

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

**CRIMINAL APPEAL NO. AAU 122 of 2022**  
**[In the High Court at Labasa Case No. HAC 64 of 2018]**

**BETWEEN** : **GABIRIELI BUARAKI**  
  
**AND** : **THE STATE** *Appellant*  
*Respondent*

**Coram** : **Prematilaka, RJA**

**Counsel** : **Appellant in person**  
**Ms. R. Rice for the Respondent**

**Date of Hearing** : **08 January 2024**

**Date of Ruling** : **09 January 2024**

**RULING**

[1] The appellant had been charged in the High Court at Labasa on the following counts:

**'Statement of Offence**

**RAPE:** *Contrary to section 207(1) and 2(a) and (3) of the Crimes Act 2009.*

**Particulars of Offence**

***GABIRIELI BUARAKI, between the 1<sup>st</sup> day of July 2017 and 31<sup>st</sup> day of July 2017, at Qaranivai, Dogotuki, Northern Division, penetrated the vagina of (name suppressed), a child under the age of 13 years, with his penis.***

**COUNT 2**

**Statement of Offence**

**PROCURING ANOTHER TO WITNESS AN ACT OF GROSS INDECENCY:** *Contrary to section 210(1) (b) (ii) of the Crimes Act 2009*

**Particulars of Offence**

*GABIRIELI BUARAKI, between the 1<sup>st</sup> day of January 2018 and 31<sup>st</sup> day of January 2018 at Qaranivai, Dogotuki, Northern Division, procured (name suppressed) without her consent to witness an act of gross indecency.'*

- [2] After the appellant pleaded guilty, the trial judge had convicted the appellant and sentenced him on 03 April 2019 to 11 years' and 05 months' of imprisonment on count one and 03 years of imprisonment on count two to be served concurrently with a non-parole period of 10 years.
- [3] The appellant had earlier appealed against his sentence in AAU 111 of 2019 but abandoned the sentence appeal by filing Form 3 dated 22 January 2021 which was duly considered by this court and allowed the abandonment on 01 February 2020. Thus, there is no sentence appeal on foot before this court.
- [4] The factors to be considered in the matter of enlargement of time 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? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).
- [5] The delay in the conviction appeal is over 03 years and over 06 month. There is no explanation for the delay. Since the appellant had appealed his sentence in a timely manner there is no reason why he could not have appealed his conviction without delay. Thus, his appeal against conviction appears to be an afterthought. Since the delay is extraordinary, there is hardly any ground for extension of time. Nevertheless, I would see whether there is a **real prospect of success** for the belated ground of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent has not averred any prejudice that would be caused by an enlargement of time.

[6] The trial judge had summarized the facts in the sentencing order as follows:

2. *The brief facts were as follows:*

*On 9<sup>th</sup> November, 2017 at around 9 am the victim ( 38 years) was having tea at her home with Emosi her husband's cousin and Melai her neighbour. After a while Melai left, since she was going to Nadi, she asked the victim to close the doors and windows of her house after the accused leaves. The victim and the accused were known to each other and she also knew the accused was a police officer.*

3. *After sometime, the victim went outside to get some water to wash the dishes. The accused called the victim from Melai's house asking her to close the doors and windows of Melai's house. The victim responded by saying that she will attend to it later, however, the accused kept on insisting that she closes the doors and windows of Melai's house immediately.*

4. *As soon as the victim entered the house through the kitchen door, the accused pulled her inside, and started touching her vagina. Thereafter, the accused forcefully made the victim lie on the floor, she tried to push him but could not. The accused was able to remove the complainant's shorts, push aside her swimming togs and then penetrated his penis into her vagina.*

5. *The victim started to cry, she could not believe what the accused was doing to her she did not consent to what the accused had done to her. After this, the accused stood up put on his clothes and left. The victim later told her husband about what the accused had done to her. The matter was reported to the police, the accused was arrested, caution interviewed and charged.*

[7] The ground of appeal urged by the appellant is as follows:

**Ground 1 – Equivocal Plea**

*THAT the Learned Judge misdirected or took account of matters which should have taken account of or failed to take account of matters to which he should have had regard or that he exercised his discretion in a wholly unreasonable manner (R vs Sheik C200) EWCA Crim.492 [2004] 2 Cr. App.R13.*

**Ground 1**

[8] It is difficult to decipher the appellant's complaint. He appears to claims 'erroneous legal advice by the police interviewer and prosecutor' as the reason for the guilty plea. He was represented by counsel at the trial. According to the sentencing order, he

entered an unequivocal plea of guilty before the High Court and on his agreement to a relevant set of facts (summary of facts) the High Court convicted him of both counts.

- [9] **Nalave v State** [2008] FJCA 56; AAU0004.2006; AAU005.2006 (24 October 2008) the Court of Appeal held:

*'[23] It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (Rex v Golathan (1915) 84 L.J.K.B 758, R v Griffiths (1932) 23 Cr. App. R. 153, R v. Vent (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (R v Murphy [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132).'*

- [10] It was stated by the High Court of Australia in **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132):

*"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."*

- [11] In **Tuisavusavu v State** [2009] FJCA 50; AAU0064.2004S (3 April 2009) the Court of Appeal stated:

*'[9] The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see **Bogiwalu v State** [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (Liberti (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.'*

[12] I cannot see any hint of equivocation on the record as far as the appellant's guilty plea is concerned. His arguments based on equivocal plea is an afterthought.


[13] As for the allegation of 'poor legal advice of counsel', the appellant had not followed the procedure as prescribed in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) and reiterated in **Sami v The State** AAU 0025 of 2018 (26 May 2022) in raising this allegation against his trial counsel and therefore, he is not entitled to raise it as part of this ground of appeal. I see no evidence flagrant incompetence on that part of the appellant's trial counsel.

[14] There is no merit in the appellant's assertion that he should have been convicted for the lesser charge of incest instead of rape either.

**Order:**

1. Enlargement of time to appeal against conviction is refused.



  
.....  
**Hon. Mr Justice C. Prematilaka**  
**RESIDENT JUSTICE OF APPEAL**

**Solicitors:**

Appellant in person  
Office for the Director of Public Prosecutions for the Respondent