**IN THE COURT OF APPEAL**
**ON APPEAL FROM THE HIGH COURT**

**CRIMINAL APPEAL AAU 118 OF 2011**
**(High Court HAC 79 of 2010)**

**BETWEEN** : **PETERO BAI**

*Appellant*

**AND** : **THE STATE**

*Respondent*

**Coram** : **Calanchini P**

**Counsel** : **Mr S Sharma for the Appellant**
**Ms P Madanavosa for the Respondent**

**Date of Hearing** : **8 May 2014**

**Date of Decision** : **23 May 2014**

## DECISION

[1] This is an application for an extension of time for the Appellant to file his application for leave to appeal.

[2] The Appellant was convicted in the High Court at Suva on one count of rape and one count of acting with intent to cause grievous bodily harm following a trial by Judge sitting with three assessors.

[3] On 30 November 2010 the Appellant was sentenced to 15 years imprisonment on the conviction for rape and 10 years imprisonment on the violence conviction to be served concurrently with a non-parole term of 12 years.

[4] The Appellant filed an application for leave to appeal out of time on 2 December 2011 although the letter is dated 28 November 2011. Under section 26 of the Court of Appeal Act Cap 12 (the Act) an appellant is required to give notice of his application for leave to appeal within 30 days of the date of the conviction or decision. On the basis that the notice was required to be filed no later than 30 December 2010, accepting the date of the Appellant's letter as the starting point, the application for leave to appeal was filed a couple of days short of 11 months out of time.

[5] However under the same section (section 26) of the Act, the Court of Appeal may extend at any time the time within which a notice of an application for leave to appeal may be given. Pursuant to section 35(1) of the Act a single judge of the Court of Appeal may exercise the power of the Court to extend the time within which a notice of an application for leave to appeal may be given.

[6] A formal application by way of notice of motion for an extension of time was subsequently filed on 28 March 2014 by the Legal Aid Commission on behalf of the Appellant. The application was supported by an affidavit sworn on 27 March 2014 by Petero Bai. The Respondent filed an answering affidavit sworn on 7 May 2014 by Shivendra Nath. The parties filed helpful written submissions.

[7] The factors that are considered when a court is called upon to exercise a discretion involving the determination of an application for an enlargement or extension of time to give notice of an application for leave to appeal were discussed by the Supreme Court in **Kaliova Rasaku and Another –v- The State** (unreported CAV 9 and 13 of 2012; 24 April 2013). During the course of that judgment the Supreme Court applied

the decision of Gates CJ (with whom Hettige and Ekanayake JJ concurred) in **Kumar and Sinu –v- The State** (unreported CAV 1 of 2009; 21 August 2012) who summarised the factors that will be considered by a court in Fiji for granting an extension of time as being (i) the length of the delay, (ii) the reason for the failure to file within time, (iii) whether there is a ground of merit justifying the appellate court's consideration, (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (v) if time is enlarged, will the Respondent be unfairly prejudiced?

[8] I have already considered the length of the delay which is almost 11 months. The explanation for the delay is set out in the Appellant's affidavit. The Appellant explained that he was without legal assistance as his legal practitioner had ceased to act for him at the conclusion of the trial in the High Court. In the affidavit the Appellant also deposes that he applied for legal aid on 8 January 2014 as he still wanted to pursue his appeal although his application for leave was one year out of time. A draft amended notice of appeal against conviction was exhibited to the affidavit and the deponent states that he has been informed by his Counsel that his amended grounds are *"meritorious and will probably succeed."* The answering affidavit, apart from challenging the assertions did not contradict the limited factual material in the supporting affidavit.

[9] The approach adopted by the Supreme Court to an application for an enlargement of time where the delay was considerable and where the explanations for that delay included the explanation put forward by the Appellant in this case was explained in **Raitamata –v- The State** (unreported CAV 2 of 2007; 25 February 2008) in the following extract from paragraph 12 of that decision:

> *"The difficulties facing a person without legal advice in formulating grounds of appeal on questions of law are not to be under-estimated. Those difficulties, however, are not a basis for setting aside the requirements of the Act and the Rules ___."*

[10] It must be acknowledged that those difficulties are compounded when the person without legal advice is serving a sentence of imprisonment upon conviction. However there is ample authority in the decisions of the Supreme Court to indicate that an

explanation such as has been offered by the Appellant in this case for a delay that can only be described as considerable is not sufficient alone to warrant the Court exercising its discretion to enlarge time: **Sheik Mohammed –v- The State** (unreported CAV 2 of 2013; 27 February 2014).

[11] Although the delay was substantial and the explanation unsatisfactory if not unacceptable the authorities suggest that it is still necessary to determine whether there is a ground of appeal that will probably succeed. [See **Kumar and Sinu –v- The State** (supra) and **Tokoniyaroi and Another –v- The State** (CAV 4 of 2013; 9 May 2014)]

[12] In the Appellant's exhibited amended notice of appeal against conviction, there were four proposed grounds of appeal upon which he relies in the event that his application is granted. They are:

> *"1 The learned trial Judge erred in law and in fact when he did not direct the assessors to consider the charge of attempted rape which was available on the evidence adduced.*
>
> *2 The learned trial Judge erred in law and in fact when he did not direct the assessors about circumstantial evidence.*
>
> *3 The learned trial Judge erred in law and in fact when he did not properly direct the assessors about the Appellant's disputed confession including the issue of weight to be given.*
>
> *4 The learned trial Judge erred in law when he did not clearly put all the elements of the offences to the assessors hence causing substantial miscarriage of justice."*

[13] Although it is not the task of a single judge to determine the appeal, it is necessary to consider whether any of the above grounds will probably succeed. This is a more onerous requirement than would be the case if the Appellant was merely seeking leave to appeal. When the application before the Court is for leave to appeal, the Appellant need only show that his ground or grounds of appeal raise an arguable point. It is more difficult for the Appellant to establish that any of his grounds of appeal will probably succeed. Yet, on account of the substantial delay and the unsatisfactory explanation for that delay, that is the standard that he must now satisfy.

[14] The first ground of appeal is that the learned trial Judge erred by failing to direct the assessors and himself that it was open to them to consider the charge of attempted rape which was available on the (medical) evidence adduced. The Appellant relies on two passages in the summing up in support of this ground. The first passage is in paragraph 7 of the summing up. The learned Judge stated:

> *"I will in due course remind you of the medical evidence in the case; in summary the relevant witness said that in his opinion penetration or attempt to penetrate had occurred."*

[15] The learned Judge later in his summing up reminded the assessors of the medical evidence. In paragraph 51, he summarised the evidence of Dr Turaganiwai, a specialist in obstetrics and gynaecology. Dr Turaganiwai stated that an injury to the hymen between 5 o'clock and 7 o'clock was visible to the naked eye and there was a tear in the hymen at approximately 6 o'clock. Dr Turaganiwai also said that "there had been penetration by some foreign object or some attempt made to penetrate. The Judge told the assessors that the Doctor confirmed that there was some penetration, full or partial, and that the injury was consistent with blunt trauma. The Judge also informed the assessors that the Doctor had agreed that he could not say definitely that the victim had been raped but his findings were consistent with the allegation of a sexual assault that involved attempted or actual penetration.

[16] In assessing this ground it is important to recall that at the time of the offences the young complainant was only 8 years old. She was unable to give any evidence in relation to the sexual assault.

[17] It is also important to recall that the Appellant's defence was based on identification in the sense that he claimed he was not the person who committed the offences. That was the issue in the trial. In paragraph 8 of his summing up the learned trial Judge informed the assessors that *"the case against the accused depends to some extent or the correctness of 3 identifications of him ___."*

[18] It is also necessary to comment that if the offence of attempted rape as an alternative verdict was of some interest to the Appellant, then his Counsel should have raised the matter at the trial and requested the learned Judge to give further directions on the alternative verdict of attempted rape.

[19] Perhaps the significant objection to this ground is that the Appellant had admitted in his caution interview that he *"put both his fingers and his penis into the complainant's vagina."*

[20] In this case the young victim was not able to identify the Appellant and she remembered nothing about the sexual assault. The admission of penetration by the Appellant in his caution interview was sufficient evidence to support an opinion of guilty on the rape charge. The evidence given by Doctor was to the effect that the hymen had been injured and that there had been penetration full or partial. In my judgment his use of the words *"attempted penetration"* in his evidence is consistent with the words *"partial penetration."* In my view the Appellant's admissions were not in any way diminished by the medical evidence and as a result it was not necessary for the learned Judge to direct the assessors on attempted rape.

[21] Although it may be arguable, this ground of appeal falls short of the standard that is required on account of the substantial delay and the unsatisfactory explanation. It is, in my judgment unlikely to succeed.

