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

CRIMINAL APPEAL NO. AAU 002 OF 2023
[Suva High Court: HAC 108 of 2022]

BETWEEN : **VILIAME VUNISINA**

Appellant

AND : **THE STATE**

Respondent

Coram : Qetaki, RJA

Counsel : Appellant in Person
Mr S. Seruvatu for the Respondent

Date of Hearing : 27 February, 2025

Date of Ruling : 14 March, 2025

RULING

Background

[1] The Appellant Viliame Vunisina was charged with two counts of Rape as follows:

Count 1

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

Viliame Vunisina on an unknown date between 1st day of August 2016 and 31st day of August 2016 at Rewa Street, in Suva, in the Central Division, had carnal knowledge of LQ ,without her consent.

Count 2

Rape: Contrary to section207 (1) and (2) (a) of the Crimes Act 2009.

Viliame Vunisina on an unknown date between 1st day of September 2017 and 30th day of September 2017 at Ocean View Hotel, in Suva, in the Central Division, had carnal knowledge of LQ without her consent.

[2] The Appellant pleaded not guilty and the matter proceeded to trial on 28th and 29th of September 2022 at the High Court in Suva, before Justice Aluthge.

[3] On 3rd October 2022 the Appellant was convicted for two counts of Rape as charged. On 4th October 2022, the Appellant was sentenced to 15 years imprisonment with a non-parole period of 12 years.

Grounds of Appeal

[4] There are two grounds of appeal against conviction, and two ground against sentence as set out in the Appellant's application for enlargement of time dated 5 December 2024, as follows:

Against Conviction

Ground 1: *That the learned trial Judge erred in law by failing to properly consider the issues of delayed reporting of the complaint.*

Ground 2: *The learned trial Judge erred in law by failing to address inconsistencies in prosecution witness evidence.*

Against Sentence

Ground 1: *That the learned sentencing Judge had erred in law in not taking into account the non-existence of the non-parole Board, and proposed to impose a non-parole term which is harsh and excessive.*

Ground 2: *That the learned sentencing Judge had erred in law in imposing a non-parole and parole terms without asking itself and assess the lawful and legality of how the non-parole and parole sentence will lawfully operate in Fiji in combination with the Laws of Fiji.*

Application for Enlargement of Time

[5] The Appellant In-Person filed an untimely application for leave to appeal against conviction and sentence on 28th November 2022, being out of time by approximately 24 days. The application was directed to the High Court Registry, and was subsequently forwarded to the Court of Appeal Registry. A second application for enlargement of time was received at the Court of Appeal Registry on 28th April 2023, and a further application was received on 5th December 2024. Although no affidavit was sworn by the Appellant setting out the circumstances and reasons for the delay, the application filed on 5th December 2024 did set out the circumstances and reasons, as follows:

"1. That I was sentence by the High Court on the 4th of October 2022 to 15 years imprisonment with a non-parole period of 12 years.

2. That I was convicted following a High Court trial for two counts of rape.

3. That from that day I never received any copy of my judgment and submission in order for me to file my appeal. I was given 28 days to appeal.

4. That from that day I convicted I was kept separately (in the condemn cell) due to the covid - 19 I was separate from other inmates.

5. That during the process we did not get any phone calls or any document dispatch to court or any written materials.

6. That after I was shifted to a normal dorm it was passed my appeal time.

7. That sometime in March 28th 2022 the matter was produced to the High Court wherewith I applied for Legal Aid to represent me throughout the proceeding of the matter.

8. That sometime in September 2022 I was told by my legal Aid counsel to plead guilty to the said offence, so that I could get a lenient sentence and they will also write my appeal application.

9. That on the 4th October 2022 I was sentence by the learned High Court Judge to 15 years with a non-parole period of 12 years.

10. That at the stage of sentencing all my court document was with my Legal Aid Counsel, and I was not given any copy of it.So I did sticked on to what I was told by my Legal Aid Counsel, that they will set up/provide everything about my appeal.

11. That being unsatisfied of the treatment and false promises made by the Legal Aid Counsel, I then made my application of appeal seeking enlargement of time.

12. That as a lay person without any legal upbringing, I pray that your Honourable Court will grant my Application of Appeal seeking an enlargement of time.

13. That the Applications ground of sentence involve a substantial question of principle affecting the Administration of Criminal Justice."

