

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

**CRIMINAL APPEAL NO. AAU 015 OF 2024**  
**[Suva High Court: HAC 052 of 2020]**

**BETWEEN** : **DINESH KUMAR** *Appellant*

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

**Coram** : Qetaki, RJA

**Counsel** : The Appellant In-Person  
Ms. L. Latu for the Respondent

**Date of Hearing** : 26 August, 2025

**Date of Ruling** : 06 October, 2025

**RULING**

**(A). Background**

[1] Following a trial in the High Court of Fiji in Suva on 31<sup>st</sup> October 2022 the Appellant was convicted for two counts of Rape under the Crimes Act 2009 and one count of Breach of Order suspending sentence under the Sentencing and Penalties Act 2009.

[2] On 25 November 2022, the Appellant was sentenced to 13 years 7 months imprisonment, with a non-parole period of 11 years and with the Interim Domestic Violence Restraining Order for the protection of the complainant.

- [3] The prosecution relied on direct evidence of the complainant, the recent and distress evidence of the aunt, the admissible Record of Interview and Charge Statement and the Medical findings of the doctor.
- [4] The Appellant gave sworn evidence and denies the allegation claiming that the entire allegation was fabricated.
- [5] Being dissatisfied with the conviction and sentence, the Appellant filed an untimely appeal on 5<sup>th</sup> February 2024 and on 5<sup>th</sup> December 2024 he filed one ground of appeal against conviction and one ground against sentence. The Appellant filed an Application for Extension of Time supported by his Affidavit explaining the reason for the delay on 24<sup>th</sup> March 2025.

**(B). Facts**

- [6] The learned judge summarized the facts of the case at paragraphs [2] to [6] of the Sentence as follows:

*“[2] The victim was 15 years old and a student when the accused raped her. She is the step-granddaughter of the accused; The accused’s son is the victim’s stepfather.*

*[3] The incident occurred on a school day. The victim’s family had gone to their farm, When the victim returned home from school, she went straight to her room to change her school uniform. The accused surprised her when he entered her room without notice. After entering her room, he gagged her mouth with a cloth to stop her from raising alarm. He then had sexual intercourse with her for about five minutes and also penetrated her vagina with his finger.*

*[4] When he left the house, she immediately went to her aunt living next to her home in a distressed condition and reported that her grandfather had raped her. The aunt immediately alerted the victim’s parents who then reported the matter to police.*

*[5] The victim was medically examined. Fresh injuries consistent with sexual penetration were found in her genitalia.*

[6] *Under caution, the accused admitted to sexual intercourse with the victim but at the trial he retracted his admission saying that it was obtained by police using force.*

**(C). Grounds of Appeal**

[7] Appeal Against Conviction

1. *That the learned judge erred in law and failed to reason out as he states in his judgment (para 11) ...He pushed her shoulders and she landed on the bed facing up. He came on top of her and started to undress her. He removed her uniform and undergarments. He undressed himself and **used** his penis in her vagina. He also **used** his finger inside her vagina.... the word used has no reference to mean that the Appellant inserted/has sexual intercourse with the victim, this has caused a great miscarriage of justice.*

[8] Appeal ground Against sentence

1. *That the learned trial judge failed to set a proper non-parole period to be served, the Appellant complains that the non-parole period is too close to the head sentence. The gap between the non-parole period and the head sentence is only 2 years.*

**(D). The Law-**

[9] Section 35 (1) of the Court of Appeal Act deals with the power of a single judge and states that:

*“A judge of the Court may exercise the following powers of the Court-*

*(a).....*

*(b) to extend the time within which notice of appeal or of an application for leave to appeal may be given.....”*

[10] Guideline for Extension of Time: In **Kumar v State, Sinu v State** CAV0001 of 2009;21 August 2012 FJSC 17, the Supreme Court held:

*“[4] Appellate courts examine five factors by way of a principled approach to such application. 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.*

[11] The above factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merits of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavoring to avoid or redress any grave injustice that might result in the strict application of the rules of court: **Rasaku v State** CAV0009.0013 of 2009,24 April 2013[2013] FJSC 4.

