

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

CRIMINAL APPEAL NO. AAU 0155 OF 2019

[Suva High Court Case No: HAC 298 of 2018]

BETWEEN : **WALUSIO KALI FERESI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**
Qetaki, RJA
Winter, JA

Counsel : **Ms S Prakash for the Appellant**
Mr R. Kumar for the Respondent

Date of Hearing : **02 July 2025**

Date of Judgment : **25 July 2025**

JUDGMENT OF THE COURT

Mataitoga, P

[1] I concur with the reasons and the conclusion of Winter, JA's judgment.

Oetaki, RJA

[2] I agree.

Winter, JA

Background

[3] In February 2019, Mr Feresi was convicted for the assault, rape, and intimidation of his separated wife, SL. There were four counts:

- criminal intimidation contrary to sections 375(1) (a) (i) and (v), and
- assault with intent to commit rape contrary to section 209, and
- oral rape contrary to section 207(1) and (2) (a), and
- anal rape contrary to section 207(1) and (2) (a)

he was sentenced to 10 years and 09 months imprisonment with a non-parole period of 09 years and 09 months.

[4] Mr Feresi appealed his conviction 6 months late. He amended his grounds of appeal two years later. There was little explanation for the substantial delay in bringing the late appeal, however, the state not objecting, enlargement of time to appeal against conviction was granted in June 2022. However, only on a matter of law, found in ground two. Following the leave ruling Mr Feresi in March 2023 applied to renew his grounds of appeal before the full court.

[5] Finally on the 17th of June 2025, some 14days before this hearing Mr Feresi again applied to amend his notice of appeal including a request for enlargement of time. His counsel submits this was to ‘tidy up’ his appeal, however counsel conceded the grounds about systemic and complaint delay were both new and never raised in previous grounds nor before or at his trial.

[6] Mr Feresi was more than six years late when he refiled this latest ‘tidy-up’ application. He abandons all previous grounds and relies upon the six ‘new’ grounds advanced. This includes the approved ground two, now ground 1 in the current application.

The offending

- [7] SL was married to the appellant but separated from him in January 2013. He had been a police officer; SL was at the time a special constable. SL once separated lived with their son at her parents' home. On 01 June 2013 a senior police officer (apparently a friend of Mr Feresi) asked SL to go and see her ex-husband and talk things over. SL refused as she was afraid Mr Feresi would hurt her again. The appellant then called her directly and asked her to come to his place as their son was with him. The appellant, without her knowledge, had taken their son from the custody of her parents. SL reluctantly decided to go and collect the child.
- [8] As soon as SL entered the house, Mr Feresi questioned her over whether she was having an extra marital affair, SL denied this was so, he then grabbed her collar, pulled her, and said, "*stop lying*".
- [9] An axe and a cane knife lay on the floor, pointing to them and picking up the axe Mr Feresi told SL he was going to kill her with the axe, chop her bones up, pack them in a sack and ask her relatives to come and pick up her remains. SL, scared by these threats was kneeling and begged him to not to do so. SL tried to defend herself by picking up the cane knife, screaming and pushing Mr Feresi away. Her son woke up to the noise and she ran to him. Mr Feresi disarmed her grabbed her by the wrist and took her to another room removed his pants, held her by the hair and forced her to suck his penis. Afraid of him SL did not consent to this sexual act he forced her to do and in fear did whatever he told her to do.
- [10] He punched her, pulled her up towards him, and bit her neck to deliberately shame her by leaving signs of love bites saying, "*let the boys see what's on your neck*". Then he pushed her on to a bed face downwards, pulled up her skirt, pulled down her panty, while pressing one hand on her back. As she lay pinned by him to the edge of the bed, without her consent, he forced his penis into her anus causing such pain that SL screamed out. SL did not consent to this sexual act he forced her to do. Mr Feresi only stopped when he heard their son awaken again and went to him.

- [11] Seizing the moment SL escaped and ran to the village then made her way to the Navua town police station. Seeing the senior officer, who had earlier asked her to visit her ex-husband, SL decided not to complain to him. Instead, two days later SL complained at the DPC's office in Draunibota and was referred on to the sexual offences' unit. Shortly afterwards SL was medically examined by a doctor, and then made her formal complaint on 04 June 2013.
- [12] The doctor noted two 'love bites' on her neck, a laceration of 01cm at the 12 O'clock position in SL's anus and recorded complaints of headaches and anal pain. The examinations and complaints were consistent with blunt force trauma by punches and bites and sexual abuse caused by forceful insertion of a penis into her anus.
- [13] Consistent with his police statement, Mr Feresi in his evidence denied luring SL to his home. While he admitted he had consensual oral sex with SL he totally denied assaulting her, or that he threatened to kill her with an axe and chop her bones, or that he inserted his penis into her anus.

