IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0031 OF2007S
(High Court Criminal Action No. HAC 05 of 2006L)

BETWEEN: TEVITA NALAWA

Appellant

AND: THE STATE

Respondent

Coram: Goundar, JA
Bruce, JA
Lloyd, JA

Hearing: Friday, 21st November 2008, Suva

Counsel: R. Senikuraciri for the Appellant
W. Kurisaqila for the Respondent

Date of Judgment: Friday, 21st November 2008, Suva

JUDGMENT OF THE COURT

The history of the proceedings

[1] On 29 January 2003 Tevita Nalawa ('the appellant') was charged with the commission of two offences, namely one charge of indecent assault contrary to section 154(1) of the Penal Code, Cap 17, and one charge of rape, contrary to sections 149 & 150 of the Penal Code. On the same day the appellant appeared before a magistrate and pleaded not guilty to both charges. The victim of the alleged offences was a girl aged just over 10 at the time the offences were alleged to have taken place. Despite the prosecution having asked for an *'early hearing date'* when the case was first mentioned before a magistrate on 29 January 2003, the case did not come on for trial in the Magistrate's Court at Lautoka until 6 February 2006.

[2] The appellant's trial was heard before a Magistrate on 6, 14 and 15 February 2006 at Lautoka. The appellant represented himself at his trial. On 31 March 2006 the Magistrate presiding at the trial convicted the appellant on both charges. On 7 April 2006 the appellant was sentenced to terms of imprisonment of one year for the offence of indecent assault and 10 years for the offence of rape. The 10 year sentence for the offence of rape was directed to be served concurrently with the one year sentence for the indecent assault. Both sentences were directed to be served consecutively to an existing term of imprisonment the appellant was serving for unrelated offences.

[3] On 7 April 2006 the appellant appealed his conviction and sentence on the rape charge only to the High Court. The appellant drafted his own grounds of appeal to the High Court. In those grounds the appellant made no complaint about any delay in the matter coming on for trial in the Magistrate's Court. The appeal to the High Court (sitting in its appellate jurisdiction) was heard by a High Court judge sitting at Lautoka on 1 December 2006. The appellant was represented by counsel at this hearing. From a perusal of the court record it appears that counsel for the appellant made no complaint about delay at the hearing of the appellant's High Court appeal.

[4] On 2 February 2007 a High Court judge allowed the appellant's appeal against the conviction and sentence for the rape offence, but convicted the appellant of the offence of defilement of a girl under the age of 13 years, for which offence the judge sentenced the appellant to a term of 8 years imprisonment. Pursuant to section 176 of the Criminal Procedure Code, Cap 21, the offence of defilement is a statutory alternative to the offence of rape. The offences of rape and defilement of a girl under the age of 13 years both carry the same maximum sentence of life imprisonment. In his sentencing remarks the High Court judge said that he had discounted the otherwise appropriate sentence by one year *'for the lapse of time'*. The 8 year term was directed to be served concurrently to the existing one year prison term for the indecent assault and directed to commence on 7 April 2006.

[5] On 1 June 2007 the appellant appeared in person before the President of the Court of Appeal seeking leave to appeal to the Court of Appeal against his conviction and sentence for the defilement offence. The President refused leave but advised the appellant that he could apply to the full Court of Appeal for leave. The appellant's application for leave to appeal to the Court of Appeal was also a week or so out of time. It appears from the court record that one of the grounds of appeal the appellant raised before the President was:

> *'That there had been unreasonable delay and [I] did not get a fair trial under section 29(1) of the Constitution and as such [the matter] should be permanently stayed'.*

[6] The remaining grounds of appeal were questions of mixed fact and law.

[7] The appellant acted on the President's advice and made application to a full Court of Appeal for leave to appeal his conviction and sentence. This appeal was made pursuant to the provisions of section 22(1) and 22(1A) of the Court of Appeal Act. These provisions restrict appeals to the Court of Appeal from judgments of the High Court in its appellate jurisdiction *'to questions of law only'* (that is, errors of law only).

[8] The appellant's application for leave to appeal to the Court of Appeal was heard by the full Court of Appeal on 8 April 2008. The only ground of appeal raised before the full Court of Appeal which could be categorised as purely one of law was the ground of appeal concerning delay and an unfair trial which we have quoted above. In two published judgments dated 25 April 2008, the three judges of the Court of Appeal granted the appellant leave to appeal out of time. One of the judges granted leave to the appellant to appeal all his grounds of appeal, including those of mixed fact and law. The other two judges in a joint judgment granted leave only in respect of the above quoted ground of delay giving rise to an unfair trial. These two judges refused leave to the appellant to argue on appeal his other grounds (relating to asserted lack of corroboration and asserted insufficiencies in medical evidence), on the basis those other grounds of appeal were hopeless. We agree with the observations of the majority judgment.

[9] At the hearing of this appeal the appellant raised an entirely new ground of appeal which we consider below. We granted leave to the appellant to argue the new ground together with the ground of appeal of the delay in this matter coming on for trial before a Magistrate giving rise to an unfair trial.

The evidence at trial

[10] The complainant gave sworn evidence. She said that she and the appellant were both residents of a housing estate. The appellant was a soldier and lived near the complainant's house together with his pregnant wife and child. The complainant on occasion played with the appellant's daughter. According to the complainant, on a Thursday evening between June and July 2001 she went to the appellant's house looking for his daughter when the appellant tugged on her dress and had her sit beside him. The appellant proceeded to put his hand on the complainant's vagina and then he pulled her hand to touch his penis. The complainant stood up and went home. She did not see the appellant's wife or child in the house at the time. As she was scared she told no-one at the time about what had taken place.

[11] The following Sunday the complainant went looking for her brother and walked past the house of the appellant. As she walked past the house the appellant called her inside and she entered the house. The appellant was the only person inside the house. The complainant said that once she was inside the house the appellant locked the door and proceeded to spread a mattress on the floor. He was wearing just a towel. The appellant lay on the mattress and then he told the complainant to massage his leg. This she did. The appellant pushed her down with his shoulder, took off the complainant's panties, pulled up her dress and forced his penis into her vagina for around 5 minutes. He then withdrew his penis and she saw a white watery substance come out of his penis. He then put a finger in her vagina for about one minute. According to the complainant, the appellant then stood up, put on his towel again, opened the doors to the house and the complainant went home.

[12] The complainant said that on arriving home she went straight to the bathroom and bathed, washing her vagina because there was some blood coming from it.

After she bathed she went to her bedroom and told her sister what had happened. Her sister immediately told her mother and then, when spoken to by her mother, the complainant repeated what she had a little earlier told her sister. The next day the complainant, her sister and mother went to the appellant's house and told his wife what had taken place. The wife burst into tears. The complainant's mother said that they did not make a complaint about the matter to police at the time because they felt sorry for the appellant's wife who was then pregnant.

[13] The complainant's sister and mother and the appellant's wife each gave evidence at the trial before the magistrate confirming the complainant's account of her complaints to each of them. A medical report tendered by consent dated January 2003 (by which time the complainant was aged 12) indicated the complainant's hymen was broken. When arrested by police and interviewed by them in January 2003 the appellant strongly denied the complainant's allegations against him.

[14] At the trial the appellant cross examined each of the prosecution witnesses putting to each that they were telling lies. All denied this was the case. In the defence case the appellant made an unsworn statement denying the complainant's allegations. Importantly, at the trial it was not put to the complainant that she had been coached to tell lies against the appellant by the appellant's estranged wife. Nor was this put to the estranged wife.

[15] The magistrate found the offence proved beyond reasonable doubt. In convicting the appellant the magistrate said that he found the complainant's evidence to be firm, clear and precise as was the evidence of the corroborative witnesses. He had no reason to disbelieve their evidence.

Delay in the matter coming on for trial

[16] As we have stated above, the appellant was charged by the police with the indecent assault and rape offences on 29 January 2003 (some 18 months or so after the commission of the offences) and he appeared before a magistrate at Lautoka on the same day. He immediately entered pleas of not guilty and the

prosecutor quite properly asked the magistrate to give the matter an early hearing date. The matter thereafter had an unfortunate history leading up to the trial taking place 3 years later in February 2006. The court record reflects a sorry chronology of some 45 adjournments before the matter finally came on for trial. But the large number of adjournments is somewhat misleading. The reasons stated for the adjournments on the court record are more enlightening.