#### **(E). Notice of Application for Extension of Time**

##### **Discussion**

[12] *Length of delay:* The Appellant filed his papers on 5<sup>th</sup> February 2024 and is out of time by 1 year and 2 months. The delay is substantial. In **Qarasaumaki v State** (2013) FJCA 119;AAU0104.2011(28 February 2012) this Court held that a delay of 10 months is substantial.

[13] *Reasons for the delay:* The Appellant on papers filed on 5<sup>th</sup> December 2024, asserts that his application was filed to the Correction Administration Office in December 2022 and in early 2023 he discovered that his application was missing so he organized himself to file his second application and with the constant change of his prison accommodation he was not able to file on a timely manner, hence he is seeking enlargement of time to seek leave to appeal. The reasons for the delay are not convincing, however, the Court will

now assess if there is a ground of merit, and there is real prospect of success: **Nasila v State** [2019] FJCA; AAU0004.2011 (6 June 2019). Also, whether, if leave is granted the respondent will be prejudiced:

[14] Is there a ground of merit:

**Ground 1**, focuses on the findings in paragraph 11 of the judgment which states:

*“[11] In relation to the allegations of rape the complainant said that in the afternoon of 22 January 2020 when she returned home from school the entrance door to her house was open and that she thought her parents were at home. She went straight to her room to change her school uniform. She did not lock the door to her room. As she was taking out her school uniform her grandfather the accused entered her room and tied her mouth with a cloth. He pushed her shoulders and she landed on the bed facing up. He came on top of her and started to undress her. Her removed her uniform and undergarments. He undressed himself and used his penis in her vagina. He also used his finger inside her vagina. The complainant said she was crying when that happened. She could not scream because her mouth was tied. He told her not to tell anyone. When he left the room, she untied herself and went to her aunt, Meha’s home which was close to her house. She told her aunt that her grandfather the accused had raped her.” (Underlining and highlighting for emphasis).*

[15] The Appellant submits that using the word “**used**” instead of insert or penetration in the context of two counts of Rape does not accurately describe the physical elements of the offences. It does not establish the offence of Rape, and therefore causing a miscarriage of justice. A comparison is made by the Appellant between this case and **Peni Lotawa v State** Criminal AAU0091 of 2011 which is misconceived as in that case there is no evidence of rape either digital or penile – see paragraphs [21] and [22] below. The Respondent dismissed the argument as misconceived as the complainant in trial demonstrated how the Appellant used his penis into her vagina and penetrated his finger into her vagina.

- [16] The word “**used**” must be interpreted in the context of its use by the learned trial Judge. Although the word “inserted” or the phrase “sexual intercourse” were not explicitly used, which is unfortunate, it does not distort the meaning of “**used**” in context. The word in context, cannot be reasonably interpreted to have another meaning that is not connected to insertion of the penis or sexual intercourse. The fact that the learned Judge referred specifically to “penetration” or “sexual intercourse”, in paragraph 3 of Sentence supports the contextual interpretation of the word “**used**”, by the learned Judge.
- [17] Although corroboration is not required in sexual offences, the medical findings (paragraph 14 of judgment) support and is relied upon by the prosecution. The doctor found that there were fresh laceration and cuts noted on the complainant’s vagina which is consistent with penetration. In the Appellant’s Record of Interview, tendered by the prosecution (PE4), the Appellant had admitted to penial penetration and apologized for his actions. Together with the recent complaint evidence of the complainant’s aunt , all these go to proving the consistency of the complainant’s account.
- [18] After evaluation of the evidence (paragraphs 19 to 24 of the judgment) including careful observation of the complainant’s demeanor (paragraphs 23 and 24 of the judgment), the learned trial judge accepted the prosecution case and ruled that the prosecution had proved its case beyond reasonable doubt. There is no miscarriage of justice.
- [19] Ancillary Issues Raised by Appellant in Ground 1: The Appellant raised three ancillary issues, the First, is at page 2, paragraph 2 of his written submissions, where he contends that his admission to the police was obtained by force. That cannot be accepted as the matter was settled by the learned trial judge in the *Voir dire* hearing which was conducted first. The learned judge ruled that the Record of Interview and Charge Statement are admissible. The Appellant’s arguments on this point cannot be sustained as a result. There is no miscarriage of justice.
- [20] Secondly, the Appellant argues that the allegations against him was made up by the complainant since he had confronted her about a police officer who made her pregnant while she was 17 years old, but the affair started when she was 15 years old. The Appellant was represented by a Counsel at the trial who did not raise the allegation at that

