

**IN THE COURT OF APPEAL, FIJI**  
**On Appeal from the High Court**

**CRIMINAL APPEAL NO. AAU 100 OF 2022**

**BETWEEN** : **JOLAME DABEA**

***Appellant***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Mataitoga, RJA**

**Counsel** : **Appellant in person**  
**Ms J. Fatiaki for Respondent**

**Date of Hearing** : **26 January, 2024**

**Date of Ruling** : **12 February, 2024**

## **RULING**

1. The appellant [Jolame Dabea] was charged as follows:
  - (i) 1 count of Sexual Assault, Contrary to section 210(1) (b) (ii) Crimes Act 2009 and
  - (ii) 1 Count of Rape [Digital], Contrary to section 2017(1) and 2(b) of the Crimes Act 2009.
2. The appellant pleaded not guilty to the charges and after a trial in the High Court, he was found guilty as charged and convicted on 14 September 2022. He was sentenced to 17 years 9 months imprisonment with a non-parole period of 15 years and 9 months imprisonment.

### **Summary of Facts**

3. The appellant was aged 47 years old at the time of the commission of the offence, he was charged with. The child complainant was 4 years 10 months at the time of the offence. The appellant and the complainant are not related but are known to each other. They reside in the same village of Dakuibeqa, Beqa. Their homes are approximately 20 meters apart.
4. On the evening of 28 June 2022 around 7 pm, the complainant was seen alone near the village church. The appellant met the complainant near the church and accompanied her to the school to look for Makereta a young girl. According to the appellant the complainant had told him that she was looking for Makereta who had gone to the school to study. They went to the school and entered empty class room where there were no lights and it was dark. They were only persons there. The appellant then placed the hand of the complainant on his penis and then penetrated her vagina with his fingers.
5. Soon after the mother of the complainant came to the class room and asked the appellant what was he doing with the complainant. The complainant and the appellant are known to each other.

6. The complainant was medically examined by Dr Doreen Dipika Mani at Navua Hospital on 30<sup>1</sup> June 2022.

### **Appeal**

7. The appellant filed a timely appeal seeking Leave to appeal against Conviction on 30 September 2022, but the appeal against sentence was 12 months out of time. It is noted that this delay in substantial indeed.
8. At the hearing on 31 January 2024, the appellant appeared via skype from Levuka Corrections Facility. He appeals against conviction and also filed the application for Enlargement of time to seek leave to appeal against sentence. These two matters were heard together. It is important to note that this is an interim process before a judge alone, whereby the court makes an initial assessment of the grounds and submissions of appeal submitted by the appellant seeking leave to appeal to establish whether they are arguable i.e. having reasonable prospect of success. The final determination of the appeal will be before the full later.

### *Grounds of Appeal*

9. The appellant submitted several sets of appeal grounds against conviction. The court have reviewed them and consolidated them to reflect the core allegation, as follows:
  - (i) The learned trial judge erred in law when he did not properly consider the following:
    - (a) When he did not properly and adequately assess the complainant statement on oath and her evidence in court
    - (b) When he did not properly consider the medical evidence and the doctor's finding, in considering the credibility of the complainant
    - (c) That the appellant should not be charged on the charge of Rape, and should be charged with indecent assault
  - (ii) The learned trial judge erred in law by shifting the burden of proof to the accused, requiring the appellant to prove his innocence.

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<sup>1</sup> The date on which the medical examination of the complainant in the Judgement is 28 June 2022, is incorrect. The correct date is 30 June 2022, after the criminal offence dated 28 June 2022: See Medical Examination Form.

10. The court will deal with the grounds of appeal challenging the conviction first before consideration of the Enlargement of Time Application for Leave to Appeal against sentence.
11. It should be stated that most of grounds of appeal submitted by the appellant are so convoluted and confused, that it was very difficult to clarify what the grounds of appeal and what are submissions provided in support of those grounds. I have consolidated the grounds to make it manageable as set out in paragraph 9 above.

### **Applicable law**

12. This is an application seeking Leave to appeal pursuant to section 21(1)(b) of the Court of Appeal Act 2009. The appellant to be given leave to appeal, the relevant caselaw have determined that the grounds of appeal urged must have a reasonable prospect of success:  
**Caucu v State [2018] FJCA 173**
13. Section 21(1) (a) of the Court of Appeal Act states that an appeal may be allowed if it thinks the verdict should be set aside because it:
  - (i) Is unreasonable verdict
  - (ii) Cannot be supported having regard to the evidence
  - (iii) Verdict was based on incorrect legal basis
  - (iv) Miscarriage of justice
14. Section 21(1) c) of the Court of Appeal Act requires leave to appeal against sentence.

#### *Review of the Grounds of Appeal*

15. As regards ground 1, which claims that not enough weight and assessment of the credible evidence, given by the complainant in her sworn statement and evidence she gave in court. This claim by the appellant is based on a misunderstanding. It is a fact that the complainant written statement was not in evidence before the court. There was no need to make the comparison alleged by the appellant. The court only had the evidence of the complainant in court. The trial Judge at paragraph 35, 36 and 37 of the judgement provided the basis of his assessment of complainant's evidence and why he found her evidence credible, reliable and accepted them as the truth.

