

4. After the Prosecution closed its case, Accused was put in his defence. Applicant gave evidence and wanted to call witnesses. When he failed to get them on two occasions, judgment was delivered convicting the Applicant. He filed submission in mitigation and the matter was then adjourned for sentencing.
5. On the 8th day of February 2016, sentence was pronounced in Court where he was sentenced to 2 years' imprisonment with 18 months non-parole period.
6. Applicant, by way of a letter dated 29th February 2016, addressed to the Deputy Registrar of the High Court at Lautoka filed his Application through the Prison authorities to appeal his conviction and sentence. This application was received by the Lautoka High Court on the 6th day of May, 2016.

THE LAW

7. Section 248 of the Criminal Procedure Decree lays down the procedure to be followed in filing appeals in the High Court:

248.-(1) Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against –

- (a) It shall be presented to the Magistrates Court from the decision of which the appeal is lodged.*
- (b) A copy of the petition shall be filed at the registry of the High Court; and*
- (c) A copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.*

- (2) *The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.*
- (3) *For the purposes of this section and without prejudice to its generality, “good cause” shall be deemed to include –*
 - (a) *a case where the appellant’s lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;*
 - (b) *any case in which a question of law of unusual difficulty is involved;*
 - (c) *a case in which the sanction of the Director of Public Prosecutions or of the Commissioner of the Fiji Independent Commission Against Corruption is required by any law;*
 - (d) *the inability of the appellant or the appellant’s lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents.*

8. The principles for an extension of time to appeal are settled. The Supreme Court in *Kumar v State; Sinu v State* [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

“Appellate courts examine five factors by way of a principled approach to such applications. These 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 courts 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?"*

9. More recently, in ***Rasaku v State*** [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), the Supreme Court confirmed the above principles and said at paragraph [21];

“These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit 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 from the strict application of the rules of court.”

10. The Learned Magistrate failed to inform Applicant of his right to appeal as per section 246(3) of the Criminal Procedure Decree, 2009.

APPEAL AGAINST CONVICTION

11. Applicant’s appeal against conviction is based on following grounds:

- I. That the Learned Magistrate erred in law and in fact when he failed to seek proper clarification of the medical report from an expert thus giving his own opinion and making conclusions;
- II. That the Learned Magistrate erred in law and in fact when he failed to consider that the medical report was not clarified by the doctor and the alleged victim’s mother had not given any sworn testimony in court thus making the mother’s testimony inconclusive;

- III. That the Learned Magistrate erred in law and in fact when he failed to consider the victim's statement that she had been sexually assaulted by her father in 2008 thus creating a shadow of doubt that intercourse with the appellant had taken place.
- IV. That the Learned Magistrate erred in law and in fact when he failed to take into account that the complainant said his birthday was on 18/06/2012 when he came to meet her but he said his birthday was 18/04/2012.

LENGTH OF DELAY

12. The Applicant was sentenced on the 8th of February 2016. This application was filed on the 6th of May 2016. Therefore, the delay is approximately 3 months.

CAUSE OF DELAY

13. The Applicant states that he was not informed by the Court of his right to appeal.
14. There is no minute on the court record to say that the Applicant was informed of his right to appeal. Neither is there any note on the sentencing ruling that Applicant was informed of his right to appeal or the time frame within which his appeal should be filed.
15. The Applicant's application is dated 29th February 2016. Court can assume that he knew about the appealable time period. However, it does not take away Applicant's right to be informed of the period within which the appeal should be brought as per section 246(3) of the Criminal Procedure Decree, 2009.
16. The Applicant was representing himself without proper legal advice. Hence it was incumbent upon the Learned Magistrate to properly inform him of his right. If the right was explained the Learned Magistrate should have put a minute or note on the record to

show that the right was duly afforded. By failing to do so, Learned Magistrate denied the Applicant of his right.

17. Considering the above, this Court finds that there is a reasonable ground for enlargement of time. However, the ultimate decision whether leave should be granted will depend on the merits of the appeal.

PREJUDICE

18. The Respondent concedes that there is no prejudice caused to the State if leave is granted.

LIKELY SUCCESS ON APPEAL

That the Learned Magistrate erred in law and in fact when he failed to seek proper clarification of the medical report from an expert thus giving his own opinion and making conclusions.

19. In essence, the Applicant is challenging the admissibility of the medical report tendered without the doctor coming to explain his record thereby the Learned Magistrate making his own conclusion about the medical report.
20. The doctor has not been called as a witness. Generally, the maker of the document should tender his document unless the law provides otherwise or both parties consent to the documents being tendered in.
21. There is no minute in the court record to indicate that the medical report was tendered in evidence. It is only in the Judgment the Learned Magistrate has referred to it as being tendered in as exhibit 3. In fact, there is no record of whether it was an agreed document.

22. Section 133 of the Criminal Procedure Decree, 2009 states:

133. – (1) Any plan, report, photograph or document purporting to have been made or taken in the course of an office, appointment or profession by or under the hand of any of the persons specified in subsection (3), may be given in evidence in any trial or other proceeding under the provisions of this Decree, unless the person shall be required to attend as a witness by –

- (a) the court; or*
- (b) the accused person, in which case the accused person shall give notice to the prosecutor not less than 14 clear days before the trial or other proceeding.*

(2) In any case in which the prosecutor intends to adduce in evidence a plan, report, photograph or document a copy of it shall be delivered to the accused not less than 21 clear days before the commencement of the trial or other proceeding.

