

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

**CRIMINAL APPEAL NO. AAU 091 OF 2022**  
**High Court No. HAC 354 of 2019**

**BETWEEN** : **JONI MALAULAU**

*Appellant*

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

*Respondent*

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

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

**Date of Hearing** : **27 March 2024**

**Date of Ruling** : **18 April 2024**

**RULING**

1. The appellant was charged with 1 count of Attempted Murder, contrary to section 44 (1) and 237 of the Crimes Act. The particular of the offences are that:

***Statement of Offence***

***ATTEMPTED MURDER:*** *Contrary to Section 44(1) and 237 of the Crimes Act 2009*

***Particulars of Offence***

***JONI MALAULAU on the first day of October 2019 at Gasele Village, Yale Kadavu in the Southern Division attempted to cause the death of **RUSILA CABEBULA** by striking her with a cane knife and at the time **JONI MALAULAU** intended to cause **RUSILA CABEBULA**'s death.***

2. Following the trial the appellant was found guilty as charged and convicted. On 9 April 2021 he was sentenced to life imprisonment with a minimum period of 7 years imprisonment before any pardon may be considered.

### **Leave Application**

3. The appellant filed an untimely Notice for Leave to Appeal against conviction on 30 September 2022. On the 4 April 2023 the appellant filed an Application for Leave to appeal out of time against conviction and sentence. The appellant's submission in support of his application was filed on 18 December 2023.

### **Relevant Law**

4. Rule 40 of the Court of Appeal Rules states that an application for enlargement of time must be file in accordance with Form 6 Second Schedule of the rules.
5. Under section 35 (1)(b) of the Court of Appeal Act power is given to a single judge to grand enlargement of time to appeal or not. In the exercise of that power, the judge is guided by relevant case law which have established principles to follow.

### **Application for Enlargement of Time to Appeal**

6. Enlargement of time is not granted as a matter of course, but only if exceptional circumstances exist to justify the grant of additional time to comply with the rules of Court, in an endeavour to avoid or redress some grave injustice that might otherwise occur from the strict application of such rules of court. The objective of the discretion possessed by this Court in this regard is to ensure that such a rule of court does not become an instrument of injustice.
7. In dealing with Enlargement of Time Applications for Appeal, the Supreme Court in **Kumar & Sinu v State** [2012] FJSC 17, have provided the following factors the appeal court may assess before granting the application or not:

*'[4] 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?'*

8. In assessing the above factors, the submission of the appellant is now reviewed against it:

(i) Reason for Failure to file within Time

The appellant claims that that he had submitted his application for leave to appeal on time. It was misplaced by staff in the relevant office of the Correction Service. He was also transferred to another prison; he does not name the prison. There is no independent verification for his claim. When he did not hear from the Court Registry he filed another fresh application.

This explanation is inadequate and the Court does not accept it. A delay of 1 year 10 months is substantial indeed. To allow on the kind of explanation given by the appellant, would make a mockery of the Court Rules. The reason given just does not equate with the appellant's claim that he was diligent in seeking leave to appeal. It is more like an afterthought.

(ii) The length of the Delay

1 year 10 months. A substantial delay

(iii) Any ground that merit justifying appellate courts consideration

There is no other ground submitted, to justify the court's consideration.

(iv) Despite substantial delay, whether there is ground of appeal likely to success

This factor requires an assessment of the substantive ground submitted by the appellant for Leave to Appeal against Conviction and sentence. In this regard the hurdle is whether the ground has '**reasonable prospect of success**' on appeal.

There are 6 grounds of appeal submitted against conviction and 1 against sentence.

In his submission filed in court on 23 December 2023, the appellant, stated 'his application dated 27 March 2023 received at the registry on 4 April 2023 and not the other two applications. On grounds and submissions 1) states that grounds 1 to 4 can be subsumed into one ground i.e. the inadmissibility of the caution interview evidence relied upon by the trial judge in his judgement and ruling to find the appellant guilty, creating an unbalanced judgement

This claim of the appellant is not back up with specific reference to passage in the judgment where the trial judge relied on inadmissible evidence arising from the caution interview statements of the accused.

In reviewing the judgement, the following is clear: paragraphs 7 to 12 set out the requirement to prove the charged against the appellant. That analysis by the trial judge is correct.

From paragraphs 13 to 17 the evidence of the complainant and the Doctor is summarized by the trial judge and at paragraph 17 and 18, he stated thus:

*'17.1 accept the evidence of the complainant and the Doctor as credible, reliable and truthful evidence*

*'18. Having taken into consideration the reasons discussed above, it is my considered view that the prosecution has successfully proven the accused had committed this offence as charged.'*

The other 2 grounds have not been substantiated with proper references to the evidence adduced and relied on by the trial judge to the actual judgement to base their claim.

The grounds advanced by the appellant against conviction have no reasonable prospect of success on appeal.

**Against sentence** – The sentenced passed by the trial judge is provided by law and it is open to the judge to impose the same on the appellant. The appellant has not stated the basis of his claim that the sentence is harsh and excessive.

Given that this appellant has previous convictions of similar kind of domestic violence, the minimum imprisonment term of 7 years, is lenient.

This ground has no prospect of success on appeal

(v) If respondent may be prejudiced

No prejudice likely if enlargement of time was allowed to the respondent.

9. In light of the assessment above with regard to the application for Enlargement of time to Apply for Leave to Appeal, application is declined for enlargement. Consequently, leave to appeal is refused as well.

**ORDERS:**

1. Application for Enlargement of Time to Appeal is refused
2. Leave to Appeal against conviction and sentence is refused.



  
Isikeli U Mataitoga  
Resident Justice of Appeal