

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

CRIMINAL APPEAL NO. AAU 128 OF 2016
(High Court HAC 178 of 2016)

BETWEEN : **SEKONAIA NAKULA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Calanchini P**

Counsel : **Mr T Lee for the Appellant**
Mr M Vosawale for the Respondent

Date of Hearing : **27 September 2019**

Date of Ruling : **14 November 2019**

RULING

- [1] Following a trial in the High Court at Suva the appellant was convicted on one count of rape and one count of sexual assault. On 12 April 2016 the appellant was sentenced to 9 years 9 months imprisonment on the rape conviction and 5 years imprisonment on the sexual assault conviction. Both sentences were ordered to be served concurrently with a non-parole term of 8 years imprisonment.

- [2] This is his application for an enlargement of time for leave to appeal against conviction sentence and 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 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 dated 16 August 2016 although not received by the Registry until 6 September 2016. In keeping with the practice of the Court the appeal will be deemed to have been filed on about 16 August 2016 and is as a result about 3 months late.
- [5] The reason for the delay is set out in the affidavit sworn on 27 June 2018 by the appellant in support of his application. The appellant explains that the delay was caused by his mistaken belief that his trial counsel (from Legal Aid) would file his grounds of appeal against conviction and sentence within time. Although the appellant deposes that he had always desired to appeal against his conviction and sentence, he does not claim to have given instructions to his Counsel within time that he desired to appeal: In my judgment the explanation is unconvincing and does not excuse the delay which must be regarded as substantial. As a result the appellant is required to establish that his appeal is likely to succeed.
- [6] The grounds of appeal upon which the appellant relies are set out in the Amended Notice of leave to appeal against conviction filed on 5 September 2019 and are:

"1) ***THAT*** the Learned Trial Judge erred in law and in fact in the Summing Up by failing in its duty to warn the assessors, and to keep in mind

himself, that it was dangerous to accept sworn evidence which is in conflict with statements previously made by the complainant.

- 2) ***THAT*** *the Learned Trial Judge erred in law and in fact in the Summing Up which lacks the adequate and proper directions to the assessors on the issue of consent since consent was the main issue in contention at the trial, thus resulting in substantial miscarriage of justice.*
- 3) ***THAT*** *the Learned Judge erred in law and in fact when convicting the Appellant as the conviction was unreasonable and cannot be supported when considering the totality of the evidence adduced, thus resulting in a substantial miscarriage of justice, in particular, to the following:*
 - (a) *found that there was penetration but the State failed to prove beyond reasonable doubt the lack of consent; and*
 - (b) *accepting that complainant was made to sign the Letter [Exhibit D1] to get Appellant out of 'it' when there was no evidence adduced to support this fact; and*
 - (c) *Accepting the complainant to be a credible witness when the learned Trial Judge had not warned himself, that it was dangerous to accept the evidence in Court which was in conflict with statements previously made by the complainant."*

[7] Ground one appears to relate to an allegation that the complainant had made a prior out of court statement that was inconsistent with her evidence at the trial. The claim is that in her statement to the Police made one day after the alleged incident the complainant had made no mention of the claim in her evidence that she had been dragged into the appellant's room. In his judgment delivered on 1 April 2016 the learned trial Judge has considered this inconsistency at paragraph 13.

[8] For the reasons stated in the judgment the Judge has accepted the evidence of the complainant notwithstanding the omission in her police statement. It must be recalled that the trial Judge determines questions of both fact and law in a criminal trial in Fiji. His judgment may sufficiently consider the issues of fact and law notwithstanding any shortcoming in the judge's directions to the assessors whose task is to provide opinions for the assistance or guidance of the trial Judge. In my judgment this ground does not meet the necessary standard for an enlargement of time.

- [9] Ground 2 raises the issue of consent. Although the appellant admitted that he had licked the complainant's body, breasts and vagina, he denied that he had inserted his finger into the complainant's vagina. Therefore while consent was the issue in relation to the sexual assault charge both conduct and consent were in issue in relation to the rape count. On the issue of consent the learned Judge has stated that he accepted the complainant's evidence and rejected the assertions made by the appellant. His reasons for doing so have adequately taken into account the evidence that was adduced at the trial. His conclusions are consistent with the majority opinions of the assessors on the rape count and with the unanimous opinions on the sexual assault charge. This ground does not meet the necessary standard for an enlargement of time to be granted.
- [10] Ground 3 alleges that the conviction was unreasonable and cannot be supported by the evidence. The ground claims that there has been a substantial miscarriage of justice on account of the failure of the trial Judge to direct the assessors and himself in relation to prior inconsistent statements.
- [11] The requirement to establish lack of consent was adequately considered by the trial Judge in his judgment. It ultimately became a matter of credibility. When the trial Judge concluded that the evidence of the complainant was credible he was then entitled to determine whether that evidence established beyond reasonable doubt the element of lack of consent. In my judgment the evidence of the complainant did establish lack of consent.
- [12] In his judgment the trial Judge has considered the letter signed by the complainant after the incident. He has accepted the complainant's explanation. The letter was, according to the complainant, brought to her by the appellant's wife. The complainant signed the letter without reading it. She was pregnant at the time. It can be safely inferred that the letter was written by the appellant, his wife or some third person on his behalf. It is also apparent that the issue of consent was as critical to the appellant as it was to the complainant as both were married. In reaching his conclusion on credibility the trial

Judge has considered the evidence in its totality and has accepted the evidence of the complainant. This ground does not succeed.

[13] The third component of ground 3 relates to the failure of the complainant to complain about being dragged by the appellant when she made her statement to the police although she gave evidence to that effect at the trial. This issue has been considered earlier in this Ruling and for the same reasons does not warrant an enlargement of time.

[14] The grounds of appeal against sentence are set out in the amended notice filed on 6 July 2018 as follows:

“The learned trial Judge erred in principle when sentencing the appellant, in particular, to the following:

- (a) Considering a disputed fact to enhance the sentence; and*
- (b) Relying on unsupported medical facts to enhance the sentence*
- (c) Not properly considering the mitigating factors to adequately decrease the sentence.”*

[15] The issue is whether the appellant has demonstrated the existence of an arguable error in the exercise of the sentence discretion that is likely to succeed. The Judge has correctly identified the tariff for sentencing an accused convicted for rape of an adult as 7 – 15 years imprisonment. He has selected as the starting point 7 years which is at the lower end of the tariff. The Judge added four years for the aggravating factors specified in paragraph 4 of his Ruling. Although it may appear to be high it cannot, in my judgment, be regarded as constituting an error.

[16] The deduction of one year for mitigating matters is challenged. However the appellant had pleaded not guilty and hence it is difficult to adjust the sentence for remorse. There can be no discount for being a person of good character as there were previous matters. The fact that he was married with children is quite a common occurrence and cannot attract any substantial discount by ways of mitigation. In all the circumstances it is difficult to identify any matter that would justify a greater discount by way of mitigation.

[17] Finally the trial Judge has deducted the time spent in remand in accordance with section 24 of the Sentencing and Penalties Act 2009. As a result the application for an enlargement of time to appeal against sentence is refused.

Order:

1. *Application for enlargement of time to appeal against conviction is refused.*
2. *Application for enlargement of time to appeal against sentence is refused.*



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL