apparently clear that the letter initiating the appeal and the written submissions of the petitioner lack any merits. It must be stated in fact, the petitioner had been given sufficient opportunities to retain the services of any Attorney or Legal Aid Commission. But the petitioner seems to have waived the right given to him by court in regard to the issue of legal representation. We strongly observe that the petitioner has completely disregarded the appellate process contained in the Supreme Court Rules when filing Appeal papers. The failure to observe the rules of the Supreme Court is fatal and cannot be permitted by Court.

[52] It can be seen from the observations made by Griffiths LJ In **CM Van Stillevoeldt BV v EL Carriers Inc.** (1983) 1 WLR 207 at page 212 the court has an unfettered discretion in deciding whether or not to grant the leave out of time. That is the well settled legal position.

[53] In **Revici v Prentice Hall Incorporated and Others** (1969) 1 ALL E. R .772 Lord Denning M.R.at page 774 has said: (EDMUND DAVIES, L.J. and WIDGERY, L.J. agreed)

“.....Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not. (I should imagine it was considered)Moreover, (and this is important) not a single ground or excuse is put forward to explain the delay and why he did not appeal. The plaintiff had 3/1/2 months in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time anymore”.

[54] We also observe that there does not seem to be any legal issue contained in the grounds of appeal for this court to consider. In the petitioner's case the grounds of appeal urged have not met the threshold criteria laid down in section 7(2) of the Supreme Court Act 1998 and therefore the petitioner is not entitled to any relief from this court.

CONCLUSION

[55] In the circumstances, this court is inclined to conclude that there is no question of general legal importance involved in the matter. Nor is there any substantial question of principle affecting the administration of criminal justice. We also conclude that there is no substantial or grave injustice that would otherwise occur.

[56] It is manifest to state that the petitioner has failed to establish any of the threshold criteria contained in section 7 (2) of the Supreme Court Act in his application for enlargement of time and leave to appeal.

[57] In the circumstances we are of the considered view that the petitioner's application for leave and time enlargement should be dismissed.

[58] Accordingly this court makes the following orders.

ORDERS:

(1) Petitioner's application is dismissed.

(2) Ruling of the Court of Appeal dated 4th May 2012 is affirmed.

Anthony Gates , President

I agree with the Judgment and the reasoning of Hettige JA.

Ekanayake, JA

I agree with the Judgment and the reasoning of Hettige JA.



Hon. Chief Justice Anthony Gates
President of the Supreme Court

Hon. Mr. Justice Sathya Hettige
Justice of the Supreme Court

Hon. Madam Justice Chandra Ekanayake
Justice of the Supreme Court

Solicitors:

Petitioner in person.

Office of the Director of Public Prosecutions for the Respondent.