IN THE COURT OF APPEAL, FIJI
On appeal from the High Court of Fiji

CRIMINAL APPEAL AAU 75 OF 2014
(High Court HAC 14 of 2012)

BETWEEN : **TAITUSI GONEDAU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr J Savou for the Appellant**
Ms P Madanavosa for the Respondent

Date of Hearing : **6 July 2016**

Date of Ruling : **28 October 2016**

RULING

[1] There were two applications filed by the Appellant. The first application was for leave to appeal against conviction and sentence. Since the application for leave was out of time a formal application for an enlargement of time was subsequently filed on 2 July 2015 by

the Legal Aid Commission on behalf of the Appellant. That application was supported by an affidavit sworn on 2 July 2015 by Taitusi Gonedau and filed on the same day.

[2] The second application was an application for bail pending appeal. That application was supported by a document that purported to be an affidavit. However there was no jurat clause and the document was not signed before a Commissioner for Oaths.

[3] The application for an enlargement of time is made under section 26(1) of the Court of Appeal Act Cap 12 (the Act). The application for bail pending appeal is made under section 33(2) of the Act. Pursuant to section 35(1) of the Act a judge of the Court of Appeal may exercise the jurisdiction of the Court of Appeal to hear and determine both applications.

[4] The Appellant appeared before the High Court charged with one offence of indecent assault contrary to section 212(1) of the Crimes Decree 2009 and one offence of rape contrary to sections 207(1) and 207(2) (a) of the Crimes Decree. The particulars of the indecent assault charge were that the Appellant on 3 January 2012 at Nabua unlawfully and indecently assaulted the complainant. The particulars of the charge of rape were that the Appellant on 4 January 2012 at Nabua penetrated the complainant's vagina with his penis without her consent.

[5] Following a trial lasting two days before a judge sitting with three assessors the Appellant was convicted on both counts. The assessors had returned unanimous opinions of guilty on both charges. In a written judgment delivered on 26 February 2013 the learned trial Judge indicated his agreement with the opinions of the assessors and formally convicted the Appellant on both counts. On 5 March the Appellant was sentenced to a term of imprisonment of three years for the indecent assault conviction. In respect of the rape charge he was sentenced to a term of 9 years imprisonment. The sentences were ordered to be served concurrently with a non-parole term of 7 years.

[6] The background facts to the offences may be stated briefly. This summary is based on the material in the Sentencing decision delivered by the learned trial Judge on 5 March 2013. The complainant was a married lady aged 28 years. In early January 2012 she and her husband were having serious marital problems. The complainant went to stay with the Appellant and his wife for a few days while trying to resolve the problems with her husband. The Appellant was at the time the pastor (talatala) of a small evangelical church at Nabua. The Appellant is a cousin of the complainant and had on a previous occasion counseled the complainant when she had problems and this was her expectation on this occasion. She arrived on 2 January and spent the day and night with the Appellant and his wife without incident. The next day (3/1/12) the Appellant and his wife went to work and the complainant agreed to look after the four children. The Appellant came home early in the afternoon feeling unwell. He asked the complainant to massage him and she agreed. After the massage the Appellant hugged the complainant who then went to the kitchen to cook a meal. The Appellant followed her into the kitchen where he fondled her breasts and took her hand and put it inside his pants to touch his genitals. The same evening the Appellant and his wife went to a funeral gathering leaving the complainant again to look after the children. At about 3.00am the Appellant returned home and woke up the complainant telling her to come to his bed. The complainant refused but was forced to the bed by the Appellant. After her sulu fell off the Appellant forcibly removed the complainant's underwear and raped her. That morning the complainant left the house and went to an aunt's house at Valelevu and told her what had happened. A report was made to the Police.

[7] In its decision in **Ranuku and Another –v- The State (**CAV 9 and 13 of 2012; 24 April 2013) the Supreme Court considered the principles involved when an appellate court is called upon to determine an application for an enlargement of time. In the course of its judgment the Supreme Court confirmed that the factors that should be considered in the exercise of the discretion to enlarge time included those that had been summarized in its earlier decision in **Sinu and Kumar –v- The State** ([2012] FJSC 17, CAV 1 of 2009; 21 August 2012). They are (a) the length of the delay, (b) the reason for the delay, (c) 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 (d) if time is enlarged, will the respondent be unfairly prejudiced?

[8] The Appellant's notice of appeal was dated 10 June 2014. Pursuant to section 26 of the Act it should have been filed by 5 April 2013. It was therefore about 14 months out of time. The reasons for the delay are explained by the Appellant in his supporting affidavit. He deposes that he was disillusioned by the conviction and affected mentally by the decision and gaol (jail) sentence. By the time he had *"regained some semblance of balance"* he was out of time and then it took him some time to prepare his grounds of appeal.

