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

**CRIMINAL APPEAL NO: AAU 3 OF 2014**
**(High Court HAC 107 of 2011)**

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| **BETWEEN** | : | **ABDUL RASHID** |
| | | ***Appellant*** |
| **AND** | : | **THE STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Calanchini P** |
| **Counsel** | : | **Ms S Vaniqi for the Appellant**<br>**Mr V Perera for the Respondent** |
| **Date of Hearing** | : | **23 March 2015** |
| **Date of Ruling** | : | **24 April 2015** |

## RULING

[1] This is an application for an enlargement of time to file an application for leave to appeal.

[2] The Appellant was convicted in the High Court at Suva on two counts of rape following a trial before a judge sitting with three assessors. On 21 February 2013 he was sentenced to a term of imprisonment of 16 years on the first count and 13 years on the second count to be served concurrently with a non-parole term of 14 years.

[3] A formal application by way of notice of motion for an extension of time to file an application for leave to appeal was filed on 11 February 2014 on behalf of the Appellant. The application was supported by an affidavit sworn on 10 February 2014 by Abdul Rashid. The application was opposed. The parties filed written submissions prior to the hearing of the application.

[4] Under section 26 of the Court of Appeal Act Cap 12 (the Act) the Appellant was required to give notice of his application for leave to appeal within 30 days of the date of the decision. In this case the sentencing decision was delivered on 21 February 2013. On the basis that the application for leave was required to be filed no later than 23 March 2013, the application for leave was filed about 10½ 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 application for leave to appeal may be given. Pursuant to section 35(1) of the Act a justice of appeal may exercise the power of the Court to extend the time within which an application for leave to appeal may be given.

[6] The factors that are considered when a court is called upon to determine an application for an extension of time under section 26(3) of the Act 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 to be considered 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 or, where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (iv) if time is enlarged, will the Respondent be unfairly prejudiced? These are all

matters that are relevant to a determination as to whether it would be just in all the circumstance to grant or refuse the application.

[7] The explanation for the delay of about 10½ months was set out in the supporting affidavit. The Appellant deposed that following his trial he decided to look for a different legal practitioner for his appeal. This took some time as he had had no previous experience with the criminal justice system. He also needed time to raise the funds for a private practitioner as apart from one elderly aunt in Fiji, his close relatives reside overseas. The Appellant stated that he did not wish to engage the free services of a legal aid lawyer. He also appeared to rely on his lack of education for the delay in arranging legal representation.

[8] The Supreme Court has acknowledged that incarcerated appellants who are unrepresented do face difficulties in the preparation of their appeals. However those difficulties do not justify setting aside the requirements of the Act and the Rules (See: **Raitamata –v- The State** unreported CAV 2 of 2007; 25 February 2008 and **Sheik Mohammed –v- The State** unreported CAV 2 of 2013; 27 February 2014).

[9] The explanation for the delay does not by itself lead to the conclusion that an extension of time should be granted. It is necessary to determine whether the appeal has sufficient merit to justify the Appellant's non-compliance with the Rules.

[10] In the Appellant's exhibited notice of appeal there were listed a total of seven grounds of appeal of which five were grounds of appeal against conviction and two were grounds of appeal against sentence upon which he proposed to rely in the event that time is enlarged. They are:

> *"1. That the learned Judge erred in law and fact when he failed to outline the available defences open to the accused when summing up to the assessors.*
>
> *2. That the learned Judge erred in law and fact when he failed to direct the assessors properly in regards to the inherent weaknesses of the prosecution case.*

3. *That the learned Judge erred in law and fact when he failed to highlight to the assessors the discrepancies in the medical report which favoured the defence.*

4. *That the learned Judge erred in law and fact when at para. 13 of the summing up he failed to advise the assessors that another option available for them to consider was the Accused did not have sex with the complainant at all, the defence being advanced by the Appellant at trial.*