[6] It appears that the Respondent did not address the issues arising from the untimely filing of the application for leave to appeal, nor the circumstances and the reasons for the delay. However, the Respondent made submissions on the grounds of appeal and on whether or not there is a ground of merit or with prospects of success. That being the case, I intend to deal with the Appellant's application for enlargement of time , in light of the applicable and relevant test for the Court's exercise of discretion on whether or not to grant enlargement of time for the Appellant to apply for leave to appeal against his conviction and sentence.

The Test for Grant of Enlargement of Time

[7] The factors that will be considered by a Court in Fiji for granting of enlargement of time are as follows:

(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) Whether there has been a substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) *If time is enlarged, will the Respondent be unfairly prejudiced*.

See: **Kamesh Kumar v State; Sinu v State** FJSC 17; CAV0001.2009 (21 August 2012), and **Rasaku v State** [2013] FJSC 4; CAV0009.0013.2009 (24 April 2013).

Delay and the Reasons

[8] In applying the test, I am mindful of the following: that the Appellant is In-Person; the factors (circumstances and reasons) he had stated in his application (dated 5 December 2024), and that the Respondent had not addressed this aspect in its written submissions. It is not unusual the prisoners who wish to appeal their cases while in prison face all sorts of issues and constraints, especially in order to meet the procedural timelines set under statutory provisions, for example, the High Court Rules .See **Soloveni Tubuitamana v The State ,**Criminal Appeal No. AAU001 of 2008.

[9] Having considered all the above, I am inclined to accept that the delay is reasonable in the circumstances described, and the reasons for the delay in this case , are acceptable and justifiable.

Whether there is a Ground of Merit?

[10] For a timely appeal the test for leave to appeal against conviction is "*reasonable prospect of success* " as established in a line of cases including: **Caucau v State** [2018] FJCA 171; AAU0029 of2016 (4 October 2018), **Navuki v State**[2018] FJCA 172; AAU0038 of 2016 (4 October 2018), **State v Vakarau** [2018] FJCA 173;AAU0052 of 2017 (4 October 2017 and **Sadrugu v State** [2019] FJCA 87;AAU0057 of 2015 (12 July 2019). In **Chand v State** [2008] FJCA 53;AAU0035 of 2007 (19 September 2008) the test of "arguable grounds" as opposed to "non-arguable grounds" were discussed ; See also **Naisua v State** [2013] FJSC 14; CAV10 of 2013 (20 November 2013), and **Nasila v State** [2019] FJCA 84; AAU0004 of 2001 (6 June 2019).

[11] For appeals against sentence, the guidelines are whether the sentencing Judge:

(i) Acted upon wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts, and

(iv) *Failed to take into account some relevant considerations*: **Naisua v State** (supra); **House v King** [1936] HCA 40 ;(1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal N0. AAU0015.

[12] The Appellant did not submit a written submission in support of his grounds of appeal nor state in his written applications or in oral submissions that his grounds are arguable or have reasonable prospects of success. In his sentencing appeal he stated that the learned trial Judge erred in law, and that *"the ground of sentence involve a substantial question of principle affecting the Administration of Criminal Justice.* "In his oral submissions (from his speaking notes) at the hearing, the Appellant with reference to the conduct of the trial, submits that the trial found him guilty *"contravening my rights to fair trial* "and invoked the provisions of section 14(1) (a); section 15(1) and section 26 (1) and (2) of the Constitution, but did not offer any details or explanation on the aspects of the rights contravened and their impact on fair trial.

The Respondent's Case

(a) Against conviction grounds

[13] The Respondent admits, in respect of conviction Ground 1, that delayed reporting in sexual offences can raise questions about the credibility of the complainant. However, delay alone does not render a complainant's evidence unreliable. The learned trial Judge must assess the reasons for the delay in reporting and determine whether the evidence remains credible.

[14] The issue of delayed reporting was addressed by the learned Judge in paragraphs 7, 8 and 9 of the Judgment. The Judge acknowledged the delay but found it reasonably justified based on the complainant's circumstance, including her fear of the Appellant, ongoing threats and lack of familial support. The Judge referred to the complainant's testimony that she was threatened by the Appellant and feared retaliation if she reported the incidents. The fear was compounded by the Appellant's surveillance of her through family members.

[15] The Judge also referred to the complainant's attempt to report the incidents to her mother and uncle, which were ignored or dismissed. This shows that the delay was not due to fabrication but rather a result of the complainant's vulnerable position and lack of support.