Extension of time — applicable principles

- [14] The courts may look with some leniency upon procedural lapses by incarcerated appellants when they are not legally represented. However, when an application for enlargement of time has been refused by a single Justice of Appeal, this Court will not automatically grant a renewal application under s 35(3). Consideration of a renewal application requires the full Court of Appeal to scrutinise closely the appellant's application against the reasonably strict criteria to be met before a defaulting appellant is permitted to proceed out of time.¹
- [15] The "*touchstone*" in applications for leave to appeal out of time "*will always be the interests of justice*". This may include in cases involving sexual offending, the desire

¹ *Vakacegu v State* [2023] FJSC 13 at [9]

for finality, because of the effects of a retrial on complainants.²As this Court noted in *Rasaku v State*³ extension of time applications considers five factors. These generally reduce to two questions: (1) why the appeal was filed late and (2) what merit, if any, the proposed appeal appears to have.

[16] Enlargement is permitted only exceptionally and only in an endeavour to avoid or redress some grave injustice that might otherwise occur from the strict application of the rules of court.

[17] The threshold for a successful application to appeal is higher when the appellant has filed out of time. The appellant must satisfy the Court that the appeal has a real prospect of success, rather than a reasonable prospect of success.⁴

The application

Reasons for the delay and length of time

[18] In his Ruling refusing enlargement of time, the single Justice of Appeal regarded the appellant's delay in bringing and then successively amending his appeal grounds as substantial. We agree. Without any satisfactory explanation the delay must be regarded as inordinate and unjustified. That is now compounded by the 'last minute' current application to introduce fresh grounds and 'tidy up' the appeal more than six years late. Nevertheless, as the respondent at leave and before the full court has not relied on any prejudice that would be caused by our enlargement of time the belated grounds of appeal against conviction in terms of merits and any real prospect of success will be considered.⁵

² *C (CA667/2020) v R* [2021] NZCA 271 at [7]; *S (CA88/2014) v R* [2014] NZCA 583 at [13]; and *Williams v R* [2010] NZCA 616 at [23].

³ *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013) at [19].

⁴ *Usa v State* [2020] FJCA 52 at [12].

⁵ *Nasila v State* [2019] FJCA 84; AAU0004.2011 (6 June 2019)

Merits of the proposed appeal

Ground 1: Jurisdiction to try summary and indictable offences from the same event together in the high Court

[19] When leave was properly granted by my brother Prematilaka for this ground the law had not been finally settled by the full court. It now has. In *Kumar v State*⁶ it was made clear that an information may contain not only indictable offences but also indictable offences triable summarily and summary offenses. An accused is not entitled to any election as to the forum.⁷

[20] This ground cannot succeed

Ground 2: failure to properly consider Inconsistencies and omissions in the complainant's evidence

[21] The trial judge addressed the assessors on the evaluation of inconsistent evidence⁸. The trial judge highlighted the inconsistencies and omissions brought to light by the defence cross-examination of SL.⁹ The trial judge was clearly mindful of and had regard to the applicable test in assessing the contradictions, inconsistencies and omissions in evidence generally and particularly as regards this evidence in context.

[22] In *Turogo v State*¹⁰ this court observed that discrepancies which do not go to the root of the matter and shake the basic version of the witness's testimony cannot be given undue importance. Such was the case here. The trial judge properly addressed the assessors on the law, adequately summarised relevant inconsistencies for them and fairly left that issue to their good judgement. The trial judge could do no more.

[23] There is no real prospect of success of this ground.

⁶ *Kumar v State* [2023] FJCA 189; AAU009.2019 (28 September 2023)

⁷ *Ibid* para [31]

⁸ *Nadim v State* [2015] FJCA 130; AAU0080.2011 (2 October 2015)

⁹ Under paragraphs 22 (iii), (iv) and (v)

¹⁰ *Turogo v State* [2016] FJCA 117; AAU.0008.2013 (30 September 2016)

Ground 3 and Ground 4: Delay to court and delay in complaint.

