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

CRIMINAL APPEAL NO. AAU 60 OF 2016
(High Court HAC 141 of 2013)

BETWEEN : **PETER CASSIDY**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr M Fesaitu for the Appellant**
Ms S Khan for the Respondent

Date of Hearing : **21 August 2019**

Date of Ruling : **25 September 2019**

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on one representative count of rape. On 10 July 2015 he was sentenced to 8 years 8 months imprisonment with a non-parole term of 7 years.

[2] This is his application for an enlargement of time for leave to appeal against conviction. The application is made pursuant to section 26(1) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives to a single Judge of the Court of Appeal power to enlarge time.

[3] The factors to be considered for an enlargement of time are (a) the length of the delay, (b) the reason for the failure to file within time, (c) whether there is a ground of merit justifying the appellate court's consideration and 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: **Kumar and Sinu –v- The State** [2012] FJSC 17; CAV 1 of 2009, 21 August 2012.

[4] The notice of appeal was filed by the appellant on 19 May 2016 and as a result was about 9 months out of time. The reason for the delay is set out in the affidavit sworn on 23 October 2017 by the appellant in support of his application. The appellant deposed that the Corrections Services had not processed or delivered his first notice of appeal that he claimed to have written on 3 August 2015. However the first handwritten notice received by the Registry on 19 May 2016 is undated. There is a second handwritten notice dated 17 May 2016 and also received on 19 May 2016 providing an explanation for the delay similar to that stated in the appellant's supporting affidavit. I am somewhat concerned that the appellant is able to recall exactly the date upon which he drafted his first appeal notice and yet appears not to have dated that notice. In my view the appellant's explanation is unconvincing and it is necessary to consider the prospects of the appeal succeeding.

[5] The grounds of appeal upon which the appellant proposes to rely in the event that time is enlarged are set out in a notice annexed to the supporting affidavit. They are:

> *"1. The learned trial Judge erred in law and in fact when he misdirected the assessors on the issue of hearsay evidence.*

2. *The learned trial Judge erred in law and in fact in not giving adequate reasoning for his decision to convict given that there was a mixed verdict."*

[6] The issue of hearsay evidence raised by ground one relates to the relationship between the complainant and the appellant. However given that the appellant admitted to the acts of intercourse with the complainant the real issue and for that matter the only issue was that of consent. The appellant was convicted on the count of rape. The issue of the biological relationship between the complainant and the appellant would only have become relevant in the event that the Court had concluded that the appellant was guilty of incest. Ground one is not related to the issue of consent nor the conviction on the count of rape.

[7] Ground 2 is concerned with the judgment of the learned Judge. The assessors by a majority had returned opinions of guilty of rape. The Judge agreed with the majority. Under those circumstances the learned trial Judge was not obliged to provide a written judgment under section 237 of the Criminal Procedure Act 2009. It is worth noting that an appellate court cannot impose upon a trial judge an obligation to write a judgment when the Criminal Procedure Act has expressly stated that a written judgment is not required. However, the Supreme Court has indicated that it would be of great assistance to appellate courts, even when a trial Judge agrees with the opinions or the majority opinions of the assessors for him to provide a written judgment explaining his reasons for doing so with particular reference to the preferred evidence: **Sheik Mohammed –v- The State** [2014] FJSC 2; CAV 2 of 2013, 27 February 2014 and **Chandra –v- The State** [2015] FJSC 32; CAV 21 of 2015, 10 December 2015.

[8] In **Ram v Director of Public Prosecutions** [1999] FJSC 1; CAV 1 of 1998, 5 March 1999 the Supreme Court set out the obligations of the trial Judge after receipt of the assessors' opinions under section 299 of the Criminal Procedure Code. The position remains the law under section 237 of the Criminal Procedure Act 2009. The Court observed:

"When a trial is held before a judge and assessors the power to convict or acquit is vested in the judge after receiving the opinions of the assessors. The judge is not bound by the opinions but he must take the opinions into account _ _ _ _. Where the judge accepts the opinions of the assessors, no reasons need be given. In such a case any appealable error on the part of the judge will appear in the summing up or elsewhere in the record of the trial. But if the Judge differs from the opinions of the majority of the assessors, he must state his reasons for doing so and they become part of the judgment of the Court. Those reasons thus become available for examination on appeal by the Court of Appeal."

[9] It follows that it is not an appealable error for there to be no reasoning or insufficient reasoning in a judgment delivered by the trial Judge when he agrees with the unanimous or majority opinions of the assessors. Under those circumstances the appellant must search for an appealable error in the summing-up. Ground 2 does not refer to the summing up and accordingly fails.

[10] For the reasons stated above, I have concluded that the appeal is unlikely to succeed. It is then unnecessary to consider the question of prejudice to the respondent. The application for an enlargement of time is refused.

Orders:

Application for enlargement of time to appeal against conviction is refused.

COURT OF APPEAL FIJI

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL