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

CRIMINAL APPEAL NO. AAU 0156 of 2014
(High Court HAC 079 of 2011)

BETWEEN : **VUNIANI SOVAU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra RJA**

Counsel : **Ms S. Ratu for the Appellant**
Mr S. Vodokisolomone for the Respondent

Date of Hearing : **30 April 2018**
Date of Ruling : **11 June 2018**

RULING

[1] The Appellant was charged with one count of Rape contrary to section 207(1)(2)(a) of the Crimes Act, 2009.

[2] After trial the Assessors brought in an opinion of guilty with which the learned High Court Judge concurred. The Appellant was convicted and sentenced on 15th April 2014 to eight years imprisonment with a non-parole period of 6 years.

[3] The Appellant filed a notice of appeal against sentence on 23rd December 2014 which was seven months late.

[4] The Appellant filed another application for leave to appeal on 19th May 2016 against both conviction and sentence.

[5] On 14th February 2018, the Appellant with the assistance of Counsel from the Legal Aid Commission filed an application for enlargement of time to appeal.

[6] The following amended grounds of appeal have been advanced by the Appellant in his application seeking enlargement of time:

> *"Against Conviction*
>
> *(i) The learned Judge erred in law and in fact to provide a balanced and adequate summing up on the issue of consent as such there was a substantial miscarriage of justice.*
>
> *(ii) The learned trial Judge erred in law and in fact in directing the assessors with his analysis of the evidence where he reiterates the prosecution argument of:*
>
> *a) The complainant having fear psychosis*
>
> *b) The complainant being more vulnerable after arriving at Omkar. Without the argument being substantiated with evidence.*
>
> *c) The learned trial Judge erred in law and in fact with the wording of his comment regarding the three witnesses who were related to the Appellant. In stating that "it obviously created some interest" is prejudicial to the Appellant case.*
>
> *Against Sentence*
>
> *(iii) That the 8 years prison term imposed by the learned sentencing judge is manifestly harsh and excessive;*
>
> *(iv) The fixing of the 6 years non parole period has denied me my rights to a one third remission as stipulated by the prison authorities;*
>
> (v) *That the insufficient and inadequate discount was credited for me mediatory as a family man."*

[7] Considering the approach to applications seeking enlargement of time for leave to appeal as set out by the Supreme Court in **Kumar v State** ; **Sinu v State** [2012] FJSC 17;

CAV0001.2009 (21 August 2012), the Application for leave to appeal against conviction is late by over 2 years while the leave to appeal against sentence is late by over 7 months.

[8] The reasons for the delay adduced by the Appellant is his lack of literacy and awaiting other grounds of appeal. Although the delay regarding his appeal against conviction is quite substantial, the delay regarding his sentencing appeal is much less.

[9] The reasons for the delay are not quite excusable as he could have got some assistance through the Corrections Officers.

[10] However, even if there is a delay and the reasons for the delay are not excusable, time and again applications for enlargement of time have been allowed if there is merit in the grounds of appeal.

[11] In the present case the Appellant had taken up the position that he had consensual sex with the complainant. The complainant had admitted in her evidence that they used to have sexual relationships previously but that she did not consent on the occasion that gave rise to her complaint.

[12] The Respondent has conceded that the first ground appeal is arguable. In such a situation where it has been conceded that a ground of appeal is arguable, it would not be right to refuse enlargement of time to grant leave to appeal.

[13] The first ground of appeal is to the effect that the summing up of the learned trial Judge was not balanced and was inadequate.

[14] It has been stated in several decisions, **Prasad v State** [2017] FJCA 112; AAU 105.2013 (14 September 2017); **Gounder v State** [2015] FJCA 1; AAU0077.2011 (2 January 2015) that where consent is the main issue in rape cases, it is the duty of the trial Judge to

address that issue sufficiently in relation to the evidence given by both parties and their witnesses at the trial, and that a failure to do so would amount to a misdirection.

[15] In this case, the learned Trial Judge in his summing up has not elaborated on the issue of consent but had made the usual direction that the prosecution should prove the case beyond reasonable doubt and that even if the accused had given evidence the burden remain on the prosecution. Such a direction has been held to be inadequate where consent is in issue in the case of **Prasad** (supra) and **Gounder** (supra).

[16] In view of this position I would allow the application for extension of time seeking leave to appeal as this ground is arguable.

[17] In relation to ground 2, the position taken up by the Appellant is the use of certain words and phrases by the learned trial Judge in his summing up which had been used by the prosecution when presenting the case as being prejudicial to the Appellant.

[18] It is usual for a trial Judge to refrain from using certain words and phrases which a party utilizes in presenting their cases so that impartiality of the Judge is portrayed specially when directing the Assessors in the summing up.

[19] Counsel for the Respondent took up the position that even if such words and phrases had been used by the trial Judge, it was the duty of Counsel for the Defence to seek a re-direction from the trial Judge at the conclusion of the summing up, which he stated was not done by the Defence.

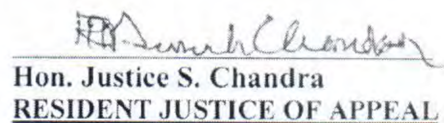
[20] However, even if a re-direction was given, it is possible that the effect of the use of such words and phrases may still have an impact on the Assessors as the trial Judge himself had used them. In those circumstances I would grant leave on this ground as well.

[21] The grounds of appeal against sentence have no merit as no error can be pointed out as is required to be shown in appeals against sentences as set out in **Naisua v State** [2013] FJSC14; CAV0010.2013 (20 November 2013). The sentence in any event is within the tariff and is therefore not harsh and excessive. The fixing of the non-parole period was within the discretion conferred on the trial Judge and the family status is not a factor that is taken into account as a mitigating factor.

Orders of Court

(1) Extension of time for Leave to Appeal against conviction is granted on the grounds set out in the application.

(2) Leave to appeal against sentence is refused.



Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL