

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Miscellaneous No. HAM 35 of 2008

Between : **ERONI QIO KOMAI** Applicant

And : **STATE** Respondent

Date of Hearing : 20th March 2009

Date of Judgment: 31st March 2009

Counsel : Applicant in person
Mr. L. Sovau for the Respondent

JUDGMENT

Leave to appeal out of time

1. This is an application for leave to appeal out of time. The appellant was convicted for multiple offences on 1st November 2007 and sentenced to one year imprisonment on 21st November 2007. He was already serving a four year prison sentence. This application for leave to appeal out of time is dated 9th February 2008.

2. His explanations for delay beyond the 28 days period for appeal is that he had lodged his application immediately after conviction and handed it to the reception officer to type and forward it to the court registry. He says the reception officer misplaced the application and did not inform the appellant until earlier this year. There is no confirmation of this from the reception officer nor a denial either.
3. Given the circumstances, I shall grant leave to appeal out of time to appeal and accept the grounds as contained in the letter dated 9th February 2009. The prosecution has not pointed out any prejudice which the grant of application may cause.

Records not complete

4. The records from Nadi Magistrates Court were not completed. They only included the various details of mention dates, the evidence of witnesses, mitigation, sentencing remarks and judgment.
5. The grounds of appeal, the charges and interview notes and charge statement and the list of previous convictions did not form part of the record as they should. The court had to look through the Magistrates Court file to find them. In the event of an appeal to Court of Appeal the record of High Court file would not tell the total story as the excluded documents and evidence would not be there. I urge upon the magistrates to compile a full record as it speeds up hearing of appeals.

6. The grounds of appeal were first that the appellant was prejudiced by lack of legal representation. On this ground the appellant tried to argue that he was not informed of his right to counsel. However, the Magistrate's Court record show the appellant was reminded about the right to counsel. I believe the Learned Magistrates busy as they are did not write everything she told the appellant. Some Magistrates write the full explanation in that they note that accused is informed of right to counsel, to use services of legal aid or represent oneself. This practice leaves no room for doubt on appeals.
7. In the present case, the appellant I believe elected to represent himself. The state submitted that the appellant was no stranger to courts. He had previous convictions so he would not be prejudiced as he would be familiar with procedural matters.
8. The above is a debatable proposition because if in all one's previous appearances in court, a person has pleaded guilty and was convicted, he/she is hardly likely to know the intricacies of procedure.

Unrepresented accused – need for advice

9. Whether or not there was prejudice can be assessed from the copy of court record. The records disclose that the appellant did not put any questions to any witness even though they were giving incriminating evidence including the police officers who interviewed him. The interview notes contained a confession yet he asked no questions.

10. When the appellant gave unsworn evidence he made allegations of assault against the police at the time of obtaining of the statement. The effect of such allegations is that one is challenging the admissibility of the confessions. The right to a fair trial is an accused's constitutional right: Section 29(1) of the Constitution. A right to counsel is generally considered an essential constituent of the right to a fair trial. It is for the courts to ensure that an accused receives a fair trial. When a trial proceeds with the accused being unrepresented, a duty rests upon the magistrate to give the accused such advice and information as is necessary to ensure the fairness of a trial: **McPherson v The Queen** (1981) 147 CLR 512. This may impose certain burden on a trial magistrate but it is a duty one cannot ignore.
11. This might require at an early stage that the accused be told of the course the trial will take, the accused's right to cross-examine witnesses and the right to call witnesses. Alternatively the court ought to draw the attention of the accused to matters or options as they arise during the course of trial. The accused ought to be told that he ought to cross-examine witnesses or put questions to them where he does not agree with their evidence especially if it is incriminating material evidence.
12. In case of confessions, the accused ought to be told that only voluntary confessions can be admitted and if for any reason he considers that his confession is not voluntary, then he must put questions to that effect to the witnesses. Without advice the accused is likely to remain ignorant of the fundamental procedure or right, which if invoked, could prove of advantage to him. Simply telling the accused of the right to counsel does not cover for

eventualities as stated above where the accused continues to remain unrepresented.

13. In the present case, the absence of timely advice or information may well have resulted in the accused not asking questions of the witnesses and not challenging the admissibility of the interview notes and charge statements. The lack of advice proved detrimental to the accused. The accused was therefore prejudiced. The accused also did not ask questions of the only witness who identified him. This again perhaps was due to lack of advice.
14. Accordingly I allow the appeal and set aside the conviction. Given the serious nature of offending and the fact the matter is not too old I order a retrial before a different magistrate. The accused is to remain in custody and to appear before Nadi Magistrates Court on 17th April 2009.

[Jiten Singh]
Judge

At Lautoka
31st March 2009.