

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**[APPELLATE JURISDICTION]**

**CRIMINAL APPEAL NO. HAA 01 OF 2024**

**IN THE MATTER** of an Application by the Director of Public Prosecutions in terms of Section 248 (2) of the Criminal Procedure Act 2009.

**AND IN THE MATTER** of an Appeal from the decision of the Magistrate's Court of Sigatoka, in Criminal Case No. 380 of 2018.

**BETWEEN:** THE STATE

**APPLICANT**

**AND:** SIMIONE VUA NAKAILAGI

**RESPONDENT**

**Counsel:** Ms. Rukalesi Uce for the Applicant  
Mr. Bharat Makanjee for the Respondent

**Date of Hearing:** 7 August 2025

**Date of Judgment:** 6 October 2025

*The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "L.N."*

**JUDGMENT**

[1] This is an Application filed by the Director of Public Prosecutions (DPP) seeking an enlargement of time for the lodging of a Petition of Appeal against the decision made by the Magistrate's Court of Sigatoka, in Criminal Case No. 380 of 2018.

- [2] On 23 July 2018, the Respondent was charged in the Magistrate’s Court of Sigatoka, with the following offence:

***Statement of Offence (a)***

**DEFILEMENT OF A YOUNG PERSON BETWEEN 13 AND 16 YEARS OF AGE:**

Contrary to Section 215 (1) of the Crimes Act 2009.

***Particulars of Offence (b)***

**SIMIONE VUA NAKAILAGI**, on the 14<sup>th</sup> day of July 2018, at Sigatoka, in the Western Division, had unlawful carnal knowledge of a girl namely, **L. N.**, aged 13 years, 7 months and 7 days, a young person, being above the age of 13 years but below the age of 16 years.

- [3] The Respondent pleaded not guilty to the charge and the matter proceeded to trial. The trial commenced and concluded on 6 November 2023. The prosecution called 2 witnesses, the complainant and her adoptive mother. At the conclusion of the case for the prosecution, the Learned Resident Magistrate held that there was a case for the Respondent to Answer and called for his defence. The Respondent exercised his right to remain silent and the matter was adjourned for judgment.
- [4] On 4 December 2023, the Learned Resident Magistrate found the Respondent guilty and convicted him of the charge.
- [5] On 14 December 2023, the Learned Resident Magistrate sentenced the Respondent to 37 months imprisonment, with a non-parole period set at 28 months imprisonment.
- [6] Aggrieved by this Order the State has filed this instant Application by way of a Notice of Motion to Appeal out of Time. The Notice of Motion, which was filed in the Registry of the High Court on 8 February 2024, is supported by an Affidavit in Support, filed on the same day, by Maciu Nacaucaulevu, the Senior Litigation Administrative Officer, at the Office of the DPP.
- [7] On 23 April 2024, the Respondent, Simione Vua Nakailagi, filed an Affidavit in Reply to the Affidavit in Support filed by Maciu Nacaucaulevu.

[8] This matter was taken up for hearing before me on 7 August 2025. Counsel for both the Applicant and the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

**THE AFFIDAVIT IN SUPPORT FILED BY MACIU NACAUCAULEVU**

- [9] The Notice of Motion to Appeal out of Time, is supported by an Affidavit in Support filed by Maciu Nacauculevu, the Senior Litigation Administrative Officer, at the Office of the DPP. Therein, he deposes that he has been a Senior Litigation Administrative Officer with the Office of the DPP for the past 22 years. He is currently based in Lautoka since March 2014.
- [10] He states that he is familiar with matters pertaining to this case and deposes the Affidavit from the best of his knowledge and believe and with information obtained in the cause of his work.
- [11] He submits that the prosecution against the Respondent in the Magistrate's Court of Sigatoka was handled by the Divisional Police Prosecutions Office in Sigatoka. The Respondent was charged in the Magistrate's Court of Sigatoka with one count of Defilement of a Young Person between 13 and 16 Years of Age, contrary to Section 215 (1) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [12] The Respondent pleaded not guilty to the charge and on 6 November 2023, the matter proceeded to trial in the Magistrate's Court of Sigatoka. The prosecution called two witnesses in support of its case. At the conclusion of the case for the prosecution, the Learned Resident Magistrate held that there was a case for the Respondent to Answer and called for his defence. The Respondent exercised his right to remain silent. The matter was then adjourned for judgment.
- [13] On 4 December 2023, the Learned Resident Magistrate found the Respondent guilty and convicted him of the charge. On 14 December 2023, the Learned Resident Magistrate sentenced the Respondent to 37 months imprisonment, with a non-parole period of 28 months imprisonment. A copy of the Sentence is attached to the Affidavit marked as 'A'.

