IN THE COURT OF APPEAL, FIJI AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU0003 OF 1996S
(High Court Criminal Case No. Hac 0013 of 1995L)

BETWEEN

JOSAIA LUTUNATABUA

Appellant

AND:

THE STATE

Respondent

Coram: The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing: Monday, 15 February 1999, Suva

Counsel: Appellant present, not represented
Mr J. Naigulevu for Respondent

Date of Judgment: Friday, 26 February 1999

JUDGMENT OF THE COURT

On 10 October 1995 the appellant was convicted of rape and sentenced to serve 8 years' imprisonment. On 29 February 1996 he applied for leave to appeal. Leave was granted shortly thereafter. Now, nearly three years later his appeal has come to hearing. As we are satisfied that the appeal must be dismissed, the delay has not caused the appellant any actual detriment in terms of loss of his liberty. However, where the liberty of an appellant is at stake, it is imperative that an appeal be heard and determined as soon as possible. In this case the registry of this Court wrote to the High Court registry in Lautoka early in 1996 requiring that a typed record of the trial be provided. That record was not received until late 1998. Such a delay is unacceptable in respect of any appeal. But where it is a criminal appeal and the appellant is in prison, the record **must** be provided to the registry of this Court **as a matter of urgency**. A delay of more than three months should be exceptional and an explanation required for it. If there is no satisfactory explanation, those responsible for the

delay should be held accountable and made subject to disciplinary action.

Although the letter by the appellant seeking leave to appeal was headed "Late Sentence Appeal", the grounds stated in it related to the conviction. At the hearing of the appeal he confirmed that he wished to appeal against his conviction on questions of mixed fact and law. In case further leave was required for him to do that, we granted it (see Court of Appeal Act (Cap. 12) s.21(1)(b)). Although the grounds were expressed in the letter in layman's fashion they are essentially that the learned trial judge failed to bring to the assessors' attention contradictions in the evidence of the prosecution witnesses, that the evidence did not establish that there was sperm inside the woman's vagina, and that the evidence was insufficient to establish the appellant's guilt beyond reasonable doubt. At the hearing he specified one instance in which the evidence of the woman differed from information she had given the police. He said that three of the prosecution witnesses had lied and should not have been believed.

There was evidence that the alleged victim told the police that she had been raped by three men. In her evidence-in-chief she said that it was the appellant alone who assaulted and raped her; she was not cross-examined about the discrepancy between that evidence and her report to the police. At the trial three Fijian men gave evidence that they were with the appellant when she walked along the beach past them; that the appellant spoke to her asking her to have sexual intercourse and that she refused; and that he then left them, followed her and assaulted her. They said that they followed the appellant for a sufficient distance to be able to see the offence being committed. They admitted that, although she was calling for help, they did not go to her assistance. They could have been seen by the woman when the

offence was taking place and she could well have believed at the time that they were there supporting the appellant. The learned trial judge did not address the assessors on the matter. In our view, he should have done so, but the error was not sufficient to vitiate the assessors' findings. The evidence that the appellant committed the offence was overwhelming

Although no other contradiction or inconsistency was specified by the appellant in his letter or at the hearing, as he was unrepresented we have examined the appeal book to see whether there were any others and, if so, whether they were significant. We have found only one major contradiction; it was between the evidence of the woman and the three Fijian men and concerned the clothing worn by the appellant. She gave evidence that he was wearing shorts; the three Fijian men said that he was wearing long trousers. The relevance of such evidence is mainly to the identification of the person accused of the offence, although it may also be relevant to assessment of the witnesses' veracity. In the present case the woman saw her assailant's features in broad daylight for some considerable time, before and during the commission of the offence. She was certain of his identity. The Fijian men had been in company with the appellant immediately before the offence was alleged to have been committed and, if they were telling the truth, there could be no doubt about his identity as the assailant . In his statement to the police made under caution he placed himself at the scene, although he denied committing the offence. The appellant, who was unrepresented at his trial, put the veracity of the Fijian men in issue when he cross-examined them; however, neither they nor the alleged woman were cross-examined about the appellant's clothing and in those circumstances the contradiction concerning it was not significant in relation to the assessment of the veracity of any of them.

In respect of the second ground of appeal, proof of there having been semen in the vagina was not necessary. For the purpose of establishing rape, insertion of the penis into the vagina is sufficient, even if there is no ejaculation. Of course, if semen is found, it strengthens the prosecution case. That is why it is usual for doctors examining women who allege rape to take a vaginal swab. In this case the doctor took a vaginal swab on the day of the alleged offence; but he gave evidence of delay in the carrying-out of the scientific examination of it and said that, if there had been semen on the swab, the delay could account for the result of the examination being negative. The learned trial judge drew this evidence to the assessors' attention. The second ground is, therefore, without merit.

The third ground goes simply to the strength of the prosecution evidence. The learned trial judge made it clear to the assessors that the appellant's case was that the prosecution witnesses were lying. He addressed them properly on the onus and standard of proof. If the assessors and the judge believed them, as clearly they did, the evidence was overwhelming. The appellant cannot, therefore, succeed on the third ground.

The appeal against conviction must be dismissed.

None of the grounds of appeal in the appellant's letter related to sentence. However, we asked him whether he wished to address the Court about it. He said that the sentence was excessive. We would be willing to give the appellant leave to amend his appeal to include appeal against sentence, if we considered that such appeal had any merit. However, in our view it does not. The offence was committed in a most violent manner by a strong man against a weak woman who was a stranger to him and who had simply walked

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past him on the beach. The appellant has previous convictions involving violence and rape but had not been convicted for more than four years before the commission of this offence. In our view, the sentence was not harsh or excessive; if any thing, it was lenient. We have decided, therefore, not to give leave to amend the appeal to include appeal against sentence.

Decision: Appeal dismissed.

M.E. Casey

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Sir Maurice Casey
Presiding Judge

I.R. Thompson

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Mr Justice Ian R Thompson
Justice of Appeal

Solicitors

Appellant not represented
Office of the Director of the Public Prosecutions for the Respondent