

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Miscellaneous No. 007 of 2009

BETWEEN:

THE STATE

Applicant

AND:

RAKAI VATUKATAKATA

Respondent

Counsel: Mr. M. Korovou for State
Respondent in Person

Date of Hearing: 28 August 2009
Date of Ruling: 31 August 2009

RULING

- [1] The State seeks an enlargement of time to appeal against acquittal of the respondent in the Savusavu Magistrates' Court on a charge of unlawful possession of an illicit drug. The application is supported by an affidavit from Sergeant Viliame Sogari, Divisional Prosecuting Officer (Northern).
- [2] The right of appeal is statutory. Section 310(1) of the Criminal Procedure Code provides that an appeal to the High Court from a decision of the Magistrates' Court shall be lodged within twenty eight days of the date of the decision appealed against.

If the statutory appeal period of twenty eight days has expired, the Magistrates' Court or the High Court has discretion to enlarge the period of limitation, for good cause.

Good cause includes:

- (a) a case where the legal practitioner engaged by the appellant 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 is required by virtue of section **308**;
- (d) the inability of the appellant or his legal practitioner 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 therefore. (see, s. 310(2)).

[3] Good cause for the late appeal is not the only factor to be considered in this type of application. The merits of the appeal, the practicality of the remedy sought and the prejudice to the opponent are other relevant factors to be considered (***State v Patel [2002] FJCA 13***).

[4] The respondent was acquitted on 26 February 2009. The appeal should have been filed by 26 March 2009. The application for an extension of time was filed on 21 July 2009. The length of delay is about four months. A number of reasons have been advanced for the late appeal.

[5] On 27 February 2009, Sergeant Sogari made a request for a copy of the written decision of the Magistrates' Court acquitting the respondent. A copy of the decision was made available to the police prosecution office on 30 March 2009, by which time the appeal period had expired.

- [6] Since the appeal was against an acquittal, a written sanction of the Director of Public Prosecutions was required under section 308(1) of the Criminal Procedure Code. The Office of the Director of Public Prosecutions learnt about the Magistrates' Court decision on 1 April 2009. The Office of the Director of Public Prosecutions sought further information from the police prosecution office but the information was not made available until 27 April 2009 because the police prosecutor was on leave. Meanwhile, on 10 April 2009, the position of the Director of the Public Prosecutions became vacant. Upon the appointment of an Acting Director of Public Prosecutions, a written sanction was signed on 24 June 2009, and the application for an extension of time was filed on 21 July 2009.
- [7] Whilst inability to obtain the court record may constitute good cause for the late filing of an appeal, the party appealing a decision must demonstrate that the appeal could not have been filed without citing the decision appealed against. In this case, the State waited for a month to obtain the decision of the learned Magistrate. However, when the decision to acquit the respondent was delivered, the State was represented by a police prosecutor. The police prosecutor must have made notes of the reasons for the acquittal and the State could have easily formulated the grounds of appeal using those notes. In any event, even after receiving the decision, the State further delayed the filing of appeal, to seek further information from the prosecutor. By the time the information was made available, the position of the Director of Public Prosecutions became vacant. When a written sanction was eventually signed by the new Director on 24 June 2009, the State took another one month to file the appeal. There is no suggestion that the appeal presents a question of law of unusual difficulty.
- [8] The grounds advanced for the appeal are:
- (a) That the trial Magistrate erred in law when he failed to consider or entertain a part-heard trial.

- (b) That the learned magistrate failed to exercise his discretion judiciously by refusing to proceed to hearing on the available prosecution witnesses.
- (c) That the learned Magistrate erred in law when he invoked section 210 of the Criminal Procedure Code to acquit the Respondent.

[9] The grounds of appeal can be summarized into one main compliant. The complaint is that the learned Magistrate did not exercise his discretion judicially in refusing to hear the case part-heard because of the unavailability of the government analyst as a witness for the prosecution. No evidence has been led to show that the government analyst was summoned by the prosecution to appear as a witness in the trial and that she failed to obey the subpoena.

[10] The respondent opposes the application for extension of time to appeal. He submits the offence is more than two years old and that he attended all court hearings. He further submits there were other adjournments granted to the prosecution and that the delay has caused anxiety to him and his family.

[11] Granting of an adjournment requires the exercise of a judicial discretion by the trial Magistrate. An appellate court will be slow to interfere with the discretion of the trial Magistrate unless the result of the order made by the Magistrate is to defeat the rights of the parties' altogether or to do injustice to one party or the other party (**Macahill v R [1980] AAU 43/80**).

[12] If an adjournment is refused, the trial Magistrate must invite the prosecution to call evidence, and if no evidence is called, then the accused can be acquitted under section 210 of the Criminal Procedure Code (**DPP v Vikash Sharma & Ors (1994) 40 FLR 234**).

[13] In this case, the learned Magistrate refused to hear the case part-heard because of unavailability of a prosecution witness. Some witnesses were present and the prosecution was ready to call evidence. But realizing the case will be adjourned to a later date because of the unavailability of the government analyst as a witness for the prosecution, the learned Magistrate refused to hear any evidence and proceeded to acquit the respondent.

[14] It appears the learned Magistrate failed to abide by the procedure laid down in the case of **DPP v Vikash Sharma & Ors** (supra) and therefore he fell in error. I am satisfied there are merits in the appeal.

[15] The question is whether the substantive appeal should be further delayed to file the court record in light of the concern raised by the respondent about the delay. To avoid further delay and potential prejudice to the respondent arising from the delay, I grant leave to appeal out of time, quash the acquittal and remit the case to the Magistrates' Court for a new trial before another Magistrate.

Daniel Goundar
Judge

At Labasa
Monday 31 August 2009

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