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

CRIMINAL APPEAL NO. AAU 036 OF 2023
[Suva High Court: HAC 214 of 2020]

BETWEEN : **PAULO DOMOKAMICA**
Appellant

AND : **THE STATE**
Respondent

Coram : Qetaki, RJA

Counsel : Mr. M. Fesaitu for the Appellant
Ms. U. Ratukalou for the Respondent

Date of Hearing : 18 June, 2025

Date of Ruling : 27 June, 2025

RULING

(A). Background

[1] The Appellant was on 16 June 2022 convicted of a single count of rape contrary to section 207(1) and (2)(b) and (3) of the Crimes Act 2009. The prosecution alleges that the Accused on 29 June 2020, in Suva, penetrated the vulva of AM, a child under 13 years, with his finger.

[2] The Accused pleaded not guilty to the charge. At the trial, the prosecution presented the evidence of the complainant and two other witnesses while the Accused gave

evidence in defence. At the end of the trial, the learned Judge having carefully considered the evidence presented at the trial found the Accused guilty of the count of rape and convicted him on 16 June 2022. The Appellant was sentenced on 17 June 2022 to 11 years' imprisonment with a non-parole period of 9 years.

[3] On 4 April 2023, the Appellant lodged in person an untimely appeal against conviction. The Appellant subsequently agreed to accept legal assistance from the Legal Aid Commission for the purpose of filing of a notice of enlargement of time to seek leave to appeal and in preparing his written legal submission.

(B). Principles and The Law

[4] The legal principles applicable in an application for enlargement of time has been established and discussed in a number of cases including **Kumar v State,** Criminal Appeal No. CAV 0001/09 (21st August 2012). They 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 substantial delay, nonetheless is there a ground of appeal that will probably succeed? and

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

[5] Section 35(1) (b) of the Fiji Court of Appeal Act gives a single judge of appeal the power to extend the time within which notice of an application for leave may be given. It states:

"35-(1) 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;…."

(C). Grounds of Appeal

[6] There are two grounds of appeal:

(i) That the learned Judge erred in law and fact in convicting the Appellant when the evidence in totality does not support the conviction.

(ii) That the learned Judge erred by failing to properly consider the issue of delayed reporting of the complaint.

(D). High Court Judgment

[7] The learned trial Judge, Aruna Aluthge J, discussed the case for the prosecution from Paragraph 6 to Paragraph 22 of the judgment. He observed that the complainant proved to be competent and passed the competency test. That complainant demonstrates that she is capable of understanding the obligation to tell the truth (Paragraph 7). She was 5 years old when she gave her testimony. The complainant said that Paula touched her tuna and no one was there when Paulo touched her tuna (Paragraph 10). Under cross-examination the Defence Counsel suggested that Paulo did not touch her tuna, she disagreed. She also disagreed when Defence Counsel suggested that she could be mistaken (Paragraph 12).

[8] The complainant's father Alivereti Nigiri (2nd Prosecution witness) stated that he came to Nakasi to run his canteen leaving his wife behind, because she had just given birth to the fourth child. He was accompanied by his two children, the eldest of whom was the complainant, who was 2 years old at the time. That on June 29 2020, he asked Paulo to be with the children while he went to buy cigarettes from the RB Supermarket and came back. That he told Paulo to go inside the canteen and close the door as he feared the children might come out. He went to the RB Supermarket which was about 2 to 3 minutes' walk away and returned in 10 to 15minutes at around 6 to 7pm. On his return Paulo and two of his children were all inside the canteen and things looked normal - Paragraph 14. He and the two children slept at the canteen that night. When they woke up the next morning, the complainant told him that Paulo touched her tuna when he had gone to buy the cigarettes. He checked the complainant and found blood on her panty. He was angry. He took the children back to their mother and came back together to report the matter to the police. They then went to the hospital where the

complainant was checked to confirm what had happened - Paragraphs 15 and 16. Under cross-examination, Alivereti denied that Paulo was selling cigarette rolls outside his canteen. He also denied that Paulo was outside the canteen when he left for RB Supermarket. He admitted Paulo had a twin brother that looked like Paulo but denied that his daughter must have been mistaken-Paragraph 17.

[9] The final witness for the prosecution Doctor Losana Burewai stated that she examined the complainant on 15 July 2020, two weeks after the alleged incident. She found no physical injuries at the general examination. Upon genital examination, she found child's hymen to be intact. There was an abrasion, 2-3 weeks old, present at the right *labia minora*, and she also noted a slight yellowish vaginal discharge which was stained on the panty - Paragraph 20. The Doctor described the 'abrasion' as a superficial injury or a scratch on the skin of the right *labia minora. Labia minora* is the inner lip or the inner fold of the female genetalia whereas *labia majora* is the outer lip. The Doctor found the vaginal discharge to be not normal as it looked yellowish, probably due to an infection, most likely from the abrasion. She found that the abrasion was in line with the alleged incident. Her professional opinion is that the genital injury is indicative of a trauma by a sharp object, for example, finger or nail. Further, that the injury could not have happened in that particular area of the female *genitalia* otherwise than by the event complained of - Paragraph 21. In cross-examination, the Doctor ruled out the possibility of the injury being self-inflicted or due to a scratch due to itchiness of the particular area or infection. In answering a question from the Court, the doctor confirmed that the *labia manora* is part of vulva-Paragraph 22.

[10] The learned trial Judge discussed the Defence evidence at paragraphs 23 to 25 of the judgment. The Appellant was the sole witness for the Defence. He confirmed that he knew Alivereti, the complainant's father, who is a friend of his. He stated he was selling cigarettes, standing outside the taxi base across the highway opposite Alivereti's canteen. On 29 June 2020, he met Alivereti outside the canteen. He did not know Alivereti's daughter (the complainant) but admitted she was inside the canteen. Alivereti called him and he crossed the road to the side of the canteen. Alivereti told him to look after the daughter. He agreed but he did not enter the canteen but stayed outside. He denied touching the complainant's tuna with his

finger-Paragraphs 23 and 24. Under cross-examination he admitted that on 29th June 2020, through the gap at the corner, he saw the complainant inside the canteen. On the day he looked after Alivereti's children his twin brother came and bought cigarette. He admitted Alivereti came to his house the next morning and punched him. He admitted he did not go to police to make a complaint- Paragraph 25.

[11] In his *Analysis* of the evidences, the learned trial Judge stated that the defence case theory are threefold. Firstly, that the child complainant was mistaken as to the identity of the perpetrator. Secondly, the penetration could have been self-inflicted. Thirdly, the Prosecution's version was made-up because the complaint to police was belated. On the question of identity, the learned trial Judge found that the complainant was adamant that it was Paulo, when the Defence Counsel suggested that she could have been mistaken that it was Paulo, she insisted that it was Paulo. The complainant's recognition evidence is firm and never shaken, her evidence was confirmed by not only her father but Paulo himself as well. The Accused admitted he was tasked to look after the complainant and her brother on the particular day whilst Alivereti was away. The alleged incident occurred during daytime, and evidence is overwhelming to find that the complainant was not mistaken. The learned trial Judge was satisfied that the prosecution proved the identity of the Accused beyond reasonable doubt.

[12] On the suggestion that the penetration was self-inflicted, the suggestion was never put to the complainant nor the father in cross-examination. The evidence of the Doctor had ruled out the possibility that the abrasion was self-inflicted. She gave plausible reasons for her opinion. The learned trial Judge held that the Prosecution had proven beyond reasonable doubt that the penetration was not self-inflicted.

[13] On the delay in making a complaint to the police, the learned Judge held that this is reasonably explained by the circumstances of the case as set out in paragraph 34 of the judgment. It is not in dispute that the complainant made a prompt complaint to her father on the day following the incident. The father Alivereti and the two children fled to the village after the father punched Paulo because of what he did. He only returned to Nakasi with his wife to lodge a complaint to police sometimes later. The learned trial Judge held that the delay is reasonably explained and did not affect the credibility of the version of the event of the Prosecution.

[14] At paragraph 35 of the judgment, the learned trial judge stated:

> *''35. Before I can find the accused guilty on the count as charged, it is for me to satisfy myself that the complainant's vulva was penetrated at least slightly by the finger of the accused. There is no direct evidence that the complainant's vulva was penetrated by the Accused. She only said Paulo touched her "tuna''. A mere touch would not satisfy the element of penetration unless it could be shown that the touch involved an insertion at least slightly. In this case the Prosecution alleges that the vulva and not the vagina that had been penetrated."*

[15] After discussing recent decisions, the meaning/definition of vulva and the doctor's findings (paragraphs 36, 37, 38 and 39 of judgment), the learned trial Judge concluded (paragraph 40) that, all the facts and circumstances proved by the Prosecution points to the only inference that the Accused had penetrated the vulva of the complainant…."*the complainant felt the pain of the touch which she described as 'hard'. She saw blood at what she described in her own language as 'tuna'. When she used the word 'tuna' her father's understanding was that she was referring to her private part. That's why, upon the complaint being received, he had checked that area to find blood stains on her panty. She pointed to where the dolls vagina is when asked to point to its 'tuna'. The Prosecution proved that the vagina of the complainant had been penetrated by the Accused with his finger".*

(E). Case For Appellant

Delay and Reasons

[16] The appellant submitted its initial notice for leave to appeal on 4th April 2023, a delay of approximately 291 days.

[17] The reason for the delay is that as a lay person he is unaware of what he was to do with respect to his appeal. It was only after an inmate had assisted him in drafting his appeal papers, that he was able to file his notice of appeal.

Whether there is a Ground of merit?

[18] On whether the appeal ground is meritorious, the Appellant relies on the principles in **Fisher v State** [2016] FJCA 57; AAU132.2014 (28 April 2016), at (12), as per His Lordship Calanchini who stated:

> *"The Supreme Court has acknowledged that incarcerated appellants who are unrepresented do face difficulties in the preparation of their appeals. However, these difficulties do not justify setting aside the requirements of the Act and the Rules: Raitamata v The State, CAV 2 of 2007; 25 February 2008 and Sheik Mohammed v State, CAV 2 0f 2013; 27 February 2014. The explanation for the delay will not by itself ordinarily lead to the conclusion that an enlargement of time should be granted. It is usually necessary to consider whether the appeal has sufficient merit to excuse the Appellant's non-compliance with the Rules. It is necessary for the Appellant to show that his appeal grounds have sufficient merit to (a) excuse the delay and (b) be considered by the Court of Appeal."*

[19] The Appellant also cited the case **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019), where this Court made pertinent observations on the applicable test at paragraphs [22] to [24] of the judgment. From this case and the cases cited therein, it is established that the threshold that the appellant has to reach is higher than that of leave to appeal. That the bar has been raised in this Court even in timely applications to appeal by applying the test of *"reasonable prospect of success"*, that is whether *"an arguable ground of appeal exists":* See **Caucau v State; Navuki v State; State v Vakarau, and Sadrugu v State.** For an application for enlargement of time, the Appellant must satisfy this Court that this appeal not only has *'merit'* and would probably succeed but also "*has real prospect of success".*

[20] The Appellant with respect to **Ground 1** submits that the conviction entered against him is not supported by the totality of the evidence adduced by the prosecution at the trial (Ground 1). To illustrate, the Appellant submits that:

> *(i) The location of the canteen where the incident purportedly occurred (next to the main Suva to Nausori highway), and occurring between 6pm to 7pm (a busy /heavy traffic period). Given that the canteen door was open, anyone coming by on foot or by car would have had a clear view of the things that would have taken place in the canteen such as the rape complained of.*

(ii) There was lack of evidence and the judgment to explain how 'touching' of the tuna took place. That the lack of clarification on this point raises an important question of fact and warrants a reconsideration of the matters at hand before the court.

(iii) The learned Judge failed to consider that the lighting in the canteen only came from the light outside it, which would not be enough to allow the complainant to clearly see who had touched her, and

(iv) Considered together, the above points is indicative of the fact that the learned Judge did not consider all the evidence in totality and as such raises an error of law and fact, which should be considered by the full court.

[21] On **Ground 2**, the Appellant relies on the case **State v Serelevu** FJCA 163; AAU141.2014 (4 October 2018), where Justice Gamalath extensively discussed the issue of delayed reporting and applied *"the totality of evidence test"* as the correct approach in the Court's evaluation of the delay in reporting in order to determine the credibility of the evidence. In the United States case in Tuyford186, N.W.2nd *at 548,* it was decided:

"The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether there was an explanation for the delay."

[22] Gamalath J explained that the fresh complaint rule evolved from the common law requirement of "Hue and Cry" test based on the expectation that the victims of violent crimes would cry out immediately and which required proof of the details of the victim's prompt complaint as part of the prosecution's evidence. If the delay in the making of the complaint can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness: **Thulia Kali v State of Tamil Naidu**,1973 AIR.501;1972 SCR(3) 622 and **State of Andhra Pradesh v M.Madhusudhan Rao** (2008) 15 SCC 582.

[23] The Appellant submits that, as held by Justice Gamalath, an unexplained delay does not necessarily or automatically render the prosecution case doubtful, that would depend on the fact and circumstances of the particular case. The Court needs to evaluate all the evidence presented during the hearing to determine whether the evidence given by the complainant is true. The explanation of the delay is essentially material in assessing the credibility of the evidence presented by the complainant.

