

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 115 OF 2022
High Court Action No.HAC 163 OF 2016

BETWEEN : **SIMIONE RAISOKULA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Appellant in person**
Ms K. Semisi for Respondent

Date of Hearing : **18 April 2024**

Date of Ruling : **30 April 2024**

RULING

1. The appellant was charged with three counts of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act and two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The Particulars of the offences are that:

FIRST COUNT

Simione Raisokula on the 29th day of March 2014 at Soso Village, Kadavu in the Eastern Division had carnal knowledge of **AB**, without her consent

SECOND COUNT

Simione Raisokula on the 29th day of March 2014 at Soso Village, Kadavu in the Eastern Division unlawfully and indecently assaulted **AB**, by kissing her cheeks and neck.

THIRD COUNT

Simione Raisokula on the 13th day of April 2014 at Soso Village, Kadavu in the Eastern Division had carnal knowledge of **AB**, without her consent.

FOURTH COUNT

Simione Raisokula on the 13th day of April 2014 at Soso Village, Kadavu in the Eastern Division unlawfully and indecently assaulted **AB**, by kissing her lips.

FIFTH COUNT

Simione Raisokula on the 16th day of April 2014 at Soso Village, Kadavu in the Eastern Division had carnal knowledge of **AB**, without her consent.

High Court Trial

2. The trial in the High Court at Suva, commenced on the 15th of August 2017 and concluded on the 18th of August 2017. The Prosecution adduced the evidence of three witnesses including the victim. The Defence called the evidence of the appellant, but did not call any other witnesses. Subsequently, the learned counsel for the Defence and the Prosecution made their respective closing addresses. It was followed by the Summing Up.
3. The three assessors unanimously found the appellant guilty for all the counts as charged.
4. The trial judge after carefully considering the evidence adduced during the hearing, the respective closing addresses of the parties, the Summing Up and the unanimous opinions of guilt given by the three assessors, accepted the guilt verdict of the assessor and found the appellant guilty as charged of all the five counts. The date of the judgement was 22 August 2017.
5. On 24 August 2017, the appellant was sentenced to 11 years and 10 months imprisonment with a nine years and 10 months of non-parole period.
6. At the trial there was only one issue in dispute and that is whether the victim consented to the sexual intercourse with the appellant or not. The appellant was represented at the trial by counsel from Legal Aid Commission.

7. It would assist in understanding the appellant's grounds of appeal if the prosecution case as determined by the court when summing up the case, were set out in full. The relevant pages in the trial Judge's Summing up set out below:

33. The first witness of the Prosecution is the victim. In her evidence the victim said that she was living in Nasalia in Kadavu in 2014. Her Aunt called her to come to Soso village. The Aunt told her to come and meet her father. She met her father at Namalata on the 29th of March 2014. He then took her by boat and went to Lauvaki. She found her father's younger brother Michael at her father house. He told them to go to Soso village as she supposed to go there. However, her father refused to go. She then had dinner with her father and went to sleep. The house of the father is an open house and had no separate rooms. She slept on the bed and her father went to sleep on the floor, few meters away from her bed.

34. While she was sleeping on the bed, her father called her to come to him. She said "no". He then came and sat on the bed. He removed her clothes and tried to touch her body. He then kissed her cheek and neck. He touched her breast. She tried to push him away, but he was too heavy for her to push away. She was scared. The victim then felt that the penis of the accused was inside her vagina. She felt pain when he put his penis into her vagina. She told him that you are my father and she is his daughter. He told her that she is not his child and he is not her father. She did not agree or consent for him to put his penis into her vagina. She told him "no" when he did that. But he continued to put his penis into her vagina. There is only one house situated close to her father's house. Apart from that, no other houses are situated around that area. The closest village is about twenty kilometers away behind the forest. It would take about four hours to reach there by foot.

35. On the 13th of April 2014 the accused came and took off her clothes while she was lying on the bed. There was no one present in the house apart from the victim and the accused. After taking off her clothes, he came on top of her. He grabbed her hand and put her down to the floor. He then touched and kissed her lips. She was scared. She tried to push him away, but he was too heavy. She kept pushing him away. The accused then inserted his penis into her vagina. She told him "No". He asked her whether Qasiva would come and try you out. She asked him "are you mad"? Qasiva is her cousin.

36. The accused asked the victim to give him her vagina. She said "no". He then said that he will hang himself if she did not give it. He was angry.

37. On the 16th of April 2014, she was still staying with her father at his house. In that evening, she was lying on the bed, the accused was also lying on the same bed beside her. He then pulled her by the collar of her t-shirt. He then kissed her cheek and neck. He touched her breast. He then took off her clothes and penetrated his penis into her vagina. She felt scared. She pushed him away but he was too heavy. He pushed himself towards her.

38. *The victim in her evidence explained that she did not agree or consent to the accused to insert his penis into her vagina in that manner. She was scared as he threatened her that he will kill her if she tells anyone about this incident.*

39. *After the third incident, she had gone to Pastor Bai's house with her brother. She stayed there on Sunday. The Pastor, her uncle Michael and Aunty Arieta had asked her to seek forgiveness from her father, which she denied. She did not meet her father for reconciliation. Her uncle then asked her to go back to Nasalia. She then went back to Nasalia and stayed at her mother's place. She did not go back to Sogo village again.*

40. *At Nasalia she did not tell anyone about this incident. Her mother did not ask her about this incident. Neither she did tell her mother about this incident.*

41. *The victim further explained in her evidence that her aunty Bulou Milika asked her whether her father had sexual intercourse with her in the forest. The Aunty asked her about it when she went to Vukavu with the Aunt. The victim had told her "yes".*

42. *The victim in her evidence said that she made a statement to the police regarding this incident in 2016. Subsequent to making of the Police Statement, she was taken for medical examination.*

43. *The victim explained that there was no boat for her to go back when her father first had this forceful sexual intercourse. It is too far for her to go back on foot. If she wants to go back on foot, she had to go through the forest, which she could not do it alone. When her brother came, she went back with him. The neighboring house was always empty as the owner always resides at Vukavu. The victim said that she was scared and that was the reason she did not tell her mother about this incident. She did not tell this to Police till 2016 as she was scared.*

44. *During the cross examination, the victim said that her parents got separated even before she was one year old. Since then, the victim has grown up with her mother and her father had played no part in her growing up. The father was never a part of her life when she was growing up. She only found out about her father when she finished her school.*

45. *On the 29th of March 2014, she met her father at Maraia's house at Namalata, Vunisea. That was the first time she met her father. She was nineteen years old at that time. Her father was also happy to see her. They then went to Lauwaki. On their way he bought some stuff from a shop. Once they reached home, her father prepared dinner. They then had dinner. Apart from the victim and her father, no other person was present at home. She then went to have her bath. When she returned from her bath, she found that her father was washing dishes.*

46. *Ladies and gentleman, you have heard the evidence given by the victim by denying the proposition put to her by the learned counsel for the defence in respect of these three alleged sexual encounters with the accused. She said that she did not scream when the accused had sexual intercourse with her.*

The victim had told Kalou about this forceful sexual intercourse by her father on the next day after the first alleged sexual intercourse. The neighbour had told her that her father was stupid.

47. You may recall that the learned counsel for the defence asked the victim about the positions that she had when having sexual intercourse with the accused. She denied all the positions proposed by the learned counsel apart from the position that she came on top of the accused when they had sexual intercourse. She however, denied all the proposed positions in respect of the third sexual encounter. Moreover, during the re-examination she explained that she did not come on top of the accused when he had sexual intercourse with her. Only the accused came on top of her. The victim denied that she had agreed or consented to have sexual intercourse with the accused on the 29th of March 2014, 13th and 16th of April 2014 respectively.

48. The victim explained that she was scared of the accused as she thought that he was still following her, even though she lived in Nasalia village. She had told about this incident to Nurse Iva at Soso village. Nurse Iva then had spoken to the accused. Nurse Iva then took her to Nasalia village.

49. The victim said that she only told Auntie Bulou that the accused had sexual intercourse with her and never told her that he raped her. Auntie Bulou asked her whether the accused had sexual intercourse with her. The victim said that she wanted to report the matter to Police but her uncle Michael, Auntie Arieta and Pastor Bai told her not to do such.

50. In the re-examination, the victim said that she did not scream as no one was around. Only the accused and the victim were there during the time of these three incidents took place. Furthermore, the victim said that she told Auntie Bulou that the accused raped her.

51. The second witness of the Prosecution is Daiana Naikanitoba. She is the auntie of the victim. She is one of the cousins of the accused. She could recall that on the 24th of August 2014, she went to choir practice at Vukavu village. She was accompanied by the victim. At that time Ms. Naikanitoba was living in Soso village, Kadavu. The victim was at Soso village during that time, staying at the family house of her father's younger brother. His name is Waisale Osea.

52. On their way back to the village, she had asked the victim whether the accused had sexual intercourse with her. She had asked the victim four times as first two times she denied it and the third time she took a long breath but did not answer. The victim only answered to the fourth time by nodding her head and raising her eyes. They then talked for a while and walked back to the village. Ms. Naikanitoba had asked the victim why did she never tell this to them on the first time when it happened. The victim had told her that she was scared to tell. She then did not discuss it further with the victim. She did not tell anyone about this and kept it to her as she wanted to find out the truth of it. On their return to the village, the victim stayed with her on Sunday and went back to her uncle's place.

53. During the cross examination, Ms. Naikanitoba said that the reason she asked the victim about this incident because of the rumour she heard in the village. She had only asked the victim whether her father had sexual intercourse with her. The victim never told her that the accused forced her to have sexual intercourse with him. The victim answered by only nodding her head. She did not inform about this to anyone including the Police. The reason that she did not tell anyone about this as the victim never told her that the accused forced her to have sexual intercourse with him.

54. The next witness of the Prosecution is Sergeant Moape. He is presently based at Kadavu Police Station. He is the investigation and interviewing officer of this matter. He was instructed by the director CID to investigate this matter and conduct the caution interview of the accused. He has conducted the caution interview on the 19th of April 2016 and concluded it on the 20th of April 2016. There was no witnessing officer present during the recording of the caution interview. He did not want to have a witnessing officer as the accused did not behave violently. The caution interview was conducted in the room of the Station Sergeant. It was conducted in i-taukei language as the accused chose the said language. It was recorded by him. He then translated the caution interview into English language. The accused confirmed about his educational level and his ability of reading and writing of i-taukei language. During the recording of the caution interview the accused was given sufficient breaks, rest and meals. Sergeant Moape tendered the original copy of the caution interview as Prosecution Exhibit one and the translated copy of the caution interview as Prosecution Exhibit two.

55. The accused was given his right to counsel and he then freely and voluntarily signed on the caution interview in order to acknowledge it. Sergeant Moape asked the questions and the accused answered to them accordingly.

56. Sergeant Moape further said that he properly explained the accused about the allegation during the conduct of the caution interview. He in his evidence then explained about the breaks given to the accused during the recording of the caution interview. The accused was reminded and informed about his rights at the end of each and every break. The accused has signed the caution interview at the end of each break in order to acknowledge that he was reminded and informed about his rights.

57. According to evidence given by Sergeant Moape, the accused answered each and every question freely and voluntarily. He has recorded those questions and answered in the same manner that he asked and the accused answered. He recorded them to the best of his ability and knowledge. The accused understood each and every question he asked. Sergeant Moape then translated them into English to the best of his knowledge and ability. Neither Sergeant Moape nor other police officers fabricated any of the answers given by the accused.

58. *The accused freely and voluntarily pointed out all the relevant places in respect of these offences during the reconstruction. He was not forced to do so. Sergeant Moape found that the house of the accused and one more house were situated in the farm of Lauwaki. The nearest two villages are Soso village and Vukavu village. It would take about two-three hours to go there from Lauwaki. Once the reconstruction is completed they came back to the Police Station. The accused was given his rights to read the caution interview at the conclusion of the recording of it. However, the accused chose not to exercise that right. Moreover, he did not ask Sergeant Moape to read it over to him.*

59. *Sergeant Moape explained that all Police Officers in the Police Station were engaged in two other investigations pertaining to some other serious crimes at the time of the recording of this caution interview. Only Sergeant Moape and the Station Orderly were present in the Police Station. Therefore, he had to continue the recording of the caution interview without a witnessing officer.*

60. *During the cross examination, Sergeant Moape said that it was important to have a witnessing officer during the recording of caution interview of a serious offence such as this offence. He was then questioned by the learned counsel for the defence regarding the answers given by the accused in respect of the following questions in the caution interview. They are that: Q&A 53-80, 99-108, 114-120, 122-134, 139, 147, 149, 151, 154, 156, 158. The learned counsel proposed to Sergeant Moape that many of the answers that have been recorded in the caution interview pertaining to those questions were fabricated, which Sergeant Moape denied in his answers.*

61. *Moreover, Sergeant Moape in his evidence said that he received the medical report of the victim. The Medical Report of the victim was tendered as Defence Exhibit one during the cross examination.*

62. *During the re-examination Sergeant Moape said that it is not a requirement to have a witnessing officer during the recording of the caution interview."*

The Appeal

8. On 21 October 2022, the appellant submitted a Notice of Enlargement of Time to Appeal against conviction and sentence. This Notice was accompanied with 3 grounds of appeal against conviction and 1 ground against sentence, which may be considered if enlargement of time to appeal is given.
9. On 4 May 2023 additional grounds of appeal were filed by the appellant and again another set was filed on 13 September 2023. A further set of grounds of appeal was filed on 21 December 2023. The appeal was untimely.

10. All the grounds of appeal submitted by the appellant thus far, did not address the issues for Enlargement of Time to Appeal for Leave to Appeal.

Application for Enlargement of Time to Appeal

11. The application for the enlargement of time to appeal conviction is provided for under section 26(1) of the Court of Appeal Act 1949 (the Act). Section 35(1) (b) of the Act gives a single judge of the Court of Appeal power to enlarge time. The application for leave to appeal against sentence is made pursuant to section 21(1)(c) of the Act and under section 35(1) of the Act, a single judge has the power to grant leave.
12. The Court of appeal in **Tawake v State** [2018] FJCA 133, adopted the following factors to be considered for an enlargement of time application, that was set out by the Supreme Court in **Kumar & Sinu v State** [2012] FJSC 17, (CAV 01 or 2009) 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.

Assessment

13. The length of the delay was 5 years, 11 months and 5 days. This a substantial delay indeed.
14. There is no reason provided by the appellant for the delay in his appeal. As noted earlier, all the grounds of appeal submitted by the appellant did not concern factors set out in paragraph 10 above, relevant to an Enlargement of time Application assessment.
15. As regards the merit of the appeal, I had noted above that the issue at the trial was, whether consent was given by the victim to the sexual intercourse between the appellant and the victim. The appellant ground 1 of appeal that there was no evidence of forced penetration by the appellant's penis in the victim's vagina. The appellant admitted in his evidence that he had sexual intercourse with the victim on the 29th of March 2014, 13th of April 2014 and 16th of April 2014. He claims that the victim consented to have

sexual intercourse with him on those three occasions. Accordingly, the main dispute in this matter as far as the three counts of Rape are concern, is whether the victim gave her consent to the accused to have sexual intercourse with her on those three occasions.

16. The trial judge at page 3, paragraphs 7, 8, 9, and 10 found as follows:

7. The Accused admitted in his evidence that he had sexual intercourse with the victim on the 29th of March 2014, 13th of April 2014 and 16th of April 2014. He claims that the victim consented to have sexual intercourse with him on those three occasions. Accordingly, the main dispute in this matter as far as the three counts of Rape are concern, is whether the victim gave her consent to the accused to have sexual intercourse with her on those three occasions.

8. I first draw my attention to the evidence adduced by the defence, where he claims that he had consensual sexual intercourse with the victim on these three occasions. However, the Prosecution tendered in evidence the record of the caution interview made by the accused, where he has admitted that he forcefully had sexual intercourse with the victim without her consent. The accused in his evidence claims that certain answers that have been recorded in the caution interview, incriminating him to this crime are incorrect. He alleges that the Interviewing officer has fabricated those answers. 9. The accused in his evidence explained that he was angry and upset about the behaviour of the victim when she was naked and drying up her body in the bedroom. He said that he wanted to get a stick and hit her. However, he did not execute that idea as she met him after long separation. He then said that he was in tears when he saw the victim was lying naked and fondling her breast while touching her private parts from one hand. According to this evidence adduced by the accused, it appears that he was very much concern about the conduct of the victim. However, all of a sudden he has changed into a different person when the victim as he claimed, came on top of him nakedly. It is my opinion that the evidence given by the accused is improbable and not credible.

10. In respect of the caution interview, the accused admitted in his evidence that he was treated well by the Police. He properly understood the questions posed to him by the Interviewing Officer. He then answered to these questions freely and voluntarily. When he was offered an opportunity to read it or read over to him by the Interviewing Officer, he declined to exercise that right. Apart from the mere allegation that certain incriminatory answers that have been recorded in the caution interview were fabricated, I do not find any material to suggest the same. I am mindful of the fact that the accused does not need to prove anything. However, the court is required to consider the evidence given by the accused if he chose to do so.

11. In view of these reasons, I do not find the account given by the accused is true or may be true. I further find that it does not create any reasonable doubt about the case of the Prosecution.

17. Ground 2 of appeal alleging non-direction regarding the age of the victim is frivolous and has no merit.
18. Ground 3 of the appeal alleges miscarriage of justice base on a claim that the trial judge did not properly explain the defence case during the summing up to the assessors. The first matter to note is that both counsels for the parties were given an opportunity to advice any redirections on matters said or omitted in the summing up by the trial judge, but both did not avail this opportunity. Secondly, the evidence of the defence was summarised for the assessors during the summing up at paragraphs 63 to 71, so that factually the basic claim inherent in this ground of appeal is baseless. This ground has no merit.
19. In terms of factor 4 of the enlargement factors to be assessed, namely if any prejudice to the respondent may occur, in a narrow sense that the respondent DPP may not be prejudiced but there is wider issue, the need to be judicial in evaluating the enlargement of time application that is so substantially delayed that the interest of justice in the efficient administration of the court case workload and management is prejudiced. This is one such case that allowing the out of time application cannot be allowed.
20. In light of the above assessment, I conclude that given the lack of any reasons to support the application for enlargement of time to appeal, coupled with lack of any merit in the grounds submitted, to warrant such enlargement, the application is refused.

ORDERS:

Application for Enlargement of Time to Seek Leave to Appeal is refused.

Leave to appeal is refused



Isikeli U Maitaitoga
Resident Justice of Appeal