16. On the medical evidence, by reference to paragraph 30 and 31 of the judgement, it clearly sets out the medical evidence and the context of the doctor's evidence are assessed. I have no basis to disagree with the trial judge's assessment of the evidence given his advantage of having heard and observed the witnesses in court. This ground has no merit.
17. On the claim by the appellant that he should not have been charged with rape, but for indecent assault. The appellant's charge is supported by evidence led at the trial. On the basis of the admissible evidence at the trial, it was open to the trial judge to convict the appellant of rape: **Kaiyum v State** [2013] FJCA 146. This ground is frivolous.
18. The next ground of appeal, is where the appellant alleges that the trial judge had shifted the burden of proof requiring him to prove that the evidence he gave was more credible than that of the complainant. This assertion is made without reference to the clear direction the trial judge gave on the burden of proof. At paragraph 4 of the judgment, it states:

*'[4] The accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until proven guilty.'*
19. Furthermore, since both the appellant and the complainant gave opposing evidence about what happened on the night in question, and more specifically what had happened in the classroom when the appellant and the child were alone. In these circumstances the court directed itself according to the **Liberato Direction (Liberato v R (1985) 159 CLR 507)**, which states "... *if the jury does not positively believe the defence witness and prefers the evidence of the prosecution witness, they should not convict unless satisfied that the prosecution has proved the defendant's guilt beyond reasonable doubt*'. This direction was adequately dealt with in paragraph 13, 14 and 15 of the judgement.
20. From the above analysis it showed that this ground like the other have not merit.

21. All the grounds advanced by the appellant against his conviction has no reasonable prospect of success. Leave to appeal against conviction is declined.

*Enlargement Application to Seek Leave against Sentence*

22. The Supreme Court in **Kamlesh v State; Sinu v State** [2012] FJSC 17 set out the principles that govern enlargement application for leave to appeal against sentence. The Court stated:

*‘Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*

- (i) The reason for the failure to file within time.*
- (ii) The length of the delay.*
- (iii) Whether there is a ground of merit justifying the appellate court's consideration.*
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
- (v) If time is enlarged, will the Respondent be unfairly prejudiced?’*

23. The delay in submitting the application is 12 months. That is substantial delay and there are no good reasons for the delay advanced, except that as a prisoner he has difficulty preparing and getting assistance to file his application. In **Fisher v State** [2016] FJCA 57 at paragraph 12 it states:

*“[11] The reasons for the delay are explained by the Appellant in his supporting affidavit. In summary the Appellant deposes that he lacks formal education, misplaced his documents and obtained assistance for his appeal from another prisoner only after he was transferred to the Suva prison.*

*[12] The Supreme Court has acknowledged that incarcerated appellants who are unrepresented do face difficulties in the preparation of their appeals. However, those difficulties do not justify setting aside the requirements of the Act and the Rules: **Raitamata –v- The State**, CAV 2 of 2007; 25 February 2008 and **Sheik Mohammed –v- The State**, CAV 2 of 2013; 27 February 2014. The explanation for the delay will not by itself ordinarily lead to the conclusion that an enlargement of time should be granted. It is usually necessary to consider whether the appeal has sufficient merit to excuse the Appellant's non-compliance with the Rules. It is necessary for the Appellant to show that his appeal grounds have sufficient merit to (a) excuse the delay and (b) be considered by the Court of Appeal.*

23. What is the merit of grounds submitted on behalf of the appellant against sentence? Whether it has a reasonable prospect of success? Appellant submits that the trial judge in choosing the starting point of the sentence at the high end of the sentence tariff as set out in Aitcheson v State [2018] FJSC 29, may have erred in double counting on the aggravating factors. On the face of it, it does look that way, when the judge added a further 2 years for aggravating factors and only 1 year for previous good character
24. Having reviewed the relevant case law in Fusi v State [2021] FJCA 237; Senilolokula v State [2018] FJSC 5; Kumar v State [2018] FJSC 30. I do have sympathy towards the grounds of appeal against sentence advanced by the appellant. The methodology adopted by the sentencing Judge in this case may have been the cause of the error.
25. The respondent support that leave to appeal against sentence be granted. At paragraph 26 of their submission filed in court, they state:
- 'The appellant should be given leave to appeal against sentence on the aspect of sentencing error. The appropriate sentence is a matter for the full court to decide. Also see Salayavi v State [2020] FJCA 120 and Kuboutawa v State [2020] FJCA 147.'*
26. In light of the above analysis, the application for enlargement of time is allowed and leave to appeal against sentence is allowed.

## ORDERS

1. Leave to Appeal against Conviction is refused.
2. Application for Enlargement of Time to file leave to appeal against sentence to the full court is allowed.

  
Isikeli U. Mataitoga  
Resident Justice of Appeal