Delay to court

- [24] The crime happened on 1 June 2013. In the circumstances SL's initial complaint was made to the sexual offence unit very soon afterwards. Following medical examination, SL's complaint was formally made some three days after the alleged assaults and rapes on 4 June. Mr Feresi was cautioned interviewed on 27 July 2015 and formally charged on 10 July 2018. His trial took place in January 2019.
- [25] As advanced this ground is new. Systemic nor complainant delay was never raised before or at the trial proper. There was no application to 'stay' the proceedings because of any prejudice to the defence case.
- [26] Despite in this latest leave application claiming some form of 'systemic' delay, as a means of engaging a breach of his constitutionally guaranteed fair trial rights under s14(2)g the appellant nonetheless remains adamant the 5-year delay to trial did not affect his memory. Nor did he submit any other prejudice to his defence case such as the absence of witnesses or the loss of evidence over that time.
- [27] Delay between offending and prosecution does not erase criminal liability. What is required is a judicial evaluation based on assessments of the circumstances as they are at the time of trial and of the likely prejudicial effects of delay upon the defence case. Material to such assessments will be the availability (or more commonly, the unavailability) of defence witnesses, relevant documents and independent evidence of whereabouts and activity, the general impact of time on memory, any deterioration in the defendant's physical or mental health (with consequent impact on ability to mount a defence), indeterminacy as to the specifics of the alleged offending (particularly where an isolated act of offending is in issue) and the apparent strength or weakness of the State's case.
- [28] The evaluative exercise does not turn on whether the Judge is satisfied on the balance of probabilities as to any item of alleged prejudice (for instance, that but for the delay

there would have been identifiable evidence which would have assisted the defendant). Rather a weighing of all the 'prejudicial' circumstances the defence asks the court to consider. In the absence of any submitted prejudicial circumstances and a staunch claim by Mr Feresi that he had no loss of memory over the events surrounding the conviction then, Ground 3, cannot succeed.

Delay in complaint.

[29] SL explained in her evidence that after the violence and rapes and her escape to the village SL went straight to the Navua police station to seek help but did not complain to her ex-husbands police officer friend. Rather SL waited and went to the specialist sexual offence unit where SL genuinely understood her story would be believed and her complaint properly recorded.

[30] Experience has shown that there may be good reasons, often deeply buried and personal, why people do not complain about such things for long periods of time. The short time of three days it took for SL to complain was on any analysis as brief as it could possibly be in the circumstances. And, in any event the actual process of complaint and reporting the sexual violations was truthfully explained in her unimpeached evidence.

[31] Ground 4 has no real prospect of success.

Ground 5: Failure to produce the axe and cane knife.

[32] The state had no obligation to produce either item as an exhibit. The essential ingredients of the offence of criminal intimidation were capable of proof from SL's evidence, alone. The defence could not point to any prejudice to their case. The matter was not raised at trial.

[33] Ground 5 cannot succeed.

Ground 6: failure to analyse the complainant's evidence alongside the medical evidence.

[34] Dr Josese Vuki gave independent evidence of what he found on medical examination of SL just three days after her claim she was punched in the head, bitten on her neck and anal raped. His findings were consistent with her complaints. The medical evidence was properly tested in cross examination and addressed by the trial judge to the assessors. Late appeal theories 'that there must have been more significant injuries there to be seen after such brutal treatment', are at best speculative.

[35] Late suggestions that some medical evidence might equally be compatible with consensual sexual intimacy happening in the intervening days between the rape and visit to the doctor were never put to the complainant nor was any defence evidence lead in support of any such consensual sexual experience theory with another. Putting to one side the relevance and admissibility of such evidence, in any event, this ground also hardly rises above mere speculation.

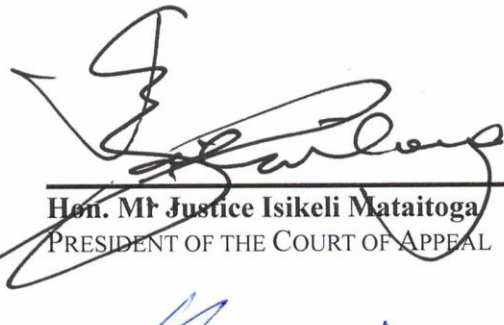
[36] Ground 6 has no real prospect of success.

Conclusion

[37] Weighing Mr Feresi's limited explanation for the delay, his adamant rejection of any prejudice to him by systemic or complainant delay and the doubtful merits of every ground of his appeal, we are not convinced that it is in the interests of justice to grant an extension of time to appeal. Regarding, now, ground 1. For completeness, leave being given, as earlier explained in this judgement, the law is now settled, we reject Ground 1.

ORDERS:

- (1) Enlargement of time on new grounds refused.
- (2) Appeal on the matter of law ground 1, dismissed.
- (3) Appeal dismissed.



Hon. Mr Justice Isikeli Maitoga
PRESIDENT OF THE COURT OF APPEAL



Hon. Mr Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL



Hon. Mr Justice Gerard Winter
JUSTICE OF APPEAL