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

CRIMINAL APPEAL AAU 82 OF 2014
(High Court HAC 34 of 2013)

BETWEEN : **ESEROMA VAKACEGU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr. S. Waqainabete for the Appellant**
Mr. M. Korovou for the Respondent

Date of Hearing : **6 July, 2016**

Date of Ruling : **28 October, 2016**

RULING

[1] This is an application for an enlargement of time to enable the Appellant to file an application for leave to appeal against conviction. The application is made under section

26 (1) of the Court of Appeal Act Cap 12 (the Act) and comes before a judge of the Court of Appeal pursuant to section 35 (1) of the Act.

[2] The Appellant appeared before the High Court charged with one count of abducting a young person contrary to section 285 of the Crimes Decree 2009 and two counts of rape contrary to sections 207 (1) and 207 (2) (a) of the Crimes Decree.

[3] The particulars of the abduction offence (count 1) were that the Appellant on 18 January 2013 at Suva unlawfully took the complainant being under the age of 18 years, out of the possession and against the will of her father. The particulars of the first rape charge (count 2) were that the Appellant on 18 January 2013 at Suva penetrated the complainant's mouth with his penis without her consent. The particulars of the second rape charge (count 3) were that the Appellant on 18 January 2013 at Suva had carnal knowledge of the victim without her consent.

[4] Following a trial lasting three days before a Judge sitting with three assessors, the Appellant was convicted on all three counts by the learned trial judge on 7 March 2014. The three assessors had returned unanimous opinions of guilty on counts 1 and 3. The majority of assessors returned opinions of guilty on count 2. The learned trial Judge in his judgment gave brief reasons for his agreeing with the unanimous and majority opinions of the assessors.

[5] On 11 March 2014 the Appellant was sentenced to 2 years imprisonment on the abduction charge and 13 years imprisonment for each of the rape charges. The sentences were ordered to be served concurrently for an effective head sentence of 13 years with a non-parole sentence of 10 years.

[6] The background facts can be stated briefly. On 18 January 2013 the Appellant, having asked the complainant to accompany him to the Ministry of Education at Marela House, took her against her will to Sunset Motel where the rape offences took place. Apparently the Appellant and the Complainant had become acquainted through Facebook. The

appellant admitted that he accompanied the complainant to Sunset Motel on that day and had requested to have sex with her. The complainant refused his request according to the Appellant who denied having sex with the complainant. His evidence in court was consistent with his answers in the caution interview.

[7] The Appellant's initial application for leave to appeal against both conviction and sentence was filed on 4 July 2014 in typed form. The document had been typed by the office at the Minimum Correction Centre. However the Appellant's handwritten letter was dated 18 June 2014. Since an Appellant has no control over the process once he submits his notice of appeal to the office for typing he cannot be held accountable for any subsequent delay. The appeal will be deemed to have been filed on 18 June 2014. The application was formalized on behalf of the Appellant by the Legal Aid Commission by the filing on 18 May 2016 of a notice of motion together with a supporting affidavit sworn on 18 May 2016 by Eseroma Vakacegu. On the same day an amended notice of appeal against conviction only was also filed. The appeal against sentence was withdrawn and will be dismissed.

[8] The principles to be considered when an appellate court is called upon to determine an application for an enlargement of time were considered by the Supreme Court in **Rasuku and Another –v- The State** (CAV 9 and 13 of 2012; 24 April 2013). In the course of its judgment the Supreme Court affirmed that the factors that should be considered in the exercise of the discretion to enlarge time included those that were discussed 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.

[9] The delay is about 2 months. The reasons for the delay are set out in the supporting affidavit. The principal explanation is the delay in receiving copies of the summing up, judgment and sentencing decision. The Appellant deposed that this delay was in part

caused by the fact that he was moved to the Suva Correction Centre after sentencing without being given copies of the documents. It would appear copies were subsequently sent by the Registry to the Suva Remand Centre. The Appellant was transferred to Naboro Maximum Correction Centre a month later. He was later transferred back to Suva Correction Centre and was able to obtain the documents from the Suva Remand Centre. In this case the Appellant cannot be held entirely responsible for the delay.

[10] The real issue is the merit of the appeal. The three grounds of appeal against conviction upon which the Appellant seeks to rely in the event that an enlargement of time is granted are:

> *"1. The learned trial judge erred in law and fact when he did not properly consider the credibility of the complainant when she lied to her parents when they enquired why she came late although she said that she did not have the courage to tell them what happened.*
>
> *2. The learned trial judge erred in law and in fact when he did not consider the opportunities of escape and raising the alarm for assistance available to the complainant when the Appellant left to go to the Ministry of Education.*
>
> *3. The learned trial Judge erred in law and in fact when he did not consider that the complainant had people to report to about the alleged rape soon after the alleged incident but she did not."*

[11] The grounds of appeal do not allege any error or misdirection in the summing up to the assessors. Furthermore the grounds of appeal do not suggest that the summing up was unfair or that material evidence was not summarised. The grounds of appeal appear to challenge the decision of the learned trial Judge to agree with the unanimous and majority opinions of the assessors, to confirm the opinions of guilty on all charges and to enter a conviction on each charge.

[12] There are only two observations that need to be made about the grounds of appeal. The first is that by agreeing with the opinions of the assessors that the Appellant was guilty and proceeding to convict the Appellant, the learned trial Judge must have been satisfied beyond reasonable doubt that the Appellant was guilty on each charge. The summing up

indicates that the relevant evidence had been considered. The finding of guilt beyond reasonable doubt would indicate that the learned Judge accepted the evidence of the prosecution witnesses. That evidence was capable of establishing guilt beyond reasonable doubt. It is the task of the trial Judge to assess the evidence and attach whatever weight he chooses to that evidence based on such matters as reliability, credibility and logical consistency. It is not for the Court of Appeal to indicate that it would have reached a different conclusion.

[13] The second matter is that pursuant to section 237 of the Criminal Procedure Decree 2009 it is not necessary, if the summing up is on record, for the learned trial Judge to deliver a written judgment, other than the decision of the Court, when the Judge agrees with the opinions of the assessors. In the absence of written reasons set out in a judgment, reliance must be placed on the summing up to ascertain what evidence has been considered by the Judge.

[14] The brief statement of reasons in the Judgment delivered by the trial Judge indicates that he has accepted the evidence of the complainant. He does not have to give reasons why he preferred that evidence. However that evidence was capable of establishing guilt beyond reasonable doubt.

[15] For the reasons stated the application for an enlargement of time is refused.

Orders:

1. *Application for enlargement of time to file application for leave to appeal against conviction is refused.*
2. *Appeal against sentence is dismissed.*

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