time in cross examination. The rule in **Browne v Dunn** 6 R.67, H.L. applies. It is clear that the issue was never put to the complainant during cross examination, the Appellant cannot rely on it now to justify his arguments, hence it must be denied.

[21] Thirdly, the Appellant adopts the argument in **Peni Lotawa v State** (supra) to support this Ground. Reliance was placed on paragraph 14 suggesting that the complainant's evidence in trial did not satisfy the elements of Rape. This case is distinguishable from **Peni Lotawa** in that although there was an essential element of the crime missing, the unrepresented accused was not aware of the consequences through his lack of access to good legal advice. He had never been given a chance to get advice or representation and was prejudiced. In this matter the Appellant was legally represented by Counsel who acts on the client's instructions and is also bound under the Rules of the Legal Profession to act at all times in the best interests of his client.

[22] In **Peni Lotawa's** case the appeal was allowed and re-trial was ordered by the Full Court, in circumstances described below (per Madigan JA):

*“[14] It can be seen immediately that there is no evidence of rape either digital or penile in this evidence. Both instances describe “tried to push his fingers in, tried to put his penis in my vagina.” Without evidence of penetration there is an essential element of the crime missing and the offence is not proved.*

*[15] On that evidence, an aware counsel would recognize that the elements of the offence had not been made out and would do nothing to disturb that position. He certainly would not cross examine the complainant. However, this is what the unrepresented accused did with the inevitable result that he succeeded in having the witness say that he had penetrated her “instantly” in the sea and in the mangrove patch.*

*[16] If the witness was not cross-examined thereby cementing her evidence of rape, then a no case submission would have almost certainly succeed.*

*[17] To this (very large) extent the unrepresented accused was prejudiced by his lack of access to good legal advice. He had never been given a chance to get*

advice or representation and being prejudiced by that the trial below miscarries.”(Underlining is for emphasis.)

[23] Ground 1 has no merit.

[24] Against Sentence

**Ground 1:** The Appellant argues that the non-parole period was too close to the head sentence, and that it should be reset to at least three-quarters of the head sentence to give more time for the Appellant to prove himself. He pleads for a non-parole period of 9 years before eligible for release. The sentencing Judge had correctly used the tariff for Rape of a child or juvenile for this offending .Section 18 of the Sentencing and Penalties Act has set the statutory guideline for setting a non - parole period of imprisonment as follows:

*“18(1) When a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.....*

*(4) Any parole period fixed under this section must be at least 6 months less than the term of sentence.”*

[25] The learned Judge had acted within the guideline. Submissions made on the Appellant’s personal circumstances was adequately dealt with at the sentencing stage. The ultimate sentence is of importance rather than each step in the reasoning process, and as stated in **Koroicakau v State** [2006] FJSC; CAV0006U.2005S (4 May 2006):

*“When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here and no error is disclosed in either the original sentencing or appeal process.”*

[26] I have carefully considered the sentencing remarks The Appellant has no real prospect of success in appealing sentence. The ultimate sentence of 13 years 7 months with a non-

parole period of 11 years is proportionate to the gravity of the offence committed by the Appellant in all the circumstances of the case.

[27] There will be no prejudice to the Respondent if time is enlarged , and the complainant has moved on with her life for the past 2 years.

**Order of Court**

1. *Appellant's applications for enlargement of time to appeal conviction is refused*
2. *Appellant's application for leave to appeal sentence is refused.*



A handwritten signature in blue ink, appearing to read "Alipate Qetaki", is written above a horizontal line.

**Hon. Justice Alipate Qetaki**  
RESIDENT JUSTICE OF APPEAL

**Solicitors**

Appellant In-Person  
Office of the Director of Public Prosecutions for the Respondent