

**IN THE COURT OF APPEAL, FIJI**  
**Appellate Jurisdiction**

**CRIMINAL APPEAL NO. AAU 057 OF 2024**

**BETWEEN:**            **AKUILA IOSEFO NAULUMATUA**

**Appellant**

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

**Respondent**

**Coram:**                **Mataitoga, AP**

**Counsel:**             **Ratidara, L for the Appellant**  
**Mishra, P for the Respondent**

**Date of Hearing:**     **15 October 2024**

**Date of Ruling:**     **2 December 2024**

**RULING**

1. The appellant was charged with 1 count of Rape, contrary to section 207(1) and (2) (a) of the Crimes Act 2009 and 1 count of Abduction of Young Person under 18 years of age With Intent to Have carnal knowledge, contrary to section 211(1) of the Crimes Act 2009.

2. Following a trial, in absentia, at the High Court in Suva, the appellant was found guilty for 1 count of Rape charged in count 2 but not guilty on the first count of Abduction of a Young Person under the Age of 18 years and was convicted on the Rape charge in the judgement dated 22 September 2023.
3. The appellant had 30 days to appeal to the Court of Appeal.
4. The Appellant was sentenced to 7 years and 9 months imprisonment with a non-parole term of 7 years and 3 months.

### **The Appeal**

5. The appellant was dissatisfied with the judgement against him and on 1 August 2024, he submitted a Notice of Appeal against conviction. The appeal in untimely.
6. The length of the delay is 10 months and 10 days, which is substantial indeed.
7. There was no Application submitted by the appellant seeking leave of the court for enlargement of time to appeal. This is required under section 26(1) of the Court of Appeal Act.

### **Should the Enlargement be considered in the absence of an application to Enlarge time to file an Appeal.**

8. In **Rasaku v State [2013] FJSC 4** the Supreme Court adopted these guidelines for determining whether enlargement of time may be granted or not. The Court stated:

*[21] In paragraph 4 of his judgment in **Kamalesh Kumar v State; Sinu v State [2012] FJSC 17**; CAV0001.2009 (21 August 2012), Chief Justice Anthony Gates has summarized the factors that will be considered by a court in Fiji for granting enlargement of time as follows:*

*(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?*

Reason for failure to file within time

9. The appellant's affidavit filed on 1 August 2024 stated his reasons for failure to file on time as:

- *“At the time I was taken into custody to serve my sentence, I was of the perception that I did not want to worsen things for myself and I had accepted my conviction and sentence.*
- *I lack knowledge on the possible appeal grounds that could have been advanced against my conviction, hence I needed advice.*
- *I was later served with an appeal by the state on my sentence. Upon my appearance in court and directions of the court for assistance by Legal Aid Commission, I was then advised by counsels for Legal Aid Commission on my appeal and the appeal against me and the appeal against me.”*

10. The reason is because the State has appealed against his sentence and the LAC advised the appellant to appeal is to appeal against sentence. If that is the only basis, without any and any substantive ground of appeal, than the reasons for the failure to file the Notice of Appeal have no merit.

Delay is Substantial

11. In this case the delay was 10 months 10 days, which is a substantial delay. Unless there are good reasons for the delay, the court may consider this application as frivolous.

Are there Grounds of Appeal with merit that requires the consideration of the full court and may reasonable succeed?

12. There is only 1 ground of appeal submitted by the appellant, namely, “the trial judge erred in law and fact in convicting the appellant, when the prosecution case cannot be sustained on the totality of the evidence pertaining to credibility and reliability of the complainant’s evidence.”

13. In assessing this ground, I am guided by the Court of Appeal’s statement in **Navunisaravi v State [2023] FJCA 68:**

*[8] Despite the excessive and unexplained delay, if the strength of the grounds of appeal and the absence of prejudice are such that it would be in the interests of justice that leave be granted to the applicant [see State v Patel [2002] FJCA 13; AAU 0002U2002S (15 November 2002)]. Delay alone will not decide the matter of extension of time and the court would consider the merits as well [see Waqa v State [2013] FJCA 2; AAU62.2011 (18 January 2013)].*

14. Counsel for the appellant have submitted that the delay in reporting the rape incident at the first available opportunity was a major issue, and further there were more than one explanation given by the complainant for the delay. These eroded the credibility of the evidence of the complainant. If these claims of the appellant are established from the full record, the issue of his conviction may be under suspicion.

15. The State have not submitted any prejudice if leave to appeal out of time is granted.

16. I am satisfied that the grounds of appeal submitted by the appellant should be considered by the full court with advantage of the court records in the High Court.

17. I would allow enlargement of time to appeal under section 26(1) of the Court of Appeal Act. I grant leave to appeal on the grounds submitted by the appellant.

## **ORDERS**

1. Enlargement of time to appeal allowed
2. Leave to appeal granted