[24] The Appellant submits that the *'totality of circumstances test'* has the following components: (i) Whether the complaint was made at the first available opportunity, and (2) Whether there was an explanation of the delay?

[25] The Appellant submits that in his case there is insufficient explanation in the judgment on why the complainant never reported the matter to the police after the first incident and there is no explanation on how it was finally reported to the police. The Appellant submits that the explanation in paragraph [34] of the judgment is insufficient/unsatisfactory and the complaint was not made at the first available opportunity.

[26] The Appellant submits that although the length of the delay is substantial the reason for the delay may be justifiable. Further, that the proposed appeal ground is meritorious for the consideration of this Court.

(F). Case for Respondent

Ground 1

[27] The Respondent submits that the Appellant denied entering the canteen and hence he did not commit any such act on the complainant. His version was that he remained outside of the canteen and entered the premises when the complainant's father had returned from a nearby supermarket. However, the version presented before the Court was that the complainant's father had asked the Appellant to wait inside the canteen with the complainant and her brother as he wanted to go to a nearby supermarket, as he was worried his children would go outside. He had told the Appellant to close the door. This was confirmed in paragraph 14 of the judgment.

[28] The above (paragraph) was in support of the complainant's evidence that the Appellant had whilst they were alone inside the canteen touched her tuna 'hard but for a short time'. It was open to the trial judge to hear and determine the evidence and which version to believe, further the Appellant did not dispute being at the canteen nor that he and the complainant knew each other hence when the defence of mistaken identity was put to the complainant, she adamantly maintained that it was the Appellant who had touched her tuna.

[29] The Respondent submits that circumstantial evidence was relied upon to prove the elements namely the complainant's vulva was penetrated by a finger and the Respondent relied on the medical evidence and report of the doctor who had given her professional opinion that the injuries sustained by the complainant were consistent with the penetration of the vulva by a finger or nail, as was summerised at paragraphs 19 to 22 of the judgment.

[30] The Respondent further submits that the complainant had adduced sufficient evidence to prove that the Appellant had used his finger to touch her vulva and that it was a hard touch and that he had done it for a short time. The complainant's father found the complainant's panty stained with blood the next morning hence upon asking the complainant she told him what the Appellant had done.

[31] The Respondent submits that in considering the complainant's account and the medical evidence, the learned trial judge did not err in arriving at his decision that the element of penetration had been proven beyond reasonable doubt as contained in paragraphs 35 to 40 of the judgment. That Ground 1 has no merit.

Ground 2

[32] The Respondent submits that the complaint was made to the complainant's father the next morning after the incident. The delay was less than 24 hours, and upon informing her father, the complainant named the Appellant and said *"Paulo had touched her tuna when he had gone to buy cigarette"*. The complaint was not only made soon after the incident took place, it (the complaint) also contained the sexual ingredient of a sexual act committed by the Appellant. The Respondent submits that the complaint was not belated but classified as a recent complaint.

[33] The Respondent submits that the fact on how the matter was reported to the police is not a fact that needs to be proven beyond reasonable doubt however, there was evidence adduced to explain the delay in reporting to police at paragraph 15 to 16 of the judgment which the learned judge found as reasonable - See paragraphs 34, 43 and 44 of the judgment:

> *"34. In my opinion, the delay, in making the complaint to police is reasonably explained by the circumstances of this case. It is not disputed that the Complainant made a prompt complaint to her father on the following day of the incident. Alivereti said that, as soon as he received the Complaint from the Complainant and saw blood on her panty, he carried his daughter and went in search of Paulo but Paulo was not there in his house. Purpose of his visit, according to him, was to speak to Paulo and his family and to 'solve 'it there. Complainant said her father punched Paulo and Paulo confirmed that he got punched on his face, causing him to bleed. However, Alivereti was cautious not to mention about this meeting and the punching. He had just fled the village after the incident with the two children. He only returned to Nakasi with his wife to lodge a complaint to police sometime later. It can reasonably be assumed that Alivereti with his anger sought summary justice or "solve" the issue when he confronted his daughter's rapist. The punch and the blood he saw on Paulo's face must have satisfied him in this regard and discouraged him from going to police immediately due to fear. The delay is reasonably explained and it did not affect the credibility of the version of event of the prosecution.*
>
> *……..*
>
> *43. The complaint made to her father by the Complainant on the following day of the incident had naturally come from the Complainant. The recipient of the complaint, Alivereti confirmed that he received complaint of sexual nature. In my opinion, her complaint can be accepted as a recent complaint evidence although it could not be taken to implicate the Accused. The recent complaint evidence is consistent with the Complainant's evidence*
>
> *44. The Accused is a good friend of the Alivereti family. There is no apparent reason for the Complainant or her father to make up this allegation. Even the accused did not say why they should make up a false allegation against him.*

Having considered the overall evidence of the Complainant, and her demeanour, I am convinced that the Complainant told the truth in Court."