- [14] Mr. Nacaucaulevu further deposes that the appealable period for the sentence had lapsed on the 11 January 2024. However, the Office of the DPP had received the Police docket together with a copy of the Judgment and Sentence in relation to this matter only on 24 January 2024, by when the appealable period for the Sentence had already lapsed by 13 days.
- [15] As per the procedure set out in the ODPP Appeal Guidelines 2018, all legal opinions relating to appeals must be sent to the Appeals Division in Suva to be vetted by a Senior Officer in the Appeals Division.
- [16] Due to this internal administrative process, coupled with the delay in the Office of the DPP receiving the Police docket together with a copy of the Judgment and Sentence, the appeal proceedings were instituted after the appeal period had lapsed for the Sentence.
- [17] It is further deposed that the decision to appeal against the Learned Magistrate's Sentence was endorsed by the Acting Director of Public Prosecutions.
- [18] A copy of the proposed Petition of Appeal has been attached to the Affidavit marked as 'B'. Therein it is stated that the Learned Resident Magistrate erred in law and in fact by applying the wrong tariff, therefore, resulting in a manifestly lenient sentence. It is urged that this Court quash the sentence imposed by the Learned Magistrate and pass such other sentence warranted in law in substitution thereof.
- [19] The Officer deposes that he verily believes that the delay in filing the appeal proceedings against the Sentence of the Learned Magistrate is not unreasonable in the circumstances and that this appeal has a high prospect of success.
- [20] Therefore, the Officer prays that leave be granted to the State to appeal this matter out of time.

**THE AFFIDAVIT IN OPPOSITION FILED BY THE RESPONDENT, SIMIONE VUA NAKAILAGI**

- [21] In his Affidavit in Reply the Respondent deposes that he is currently detained at the Natabua Correction Centre in Lautoka.

- [22] The Respondent agrees that the appealable period in this case had lapsed on 11 January 2024. As such, the Office of the DPP has filed this application 28 days after the appeal period lapsed, and that is a substantial delay on the part of the State.
- [23] The Respondent further deposes that the reason for the delay is unreasonable and the failure is on the part of State. The Sentence delivered by the Resident Magistrate was harsh and there was no leniency shown to the Respondent. There are no grounds to substantiate that the Learned Magistrate was lenient in his decision.
- [24] The Respondent further states that if time is enlarged and if Court grants leave to file an appeal out of time as prayed for he will be unfairly prejudiced, since he has accepted his sentence and is serving his time in prison.
- [25] As such, the Respondent deposes that leave should not be granted in this case as there is no prospect of success in this appeal. For the aforesaid reasons, the Respondent prays that this application be dismissed.

**PROPOSED GROUND OF APPEAL AGAINST THE ORDER OF THE LEARNED RESIDENT MAGISTRATE**

- [26] Following is the proposed single Ground of Appeal filed by the Applicant:

That the Learned Resident Magistrate erred in law and in fact by applying the wrong tariff, thereby resulting in a manifestly lenient sentence.

**THE LAW**

- [27] Section 246 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced below:

*“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*

*(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*

*(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*

*(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

*(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.*

*(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.*

*(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.*

[28] Section 248 (1) of the Criminal Procedure Act [As amended by Criminal Procedure (Amendment) Act No. 12 of 2014] provides that *“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 filed at the Registry of the High Court;*

*(b) a copy of the petition shall be served on the Magistrates’ Court from the decision of which the appeal is lodged; and*

*(c) a copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption”.*

[29] However, Section 248 (2) of the Criminal Procedure Act sets out that *“The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.”*

[30] Section 248 (3) of the Criminal Procedure Act stipulates:

*“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.”*

[31] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

*“(2) The High Court may —*

*(a) confirm, reverse or vary the decision of the Magistrates Court; or*

*(b) remit the matter with the opinion of the High Court to the Magistrates Court; or*

*(c) order a new trial; or*

*(d) order trial by a court of competent jurisdiction; or*

*(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*

*(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

*(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed.”*

## **PRINCIPLES RELATING TO ENLARGEMENT OF TIME FOR FILING OF APPEALS**

[32] It has now been well established that there are several factors that an Appellate Court needs to take into consideration when dealing with such applications.

[33] In *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), His Lordship Chief Justice Anthony Gates has elaborated on the principles to be applied or considered by the Appellate Courts when exercising its discretion in such matters. These factors are:

- (i) The reasons 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?

## **ANALYSIS**

[34] In this case the Respondent was found guilty and convicted of the charge by the Learned Magistrate of Sigatoka, on 4 December 2023. On 14 December 2023, he was sentenced to 37 months imprisonment, with a non-parole period set at 28 months imprisonment. In terms of Section 248 (1) of the Criminal Procedure Act, an appeal against this decision had to be filed within 28 days of the decision. The appealable period lapsed on 11 January 2024.

[35] This application was filed in the High Court of Lautoka on 8 February 2024. Thus, these proceedings have been instituted 28 days after the appeal period had lapsed.

[36] The reasons provided by the State for the delay in filing the appeal is that it was due to internal administrative processes, coupled with the delay in the Office of the DPP receiving the Police docket together with a copy of the Judgment and Sentence.

[37] In terms of Section 248 (2) of the Criminal Procedure Act it is stated that the Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this Section for filing of an appeal. Section 248 (3) of

the Criminal Procedure Act broadly sets out as to what good cause shall deem to include.

- [38] In *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* (supra), the Supreme Court has elaborated on the principles to be applied or considered by the Appellate Courts when exercising its discretion in such matters.
- [39] In the instant case, although the reasons for the failure to file the appeal within time may be acceptable, the length of the delay is a period of 28 days. The said length of delay must be considered in light of the usual appealable period, which in this instance is 28 days. The State has taken 56 days to institute these proceedings, which is exactly double the time of the usual appealable period. Therefore, the length of the delay in instituting these proceedings, in my view, is not reasonable.
- [40] However, in terms of the principles set out in *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* (supra), even where there has been substantial delay, nonetheless the Appellate Court has to consider whether there are grounds of appeal that will probably succeed. In other words, whether there is a ground of merit justifying this Court's consideration.
- [41] Therefore, it is necessary for this Court to go into the proposed Ground of Appeal filed by the State to determine this fact.

#### The Ground of Appeal

- [42] There is one Ground of Appeal filed by the State. That the Learned Resident Magistrate erred in law and in fact by applying the wrong tariff, thereby resulting in a manifestly lenient sentence.
- [43] In this case, the Respondent was charged in the Magistrate's Court of Sigatoka, with one count of Defilement of a Young Person between 13 and 16 Years of Age, contrary to Section 215 (1) of the Crimes Act. The prescribed penalty for the offence is 10 years imprisonment.
- [44] The applicable tariff that has been followed over a long period of time for the offence of Defilement of a Young Person between 13 and 16 Years of Age is a suspended sentence to 4 years imprisonment. The law and tariff in relation to the offence of Defilement remained the same as found in the Penal Code (Chapter 17).

[45] In *Livinai Namami v. The State* [1995] 41 FLR 152 (17 July 1995); where the accused appellant appealed the sentence of 2½ years imprisonment on a charge of Defilement of his girlfriend, aged 15½ years, His Lordship Justice Fatiaki held:

*“.....On the facts of this case there can be little doubt that this was a case of "a virtuous friendship (between two young people) that ended with them having sexual intercourse with one another." Certainly it falls within that category of offending where "... it is inappropriate to pass sentences of a punitive nature.”*

*In this case the learned trial magistrate sentenced the appellant on an incorrect factual basis in that the complainant was not then under 15 years of age at the time of the offence. Furthermore no consideration appears to have been given to the minimal age difference between the parties and finally, as conceded by learned State counsel, there is no record that the learned trial magistrate was aware that the appellant was a student at the time of sentencing him.*

*Insofar as it may be possible to give some guidance in the matter, on a charge of Defilement under Section 156(1) (a) of the Penal Code (Cap. 17), this Court is firmly of the view that in the absence of aggravating factors and subject to a favourable Social Welfare Officer's report, where the age difference between the accused and the complainant is less than 4 years, a non-custodial sentence is appropriate.*

*In the light of the above and for the foregoing reasons the appeal was allowed and the appellant and his father were ordered to enter into a recognizance of \$100 to keep the peace and be of good behaviour for a period of 12 months and further conditioned that the appellant was not to associate with the complainant.”*

[46] In *State v Kabaura* [2010] FJHC 280; HAC117.2010 (9 August 2010); His Lordship Justice Goundar said:

*“The tariff for this offence is from a suspended sentence to four years imprisonment; suspended sentences reserved for virtuous friendship offending while the higher side of the range is for offenders who are older and in position of trust with the victim (*Etonia Rokowaqa v. State Criminal Appeal No. HAA37 of 2004*); *Elia Donumainasuva v. State Criminal Appeal No. HAA032 of 2001*).”*

- [47] This tariff was followed by His Lordship Justice Madigan in **State v Raovuna** [2011] FJHC 59; HAC 021.2010 (10 February 2011) where he stated:

*"The facts at trial revealed that in the last week of May 2010, you (the accused) had gone to stay with your uncle at Seaqaga. While there you came into contact with the victim Katarina and you and she had several meetings over 3 days and you each considered the other to be a romantic friend. On the evening of the 30th May 2010, you and Katarina found yourselves at a house in the settlement where sexual intercourse took place between you. The assessors and the court were obviously of the view that it was consensual."*