[16] The Respondent submits that the trial Judge did not err in law or in fact, and that the reasons for the delay in reporting were properly considered and did not undermine the complainant's credibility. In addition, the Appellant had not shown any error in the Judge's reasoning, and as such, the ground lacks a reasonable prospect of success.

[17] On Ground 2, in addressing the Appellant's allegation that the trial Judge failed to address inconsistencies in the complainant's evidence, the Respondent submits that the trial Judge acknowledged minor inconsistencies in the complainant's evidence such as the exact location of the first incident (Rewa Street v Waimanu Road).The inconsistencies did not undermine the overall credibility of the complainant's testimony. The core of the complainant's allegations against the Appellant was not undermined by the complainant's confusion about street names. The complainant failed to identify any material inconsistencies that could have affected the outcome of the case. That ground 2 is speculative and lacks merit.

(b) Against sentence grounds

[18] The Respondent submits that the Appellants argument that the non-parole term is harsh and excessive due to the non-existence of a functioning parole Board is misconceived. The primary role of the Sentencing Judge is to impose a sentence that reflects the gravity of the offence, the need for deterrence, and the protection of society. The functioning of the parole Board is administrative and does not affect the sentencing discretion of the Court.

[19] In **State v Vakarau** [2018] FJCA 173, the Court of Appeal held that the existence or functioning of the parole Board is irrelevant to the imposition of non-parole period. The Court emphasised that the non-parole period is a statutory requirement under section 18(4) of the Sentencing and Penalties Act, and must be imposed regardless of the operational status of the parole Board. Section 18(4) sets the minimum term of the non-parole period, which "*must be at least 6 months less than the term of the sentence"*.

[20] With respect to the Appellants sentence (of 15 years imprisonment, with a non-parole period of 12 years), the difference between the head sentence (15 years) and the non-parole period (12 years) is 3 years, which far exceeds the statutory requirement of 6 months under section 18(4) aforesaid.

[21] The Respondent submits that the Sentencing Judge must impose a sentence that is appropriate at the time of sentencing, based on the facts of the case and the applicable law. The possibility of future changes in the parole system, for example, the establishment of a functioning parole Board, does not justify a reduction in the non-parole period. The non-parole period is fully compliant with the Sentencing and Penalties Act. It is not a basis for a claim that the sentence if harsh and excessive.

[22] In conclusion the Respondent submits that the Appellant's appeal against conviction and sentence are either non-arguable or lack a reasonable prospect of success, and that the application for leave to appeal ought to be dismissed.

Analysis

[23] On the application for enlargement of time, having considered the circumstances and reasons advanced for the delay, I have, as earlier stated, accepted the reasons as reasonable and justifiable under the circumstances and it ought to be allowed.

[24] On the conviction grounds, I will deal generally first with the submissions made orally by the Appellant (in his speaking notes) that there has been a breach of the provisions of the Constitution, particularly sections 14 (1) (a); section 15 (1) and section 26 (1) and (2) in the conduct of his trial in the context of the two grounds of appeal against conviction.

[25] Section 14 is titled *Rights of accused persons* "and section 14(1) (a) is not relevant to this appeal as it relates to *"acts or omissions that was not an offence under either domestic or international law at the time it was committed or omitted.* " The rights of a person charged with and offence are set out under section 14(2) (a) to (0) of the Constitution, however, the Appellant has not explained how any of those rights has been breached, and its relevance and implications on the trial in support of the grounds of appeal.

[26] Section 15 of the Constitution is tilted *"Access to courts or tribunals* "and section 15(1) states:

> *"(1) Every person charged with an offence has the right to a fair trial before a court of law.* "

The Appellant has not specifically pointed to any breach of the provisions of section 15, and its relevance and implications on the grounds of appeal.

[27] Section 26 of the Constitution is titled *"Right to equality and freedom from discrimination* " .Section 26(1) and (2) state:

> *"(1) Every person is equal before the law and has the right to equal protection, treatment and benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all right and freedoms recognised in this Chapter or any other written law.* "

The Appellant has not pointed to any evidence to suggest that the provisions referred to have been breached.