[9] It cannot be disputed that the delay is substantial and although the Appellant's reaction to his conviction and sentence is understandable it is not a satisfactory explanation for the substantial delay. It is therefore necessary to determine whether there is a ground of appeal that is likely to succeed in order for this Court to exercise its discretion in favour of the Appellant.

[10] Annexed to the supporting affidavit sworn by Appellant is an amended notice and grounds of appeal upon which the Appellant seeks to rely in the event that an enlargement of time is granted. The grounds of appeal against conviction are:

> *"1. The learned trial Judge erred in law when he failed to direct the assessors on the law with reference to recent complaint and how they should deal with the same, with reference to:*
>
> *i. The evidence of the complainant which suggested that she had spoken to her aunty some time after the alleged incident; and*
> *ii. The history relayed by complainant to the Doctor as highlighted in paragraph 15 of the summing up.*
>
> *2. The learned trial Judge erred in law in failing to adequately address the assessors and himself on the law with reference to the allegation of indecent assault which was the precursor to the rape allegation despite accepting in his sentence that the Appellant had hugged the complainant."*

[11] Since the amended notice and grounds of appeal make no reference to the appeal against sentence and since the submissions filed by the Appellant do not refer to the sentence appeal, it must be taken to have been abandoned and will be marked dismissed.

[12] Although both grounds of appeal are referred to as errors of law, in my judgment both grounds do involve questions of both fact and law. Both grounds require leave to appeal.

[13] The first ground of appeal is based upon the reference by the learned trial Judge in his sentencing decision to the complainant telling her aunty in Valelevu later the same day what had happened to her at the Pastor's house. The Appellant submits that there was no reference to this evidence in the summing up. It is claimed that the reference must have arisen from evidence given by the complainant at the trial since the aunty was not called as a witness. The Appellant submits that if the evidence was given at the trial then it constituted evidence of recent complaint. Under those circumstances the Appellant submits that the learned trial Judge should have given directions as to how that evidence should be considered and the purpose for which it was admitted into evidence. The Appellant's claim is that by failing to give directions on recent complaint and in the absence of any reference to the evidence of recent complainant in his judgment the learned Judge may have convicted the Appellant on a wrong application of the law relating to recent complaint.

[14] It the complainant gave evidence during the trial that she had told her aunt later in the day what had happened to her at the Pastor's house then that evidence may be admissible to establish the complainant's consistency and to negative consent. However to be admissible it is necessary not only that the complainant should give evidence as to the making of the complaint to her aunt but also that its terms should be proved by the aunt to whom the complaint was made. In the absence of the aunt's evidence the complainant's evidence that she made the complaint to her aunt cannot assist in establishing her consistency or negating consent. See **White v The Queen (PC)** [1998] UKPC 38; [1998] 3 WLR 992 at 995. If the evidence was given by the complainant and the aunt

was not called to testify, there was no evidence of recent complaint. The issue is whether the learned Judge should have indicated either in his summing up or in his judgment that the evidence of the complaint made to the aunt should have been disregarded on the basis that it was inadmissible. In my opinion this ground of appeal should be considered by the Court of Appeal.

[15] The challenge to the summing up of the medical evidence given by the doctor and the medical report arises from the observations made by the Judge in paragraph 15. The learned Judge has directed the assessors and himself that the history of the complaint given by the complainant to the doctor was consistent with what she told the court in her evidence. The history recounted by the complainant to the doctor could be regarded as a prior consistent statement and it is therefore arguable that directions should have been given that the assessors and the Judge should have disregarded that material. This ground raises an issue that should be considered by the Court of Appeal.

[16] The second ground of appeal again relates to observations made by the learned Judge in his sentencing decision. It is submitted that the reference to hugging in paragraph 3 of the sentencing decision was evidence that was given as part of the Appellant's case at the trial. It is referred to in the summing up at paragraph 17.

[17] In my view it is just as likely that when drafting the sentencing decision the learned Judge had inadvertently referred to the hugging evidence which had been adduced by the Appellant. Even if the evidence of hugging that was given by the Appellant was accepted as having taken place, it does not follow that the complainant consented to either the fondling of her breasts or carnal knowledge. Regardless of the issue relating to hugging the unanimous guilty opinions of the assessors and the verdict of guilty by the trial Judge indicate that the evidence of the complainant had established guilt beyond reasonable doubt. It was not suggested that the learned trial Judge had failed to fairly summarise the evidence in his summing up. This ground has insufficient merit for an enlargement of time.

[18] In relation to the application for bail pending appeal Counsel for the Appellant informed the Court that the application was to be withdrawn as the Appellant did not wish to pursue the application.

Orders:

1. *Application for an enlargement of time is granted.*
2. *Leave is granted to appeal against conviction on ground 1 and is refused on ground 2.*
3. *The appeal against sentence is dismissed.*
4. *The application for bail pending appeal is dismissed.*

W. Calanchini

.....

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