(3) The following persons shall be the persons to whom this section shall apply-

- (a) medical practitioners and medical officers;*
- (b) ...*

23. Section 133 allows for documents such as medical reports to be tendered in evidence without the doctor being called in as a witness. However, such a course of action is possible only if the doctor's attendance is not required by Court or the accused. To make his choice, the Accused should be made aware of the relevant procedure. Question is whether, in the absence of any note to the effect on the record that accused was explained his options, the Applicant knew that he could have asked for the doctor to be present to explain his report. This information would have been material to the Applicant especially in light of his defence that intercourse could have been by the victim's father and not him.

24. There isn't any note also to say that the prosecutor had delivered a copy of the medical report to the Accused 21 days prior to the commencement of the trial.
25. The Applicant should have been informed of the relevant law in order for him to understand the trial procedure and exercise his rights to a fair trial. However from the court record, it does not appear to have happened.
26. Having said that, this Court is mindful of the fact that, this being a sexual offence matter, law does not require corroboration from a medical report to accept the victim's evidence. If the Court believed the evidence of the victim, it could have come to the final conclusion without the medical report. Since the Learned Magistrate in his judgment has heavily relied on the medical report to convict the Applicant, it is only fair that the report was admitted in a legitimate way.
27. It appears that the learned Magistrate accepted the evidence of the victim because it was never challenged by the Accused. In paragraph 5 of the judgment he says:

"The above facts were never challenged by the Accused. When given the opportunity to cross examine the complainant after being explained what to do in cross examination prior to the commencement of the trial, he did not ask anything never challenged by the Accused".

28. According to this statement, the right of cross examination has been explained to the Accused 'prior to the commencement of the trial' and not at the conclusion of the examination-in-chief. The record does not indicate that right of cross examination was explained to the Accused even at the commencement of the trial. It only states "Accused advised of trial Process". Accused said under cross examination 'I did not ask because this is the first time in Court because I was not familiar with Court procedures'.

29. Therefore, the Learned Magistrate's decision to accept the evidence of the victim merely on the basis that it was not challenged by the Applicant is misconceived. Considering the above, this Court finds that there is some merits in this ground.

That the Learned Magistrate erred in law and in fact when he failed to consider that the medical report was not clarified by the doctor and the alleged victim's mother had not given any sworn testimony in court thus making the mother's testimony inconclusive.

30. The Learned Magistrate accepted the medical report as a piece of evidence that is consistent with evidence of PW1 and PW2. He accepted the medical finding that victim's hymen was missing to draw the inference that there had been a sexual intercourse.
31. In a context where the admissibility of the medical report is rather questionable some prejudice to the Applicant can be assumed when it was relied upon by the Learned Magistrate to find the accused guilty.
32. Applicant further claims that PW2's evidence was inconclusive in that she had not given any sworn evidence in court apart from her statement to police being tendered. The Learned Magistrate erred in accepting her statement as evidence that is consistent with PW1's evidence and the medical report.
33. PW2's statement was tendered in as exhibit 2 after she was sworn in. It was not even read out in Court. This appears highly irregular especially when the court record does not state on which basis the statement was tendered although the Learned Magistrate has stated in Paragraph 6 of his judgment that 'PW2's statement was then tendered by consent as exhibit 2'. There appears to be some prejudice on the Applicant for having the statement tendered without him having a say in it.

34. It appears that the Learned Magistrate in his judgment has relied on the statement of PW2 to test the credibility of the victim, PW.1. Therefore it is important and fair that the Applicant had an opportunity to know on what basis it was being tendered.
35. In the circumstances, Court finds that there is some merit in the Applicant's ground that the acceptance of PW2's statement as evidence consistent with the medical report and PW1's evidence is flawed.

That the Learned Magistrate erred in law and in fact when he failed to consider the victim's statement that she had been sexually assaulted by her father in 2008 thus creating a shadow of doubt that intercourse with the Appellant had taken place;

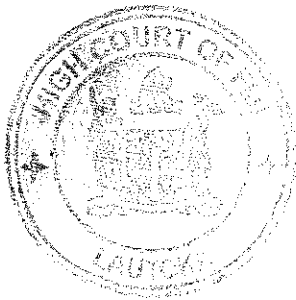
36. The victim never stated in her evidence that her father sexually assaulted her. Nevertheless, PW2's statement included that her former husband had sexually assaulted the victim. The Applicant in his evidence denied having intercourse with the victim.
37. It is clear the Learned Magistrate did not give any weight to the evidence of PW2 in respect to her former husband sexually assaulting PW1 but accepted PW1 as a credible witness. The Learned Magistrate had relied on the medical report and its finding that victim's hymen missing to come to the conclusion that a sexual intercourse had taken place. The medical report did not however implicate the Applicant. It appears that the fact that PW.1 had been sexually abused by her father could have created a reasonable doubt in PW1's evidence. Therefore, there are some merits in this ground.


That the Learned Magistrate erred in law and in fact when he failed to take into account that the Complainant said his birthday was on 18/6/2012 when he came to meet her but he said his birthday was 18/4/2012.

38. The respondent has submitted that this ground is not relevant to the charge of Defilement and therefore has no merits and should be refused. It appears that the Learned Magistrate has failed to take into consideration the inconsistency of the PW.1's evidence in respect

of Applicant's birthday. However, I do not find this inconsistency to be material enough so as to reject PW.1's evidence. Therefore, I find this ground is not meritorious.

39. The delay is not unreasonable in the circumstances. There are grounds of appeal which merit serious judicial consideration that they will most probably be successful in appeal. Therefore, application for leave to appeal out of time in respect of criminal case No. 645/2012 is granted.




Aruna Aluthge
Judge

AT LAUTOKA

On 26th of August, 2016

Solicitors: Applicant in person

Office of the Director of Public Prosecution for the State (Respondent)