(G). Analysis

Length of delay and reasons

[34] In my assessment the length of the delay is very substantial not minimal. It is unreasonable and unjustifiable. The reasons given as causes of delay is not justifiable or compelling. The Appellant was represented at the trial by a Counsel from the Legal Aid Commission. Is there a ground of merit?

Ground of merit?

[35] The appellant is challenging his conviction on two grounds, the first, being that he was being convicted by the learned trial Judge when the *totality of the evidence* does not support the conviction (Ground 1); and secondly, that the learned trial Judge did not properly consider the issue of *delayed reporting* by the complainant (Ground 2).

[36] The *totality of the evidence* requires that the evidences of all the witnesses of the prosecution, and of the defence be equally assessed, evaluated and weighed before a decision is made on whether the elements of an offence has been proven beyond reasonable doubt or otherwise. In this case, it is alleged that the Appellant had committed rape contrary to section 207(1) and 2(b) and (3) of the Crimes Act 2009. It is alleged that the Accused on 29th June 2020, in Suva, penetrated the vulva of AM (complainant), a child under 13 years, with his finger.

[37] On my reading and analysis of the judgment delivered on 16 June 2022 (see above), the learned trial judge had carefully considered and analysed the evidences of the prosecution witnesses - See Evidence of complainant (paragraphs 8-12 of judgment); Evidence of complainants father, Alivereti Nagigi (paragraphs 13-18 of judgment); Evidence of Doctor Losana Burewai (paragraphs 19-22 of judgment). These evidences were carefully and thoroughly considered together with the Evidence of the Accused/Appellant (paragraphs 23-25 of judgment). These evidences were meticulously analysed in the judgment from paragraphs 26 to 46.

[38] The learned trial Judge concluded, by stating:

> *"47. The Defence had no idea as to why this serious allegation has been levelled against him by the Complainant and her father. In the absence of an apparent motive, it is hardly possible for a girl of her age to fabricate a case of this nature. I am unable to accept Accused's denial. It is apparent that, in desperation, he was trying to save his own skin. I reject the evidence of the Defence and accept the version of events of the Prosecution.*
>
> *48. Having satisfied with the credibility of the version of the Prosecution, I analysed the evidence to see if all the elements of Rape as charged have been satisfied. I am satisfied that the Accused penetrated the vulva of the Complainant with his finger. Prosecution has proved all elements of the offences of Rape as charged beyond reasonable doubt.''*

[39] Ground 1 has no prospect of success. It has no merit.

[40] On the contention that the learned trial judge did not properly consider the issue of delayed reporting, it is not in dispute that the incident was reported by the complainant to her father promptly on the very next morning, within 24 hours of the alleged incident. However, there was a delayed reporting of the incident to the police. The delay, in my view has been fully explained in paragraphs 34, 43 and 44 of the judgment. See also paragraphs [32] and [33] above. The explanation is of a standard that satisfies the *totality of circumstances test*.

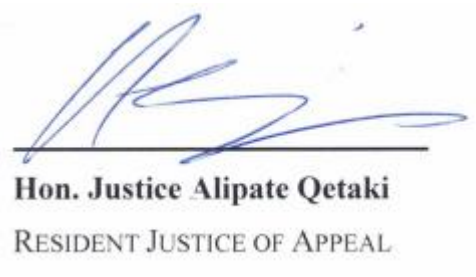
[41] Ground 2 also has no prospect of success. It has no merit.

(H). Conclusion

[42] In consideration of the application for enlargement of time for leave to appeal the Appellant's conviction in a judgment of the High Court delivered on 16 June 2022, and taking account the relevant law, the proposed grounds of appeal and the submissions of both parties to the appeal, and having carefully considered and scrutinized the judgment aforesaid, I hold that the application for enlargement of time is dismissed.

Order of Court

1. *Application for leave for Enlargement of Time to Appeal is dismissed.*



Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Solicitors
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Office of the Director of Public Prosecutions for the Respondent