5. *That the learned Judge erred in law and fact when at para. 21 of the summing up he failed to outline to the assessors that the money paid to the complainant's father was a possible motive for the complainant and her mother to lie about the allegation of rape, a direction the assessors needed to consider when looking at the evidence.*

6. *That the learned Judge erred in law and fact when he failed to allow the Accused time to mitigate.*

7. *That the sentence is manifestly harsh and excessive."*

[11] It must be recalled that it is not the task of a justice of appeal on an application under section 35(1) of the Act to determine the appeal. However in this case, in order to determine the application it is necessary to consider whether the appeal has sufficient merit and in this case that involves determining whether the appeal is likely to succeed. This is a more onerous standard than would be the case if the Appellant were merely seeking leave to appeal, in which case all that need be established is that the appeal raises an arguable ground.

[12] At the outset, it is necessary to indicate that as presently drafted, the first three grounds of appeal against conviction are too wide and fail to specify the nature of the errors, the failures or the omissions upon which each ground relies.

[13] Grounds 1 and 2 allege errors in the summing up concerning (1) available defences open to the Appellant and (2) inherent weaknesses of the Respondent's case. No particulars are provided. In the written submissions the Appellant identifies only two matters. One concerns a reference to paragraph 21 of the summing up and the other to paragraph 18 of the summing up. It is suggested that there was a difference in emphasis in the directions given in those paragraphs that was disadvantageous to the Appellant. In my judgment the difference was subtle and although going to

credibility does not raise a ground sufficient to justify granting an extension of time. There are no other specific issues raised in the submissions in relation to grounds 1 and 2.

[14] Ground 3 concerns an issue arising from the contents of the medical report. In one section, but not in the others, there is a correction in relation to whether the hymen was intact. The correction, apparently made by the Doctor who wrote the report and presumed to have been made contemporaneously with the report itself involved the crossing out of the word *'intact'* and replacing with the words *"(error) not intact"*. The report was put into evidence through another doctor. The author of the report was not available. In other parts of the report the doctor had clearly stated that the hymen was not intact. The report spoke for itself. Both the assessors and the learned trial Judge were at liberty to attach whatever weight they thought appropriate to the admitted medical report. There was no objection at the trial and the Appellant's Counsel did not seek to have the doctor who compiled the report cross-examined. In my judgment this ground does not meet the required standard in his application.

[15] Ground 4 is sufficiently particularised and is succinctly explained in the Appellant's submissions. The gist of the complaint is this. In paragraph 11 of the summing up the learned Judge correctly stated the Appellant's defence when he indicated to the assessors that *"He says that he never had sexual intercourse with (the complainant) let alone raped her."* Then in paragraph 12 and 13 the learned Judge discusses the issue of consent apparently because the Respondent claimed that it was relevant. In paragraph 13, the learned Judge appears to assume that sexual intercourse did take place and informs the assessors that the issue for them to consider is consent. They are not asked to determine whether, as a fact, any act of sexual intercourse took place between the Appellant and the Complainant in respect of either count 1 or count 2. There is no reference in the summing up, apart from in paragraph 11, that the assessors should consider the evidence in the context of the defence case that sexual intercourse never took place. I am satisfied that this ground raises an issue that has sufficient merit to allow the application for an extension of time.

[16] Ground 5 was not seriously pursued by the Appellant at the hearing on the basis that it appeared to raise similar issues to those raised by grounds 1 and 2. It does not have sufficient merit to justify extending time to appeal.

[17] Grounds 6 and 7 relate to the appeal against sentence. To obtain leave to appeal against sentence the appellant must point to an arguable error in the exercise of the sentencing discretion. The onus is higher when an extension of time is sought. The issue of no opportunity to mitigate was admitted by Counsel for the Appellant to have been the result of the Appellant having absconded before the summing up in breach of bail. Counsel for the Appellant also conceded that there did not appear to be any arguable error in the exercise by the trial Judge of his sentencing discretion. Neither ground was vigorously pursued by Counsel and neither ground has sufficient merit to justify an extension of time.