.[17] There is no doubt that many of the adjournments were simply due to the unavailability at Lautoka of sufficient magistrates to enable matters to be heard in a timely manner. But many of the adjournments were at the request of the appellant after withdrawal of defence counsel, after the sacking of defence counsel, or whilst the appellant sought legal aid (9 April 2003, 28 April 2003, 13 May 2003, 3 October 2003, 17 October 2003, 16 January 2004, 22 November 2004 and 31 January 2005). On one occasion the matter was adjourned at the appellant's request and he specifically waived the issue of delay (6 June 2003). On several occasions there was simply no appearance by the appellant (2 August 2004, 23 August 2004 and 13 December 2005). These non appearances may have been caused by the appellant being in prison at the time serving sentences on other offences. The record does not state the reasons for the non attendances. On only one occasion did the appellant ask for a hearing date (13 January 2006). The court record reflects that not once did the appellant (or legal aid solicitors appearing on occasion for him) oppose the matter being further adjourned or complain about delay or breach of his right to be tried within a reasonable time. Just a few of the adjournments were at the request of the prosecution.

The New Ground of Appeal

[18] At the hearing of this appeal the appellant raised a new ground of appeal, not raised at any earlier stage of these proceedings. This new ground of appeal was that because his convictions on sexual assault charges against his own daughter were recently quashed, there must therefore be some doubt about the safety of his conviction on the defilement charge the subject of this appeal. The only link between the facts of this case and the case where his convictions were quashed

was a suggestion his estranged wife may have had the complainant in this case make a false complaint.

[19] But such an assertion was not put to any witness at the appellant's trial for the charge the subject of this appeal, including the complainant and the estranged wife. We simply cannot see how the appellant's present suggestion can in any way effect the credibility or reliability of the complainant who gave evidence in the trial the subject of this appeal. There is simply no evidence that the complainant in this case was coached. In our opinion the new ground of appeal has no merit whatsoever

The principles applicable to delay in a matter coming on for trial

[20] At common law, if a court is satisfied , before an impending trial, that the prosecution has been guilty of serious delay such as to cause serious prejudice to the accused, to the point that no fair trial can be held, or if the authorities can be shown to have acted in such a way as to render any trial of the defendant unfair in the circumstances, further proceedings would be restrained as an abuse of the court's process by imposition of a stay (***Attorney General's Reference (No 1 of 1999)*** [1992] QB 630; ***R v Horseferry Road Magistrate's Court, Ex p Bennett*** [1994] 1 AC 42).

[21] By way of statute law, the terms of the Constitution of the Republic of the Fiji Islands also have to be considered on the issue of delay.

[22] The terms of the Constitution are clear. Section 29(1) of the Constitution states that *'every person charged with an offence has the right to a fair trial before a court of law'*. Section 29(3) states that *'every person charged with an offence... has the right to have the case determined within a reasonable time'*.

[23] The reasonable time and fair trial requirements enshrined in section 29 of the Constitution are in similar terms to the reasonable time and fair trial requirement provided in Article 6 of the European Convention for the Protection of Fundamental Rights and Freedoms. The European jurisprudence is of some help in determining the proper application of section 29 of the Fiji Constitution.

[24] In ***Rokoua v The State*** ([2006] FJSC 16) the Fiji Supreme Court stated (at [27] and [28]) that the Fiji Constitution must be construed in the context of all the factors that make up the country. Without being exhaustive, the Supreme Court said those factors included its resources and the fact that Fiji is a developing country which cannot be compared to developed Western European nations and, by implication, the resources available in those countries. The Supreme Court said when applying section 29(3) of the Constitution, whilst the section expressly imports the concept of reasonableness, when considering what is reasonable, regard must be had to the resources available in the country to the administration of justice, otherwise the consequences may be chaotic and the harm to the general community incalculable. We agree entirely with these sentiments.