[22] The second ground alleges an error in law and in fact on the part of the learned trial Judge on account of his not directing the assessors about circumstantial evidence. Although Counsel for the Appellant filed brief written submissions on his ground, it would appear that the Appellant acknowledged that this ground was not sustainable in view of the recent decision of the Supreme Court in **Mohammed Haroon Khan –v- The State** (unreported CAV 9 of 2013; 17 April 2014). In that decision the Supreme Court (per Gates CJ), in a petition involving a conviction for murder and an allegation that the trial Judge had failed to directed on circumstantial evidence, observed at paragraph 40:

*"This ground is misconceived. The main evidence is direct not circumstantial. If the assessors accepted the confession as reliable, an admission of murder with its account of the disposal of the body and the reasons for killing, such evidence has always been acceptable for a conviction for murder."*

[23] Since consent was not an issue in this case the admissions made by the Appellant in his caution interview were direct evidence of penetration and there was no requirement on the part of the trial Judge to direct on circumstantial evidence. The direct evidence was in this case acceptable for the conviction of rape. This ground has no chance of success.

[24] The third ground of appeal alleges that the trial Judge did not properly direct the assessors on the issue of weight to be given to the Appellant's disputed confession. At the outset it should be stated that there is no fixed formula for the required guidance.

[25] The trial Judge directed the assessors on the disputed confession in the caution interview at paragraph 12 of his summing up as follows:

*"The State relies upon the fact that the accused confessed to the police that he had violently and sexually attacked Ulamila. It is suggested on behalf of the accused that the confession was not true and that it was invented by the Police. Your task is to consider all the evidence relating to the circumstances in which the confession was made and to ask yourselves whether you can be sure that the confession was true; that is the only question relevant to your deliberations. If you are not sure it was then you will disregard it in coming to your conclusions as to whether you are sure that the accused was responsible for the attack upon Ulamila. On the other hand, if you are sure that the confession was true then you may take it into account as evidence of the Accused's guilt. You may think that there would be no better evidence of guilt than a reliable and truthful confession."*

[26] It is apparent that the learned Judge has directed the assessors to consider, on the evidence, whether they were satisfied that the Appellant made the admissions and whether those admissions were true. That was a proper direction to the assessors in the form of a recommendation that they consider the admissions together with all the

other evidence in the case. Although the learned Judge did not use the word *"weight"* in his summing up on this matter, he did however impress upon the assessors that their task was to determine whether or not they accepted the admissions as being the truth. He also directed the assessors that they were to disregard the admissions if they considered that the admissions were not true. I am satisfied that the direction as a whole was sufficient in relation to the question of weight. Although arguable, this ground is unlikely to succeed.

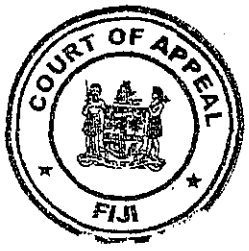
[27] The fourth ground of appeal alleges that the learned Judge did not put all the elements of the offence of rape to the assessors. This ground raises a question of law only and as a result leave to appeal is not required. However it is necessary, in considering whether the Appellant should be excused for non-compliance with the Rules, to determine whether the ground is likely to succeed on appeal before the Full Court.

[28] The learned Judge directed the assessors on the elements of the offence of rape in paragraph 7 of his summing up:

> *"A man is guilty of rape if he has carnal knowledge of another person without the consent of that person; in this context carnal knowledge would of course include penetration of the vagina by the penis to any extent. A man is also guilty of rape if he penetrates the vulva or vagina of another person to any extent with his finger without the consent of that person _ _ _. Furthermore the issue of consent does not arise in this case and therefore it is not an element of the offence to which you will need to have any regard. Accordingly the real issue on this charge is whether you are sure that it was the accused who was responsible for the sexual attack."*

[29] It is the use of the word *"sexual attack"* that forms the basis of this ground of appeal. However I am satisfied that, on the evidence before the Court and in particular the admissions made by the Appellant, the use of the words sexual attack or sexual assault were equally appropriate and in no way prejudiced the Appellant. The elements of the offence were properly and clearly stated by the learned Judge. It must also be recalled that the issue in the trial was that the admissions were not true and that it was not the Appellant who committed the offence. It is only on appeal that the Appellant has sought to challenge the summing up on the basis of penetration and the absence of a direction on attempted rape. In my judgment this ground is unlikely to succeed.

[30] For the reasons stated in this decision the grounds of appeal do not meet the required standard and as a result the application for an enlargement of time to lodge a notice of appeal is dismissed.




W. Calanchini

**HON. MR JUSTICE W.D. CALANCHINI**
**PRESIDENT, COURT OF APPEAL**