[28] I observe that the Respondent had made an error in paragraph 10 of its written submissions as reflected in paragraph [14] above, stating that the learned trial Judge addressed the subject/issue of delayed reporting (Ground 1), in paragraphs 7, 8 and 9 of the Judgment .It would appear that issues surrounding delayed reporting are discussed in the Judge's Analysis, in paragraphs 37, 38 and 39 of the Judgment, as follows:

> *"37. Let me turn to the complainant's evidence, The first alleged incident occurred in 2016 when she was 16 years old and the second incident in 2017.She had not complained to her mother or anyone immediately after the incidents. She relayed the incidents to her uncle Epeli in 2017.The matter had been reported to Police in 2018 and the accused had been charged in 2022.The position of the Defence is that she did not make a prompt complaint because these incidents never occurred.*
>
> *38. I find in evidence a lot of reasons why she acted the way she acted after the alleged rape incidents. The accused is complainant's biological father. He was*

living with her wife Mere, the complainant's step- mother. The complainant had in numerous occasions witnessed how bad her step-mother was being treated when she had visited him in Suva. In some instances, she had even cut short her visits when such bitter dispute became unbearable. Such were the memories that have informed the complainant in making her decision on how she should react.

39. During the first rape incident in 2016, the accused had threatened to punch her if she made any noise. He threatened her not to tell anyone. She said she did nothing because she was scared and was feeling the pain. Those were things she vividly recollected when she encountered the second incident in 2017.The threat was ongoing. The accused contacted her over the phone and renewed the threat continuously. He maintained surveillance over her through her aunties."

[29] It is evident that the complainant's relationship with her step-mother was not good-see paragraph 40 of Judgment. However, it appears that the complainant's uncle Epeli was able to assist. At paragraph 41 of the Judgment , the learned trial Judge stated:

"41. Epeli encouraged the complainant to report the matter to Police. The help line she contacted gave the same advice – report the matter to Police. However, she was still imagining what the outcome would be if she reported. She wanted to complain to Police but the threats keep on coming to her phone and he was watching her whereabouts. The report was finally lodged in 2018.The delayed reporting is reasonably justified."

[30] I agree with the Respondent, that there is no basis to sustain the ground that the learned Judge had erred in law and in fact in failing to consider the delayed reporting. The learned trial Judge had properly and adequately considered the evidences and circumstances leading or contributing to the delayed reporting of the two incidents of rape against the complainant by the Appellant. Ground 1 is not arguable, It has no merit and no reasonable prospect of success.

[31] In respect of Ground 2, I find that the Appellant has not been specific as to point out the various inconsistencies that the learned trial Judge had failed to address in his Judgment. It is also evident that , despite the allegations made by Counsel for the Appellant

(paragraphs 42 , 43 and 45) , and the complainant's confusion as to the Appellants address , which the Respondent has adequately covered in its submissions, the learned trial Judge believed in the complainant's evidence and held that she had been consistent. At paragraph 46 of the Judgment, he states:

> *"The complainant maintained her consistency throughout her evidence. She was straightforward in her answers. Her demeanour is completely consistent with that of a honest witness. The fact that the Prosecution had no other witness to support the complainant's evidence did not affect the credibility of her evidence. I accept the complainant told the truth in Court."*

[32] It must be emphasised that the Appellant completely denies the allegations He has not demonstrated or shown that the inconsistencies, if any, has shattered the basis of the evidence of the prosecution to an extent that, it creates a doubt in the Prosecution case. In **Sahib State** [1992] FJCA 24; AAU0018u.87s(27 November 2018), this Court, in the context of complaints against trial Judges for failure to properly assess and evaluate the credibility of witnesses and inconsistencies of their evidence, stated:

"It has been stated many times that the trial court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess the credibility and weight and we should not lightly interefere.There was undoubtedly evidence before the court that, if accepted, would support such verdicts."

[33] Ground 2 is not arguable. It has no prospects of success.

[34] On the sentencing grounds, I have carefully considered the Respondent's submissions on it, and am in agreement with the Respondent's submissions. The Appellant had not addressed raised an issue on the factors/criteria for challenging a sentence. The imposition of the sentence in this case does not offend the requirements under the Sentencing and Penalties Act 2009. The grounds are not arguable. They have no prospect of success.

Conclusion

[35] In conclusion, having regard to the foregoing, the application for leave to appeal against conviction is refused.The application for enlargement of time to appeal against sentence is allowed. Leave to appeal against sentence is not allowed/refused.

Order of Court

1. *Leave to appeal against conviction is refused.*
2. *Application for enlargement of time to seek leave to appeal against sentence is allowed.*
3. *Leave to appeal against sentence is refused.*