[18] There is one further matter that requires comment in this Ruling. The Appellant appeared in the High Court for trial on 2 counts of rape. It is appropriate to re-state both counts.

> *"**COUNT 1***
>
> ***Statement of Offence***
>
> ***RAPE**: Contrary to Sections 149 and 150 of the Penal Code Cap. 17.*
>
> ***Particulars of Offence***
>
> *ABDUL RASHEED s/o Abdul Rahiman, between 1st day of February 2005 and the 31st day of December 2005 at Nasinu in the Central Division, had unlawful carnal knowledge of a girl, namely ARTIKA SONAM SINGH, without her consent.*
>
> ***COUNT 2***
>
> ***Statement of Offence***
>
> ***RAPE**: Contrary to Sections 207(1) (2) (a) of the Crimes Decree No.44 of 2009.*
>
> ***Particulars of Offence***
>
> *ABDUL RASHEED s/o Abdul Rahiman, on the 20th day of March 2011 at Nasinu in the Central Division, had unlawful carnal knowledge of a girl, namely ARTIKA SONAM SINGH, without her consent."*

[19] At paragraph 8 of the summing up the learned Judge explained to the assessors the two counts in this way:

*"The accused is facing two separate counts of rape. Count one and count two are specimen counts. The prosecution allege that Abdul Rasheed also committed many other offences of the same kind between 2005 and 2011. Instead of overloading the information with counts charging many offences, they have selected two incidents, one at the beginning of the period and one at the end. They are entitled to do this. To convict the accused you must be sure that he committed the particular offences in the information, that is on the 9th February 2005 and lastly on the 20th March 2011. Just because you think he is guilty of one of the offences does not make him guilty of both. You must look at each count separately."*

[20] However it does appear that count 1 only is a specimen charge and leaves open the fact that a number of instances of alleged rape took place between 1 February and 31 December 2005. However count 2 refers to one act of alleged rape having taken place on a specific date, namely 20 March 2011. As drafted there is no grammatical link between the period in 2005 that is alleged in count 1 and the one date alleged in 2011 in count 2. If it had been intended to rely on numerous alleged instances of rape between 1 February 2005 and 20 March 2011, the charge could adequately have been drafted in one count only. This is required by section 70(3) of the Criminal Procedure Decree 2009 which provides that *"when a person is charged with any offence of a sexual nature and the evidence points to more than one separate acts of misconduct, it shall be sufficient to specify the dates between which the acts occurred in one count and the prosecution must prove that between the specified dates at least one act of a sexual nature occurred. In such a case the charge must specify on the statement of offence that the count is a representative one."*

[21] As a result what was before the Court was one representative (or specimen) count for the period 1 February 2005 and 31 December 2005. There was a second count alleging one offence of rape on a specific date in 2011. There was no count before the Court for any alleged offence that may have occurred between 1 January 2006 and 19 March 2011. Any evidence adduced at the trial that was intended to establish that an offence of rape had been committed between those dates was irrelevant and should not have been admitted.

[22] It may well be that the directions given to the assessors in paragraph 8 of the summing up do not accurately reflect the effect of alleging with a specimen count a separate

much later single offence in count 2 of the indictment. The position in relation to such a situation was discussed by the Court of Appeal in **Hobson –v- Regina** [2013] 1 WLR 3733, [2013 EWCA Crim. 819 which in my judgment reflects an approach which is consistent with section 70(3) of the Criminal Procedure Decree.

[23] Putting that issue to one side, the application for an extension of time is granted in respect of ground 4 for which leave to appeal against conviction is granted. The Appellant is at liberty to file and serve a notice of appeal within 30 days from the date of this judgment.

**Orders:**

1. *Application for extension of time is granted.*
2. *Leave to appeal against conviction is granted.*
3. *Leave to appeal against sentence is refused.*

COURT OF APPEAL FIJI

W. Calanchini

**Hon. Mr Justice W. D. Calanchini**
**PRESIDENT, COURT OF APPEAL**