- [48] Similarly, in **State v Raibevu** [2012] FJHC 1040; HAC27.2011 (27 April 2012); His Lordship Justice Madigan held:

*".....the usual range of sentences (for Defilement) is from a suspended sentence for protagonists in a "virtuous relationship" whilst the higher end of the range is for offenders who are older and in a position of trust. (Rokowaga CA 37/2004, Kabaura HAC 117/2010). In the case of Donumainasava CA 32/2001, Shameem, J said "The offence is clearly designed to protect young girls who have entered puberty and experiencing social and hormonal changes, from sexual exploitation."*

- [49] In the case of **State v Vetaukula** [2014] FJHC 500; HAC46.2013 (8 July 2014); the accused, who was the turaga-ni-koro of the village, and who pleaded guilty to the defilement of a 15 year old girl in the same village, was sentenced to 18 months imprisonment. Goundar J said:

*"The maximum penalty for defilement is 10 years imprisonment. The tariff is between suspended sentences to 4 years imprisonment (**Elia Donumainasava v State** [2001] HAA 32/01S, 18 May 2001). Suspended sentences are appropriate in cases of non-exploitative relationship between persons of similar age. Custodial sentences are appropriate in cases of sexual exploitation of younger girls by old men or men who hold positions of authority over the girls."*

- [50] Even in this case the Learned Resident Magistrate has followed the said tariff. He has made reference to the cases of **Elia Donumainasava v State** (supra) and **State v Raibevu** (supra) in arriving at his Sentence.

- [51] However, on 29 November 2023, the Fiji Court of Appeal in *The State v (Rajesh) Chand* [2023] FJCA 252; AAU 75.2019 (29 November 2023); has formulated a new tariff for the offence of Defilement of a Young Person between 13 and 16 Years of Age.
- [52] As per the new tariff established, the tariff would be determined by the category of culpability the offence falls into. Accordingly, the maximum sentencing range has been fixed at 5-8 years imprisonment and a lower range of 2-4 years imprisonment (where the offender is above 18 years but a young adult). A sentencing range of up to 2 years has been recommended where the offender is under 18 years of age.
- [53] The State has filed this application on the basis that the Learned Resident Magistrate has erred in law and in fact by failing to consider the aforesaid new tariff established by the Court of Appeal, thereby resulting in a manifestly lenient sentence.
- [54] While I agree with the contention of the State that the Learned Resident Magistrate should have considered the aforesaid new tariff established by the Court of Appeal in arriving at his Sentence, I am not entirely convinced that the Sentence imposed by the Learned Resident Magistrate was a manifestly lenient Sentence. However, I am of the opinion that the proposed Ground of Appeal of the State has some merit.
- [55] In fairness to the Learned Resident Magistrate, it must be stated that the decision in *The State v (Rajesh) Chand* (supra), was delivered by the Court of Appeal on 29 November 2023, which was barely two weeks prior to the Learned Magistrate delivering his sentence in this matter.
- [56] As stated before, in terms of the principles set out in *(Kamlesh) Kumar v. State; (Mesake) Sinu v. State* (supra), even where there has been substantial delay in filing of an appeal, nonetheless the Appellate Court has to consider whether there are grounds of appeal that will probably succeed. In other words, whether there is a ground of merit justifying this Court's consideration.
- [57] Accordingly, I am of the opinion that an enlargement of time should be allowed for the State to file their Petition of Appeal out of time.
- [58] However, I am conscious of the fact that the incident took place on 14 July 2018 and now over 7 years has lapsed since that day. I am also conscious of the fact that by

permitting the State to file this Appeal Out of Time, a great degree of prejudice would be caused to the Respondent.

[59] On 14 December 2023, the Respondent was imposed a sentence of 37 months imprisonment, with a non-parole period set at 28 months imprisonment. The Respondent has already served a period of 22 months of his sentence. I am informed that his date of release has been set for 13 April 2026. I am of the opinion that the Sentence imposed on the Respondent is just and equitable considering all factors in the case.

[60] For all the reasons aforesaid, I conclude that although enlargement of time to file this Appeal out of time is being granted, I am not inclined to interfere or vary the Sentence already imposed on the Respondent.

#### **FINAL ORDERS**

[61] In light of the above, the final orders of this Court are as follows:

1. Leave for enlargement of time to file Petition of Appeal is allowed.
2. The Sentence imposed on the Respondent on 14 December 2023 shall remain valid and shall not be varied.



**At Lautoka**

**This 6<sup>th</sup> Day of October 2025**

  
**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**

**Solicitors for the Applicant:**  
**Solicitors for the Respondent:**

**Office of the Director of Public Prosecutions, Lautoka.**  
**Office of the Legal Aid Commission, Lautoka.**