[25] There are many previous decisions of this Court which have reviewed the relevant principles concerning delay and the proper application to the facts of an individual case of the terms of section 29(3) of the Constitution (for example, ***Seru v State*** [2003] FJCA 26; ***Mills v State*** [2005] FJCA 6; ***Shameem v State*** [2007] FJCA 19). The collected jurisprudence shows us that there are many different factors to consider when determining if an appellant's case was determined within a reasonable time. These factors include:

(a) The length of the delay;

(b) The reasons for the delay (including on the part of the accused, the judiciary, the prosecution or legal aid);

(c) The inherent time requirements of the case;

(d) The limitations on institutional resources (including the judiciary, the prosecution and legal aid);

(e) Any waiver by an accused of his rights;

(f) Acquiescence to delay by an accused;

(g) The effect of delay on the fairness of a trial;

(h) Any prejudice to the accused caused by the delay.

[26] The above list is not intended to be exhaustive. Each case must be examined in the context of its own particular facts before unreasonableness can be determined. One must balance all the particular circumstances of a case and then determine firstly whether the length of the delay is unreasonable, and secondly, even if the delay was unreasonable determine whether it affected the fairness of a trial.

[27] What are the consequences of a violation of the reasonable time requirement in section 29 of the Constitution? We are of the opinion that the answer is well articulated in a recent decision of the House of Lords in the case ***Attorney General's Reference (No 2 of 2001)*** [2004] 2 WLR 1 at [24], where Lord Bingham (delivering the lead judgment) said:

> *"If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may... be just and appropriate... The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in he delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant... Unless (a) the hearing was unfair or(b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time."*

It can be seen from the above extract that a stay of proceedings is very much a remedy of last resort. We entirely agree with the views expressed by Lord Bingham.

Application of the principles to the facts of the case

[28] Although the delay in this matter coming on for trial was obviously regrettable it cannot be shown that the delay in any way gave rise to an unfair trial. Other than the inevitable and understandable stress suffered by the appellant whilst awaiting trial he cannot show he was in any other way prejudiced by the delay in the matter coming on for trial. The facts of the case were brief and it was not the type of case where such a time had passed that it could have affected the memories of the witnesses. The young female victim remembered quite clearly everything that had taken place. The appellant's defence to both charges was a simple denial of guilt and assertion that the complainant was lying.

[29] The reasons for the delay were not unusual. The pre charging delay was only 18 months. In child sexual assault cases delay in matters being reported to police is common, and for a variety of understandable reasons, frequently because of torn loyalties between relatives, family friends and acquaintances. Frequently in sexual assault matters complaints are made many years after the events in question. That was not the case here. The post charging delay of just on 3 years, whilst regrettable, in the years after the coup of 2000 was not uncommon in Lautoka, particularly with overburdened judicial and legal aid resources. A significant part of the delay was caused by the appellant himself and problems with obtaining legal aid. The appellant made no complaint about the delays at the time. But whatever the reasons for the delay in the matter coming on for trial, we return to the fact that it simply cannot be shown that the delay caused any real prejudice to the appellant or otherwise impacted upon the fairness of his trial.

Conclusion

[30] This Court has an undoubted discretionary jurisdiction to stay criminal proceedings, particularly for breach of the terms of section 29(3) of the Constitution. But the exercise of the discretion should be used sparingly and only in exceptional circumstances, the burden being on the appellant to show that he did not get a fair trial because of delay such that the matter should be stayed (***Tan v Cameron*** [1992] 2 A.C. 205). In our opinion, the appellant has not shown that any delay at any stage of the proceedings in this mater caused any unfairness to his trial. Certainly there was regrettable delay, but not such as to cause unfairness. In any event, that delay was reflected by the High Court judge in reducing by one year the sentence he imposed upon the appellant for the defilement offence.

Orders

[31] For the above reasons we order that:

(1) The appeal is dismissed.

(2) The conviction and sentence imposed by the High Court judge for the offence of defilement of a girl under the age of thirteen years are confirmed.

Goundar, JA

Bruce, JA

Lloyd, JA

Solicitors:

Office of the Legal Aid Commission, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent