IN THE SUPREME COURT OF FIJI
APPELLATE CRIMINAL JURISDICTION

Criminal Petition No. CAV 0027 Of 2015
(On appeal from Court of Appeal No. AAU 0036 of 2012)

BETWEEN	:	**NIMILOTE TAMANI NAIKAWAKAWAVESI**
		Petitioner
AND	:	**THE STATE**
		Respondent
CORAM	:	**Hon. Chief Justice Anthony Gates, President of the Supreme Court** **Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme Court** **Hon. Justice Priyasath Dep, Judge of the Supreme Court**
COUNSEL	:	**Petitioner in Person** **Mr. Y. Prasad for the Respondent**
Date of Hearing	:	**10 August 2016**
Date of Judgment	:	**26 August 2016**

JUDGMENT OF THE COURT

Gates, P

I agree with the judgment of Ekanayake J and with the proposed orders and the reasoning for them.

Chandra Ekanayake, J

Introduction

1. The petitioner, Nimilote Tamani Naikawakawavesi, by his document dated 15 October 2015 (which appears to have been received by the Registry on 23 October 2015) has sought leave to appeal against the judgment of the Court of Appeal (single Judge) dated 19.9.2014 by which judgment the appeal was dismissed under Section 35 (2) of the Court of Appeal Act. In terms of the above document following grounds of appeal have been submitted:-

    1. *Is evidence from those who are intoxicated reliable evidence? If yes what is the weight placed on it?*
    2. *What value and weight is placed on the evidence of rape as accepted on the credibility of the victim's statement and evidence in sober mind?*
    3. *What is the material evidence in relation to the sworn testimony and evidence of prosecution witness number 4?*

2. The petitioner was charged in the Magistrate's Court at Nausori on one count of Rape, contrary to Section 149 and 150 of the Penal Code as follows:

Particulars of Offence

NIMILOTE TAMANI NAIKAWAKAWAVESI *on the 15th day of July, 2007 at Wainibokasi, Nausori in the Central Division had unlawful carnal knowledge of a woman namely Tulia Rasovo without her consent.*

3. The Petitioner having pleaded not guilty to the charge, after trial in the Magistrate's Court which had been concluded on 18/10/2010. The petitioner was found guilty and convicted for the charge of Rape. By the order dated 27/10/2010 he was sentenced to 7 ½ years imprisonment with a non-parole period of 5 years.

4. Being dissatisfied with the above the petitioner preferred an appeal to the High Court against his conviction and sentence.

5. After hearing the learned High Court Judge by his judgment dated 29/3/2012 dismissed the petitioner's appeal mainly on the following grounds :

   a) That none of the grounds of appeal were made out, and
   b) That no error was shown in picking up the lower end of the tariff for sentencing despite the aggravating factors and in the absence of notable mitigating factors.

6. The petitioner then assailed the above judgment of the Court of Appeal by an application dated 17/4/2012 (received by the Court of Appeal Registry on 10/5/2012), submitting below mentioned 3 grounds of appeal:-

   i) That the learned Trial Magistrate erred in law and in fact when he only considered and accepted the evidence of the victim who was under the influence of liquor, as material evidence.
   ii) That the learned Trial Magistrate erred in law and in fact when he accepted the credibility of the victim's statement and evidence in sober mind.
   iii) That the learned Trial Magistrate had erred in law and in facts when he expected the sworn testimony and evidence of prosecution witness number 4 as material evidence.

In the Court of Appeal

7. The appeal being considered by a single Judge, he had concluded that the appellant has no right of appeal under Sections 22 of the Court of Appeal Act. In the result the appeal was dismissed under Section 35(2) of the above Act on the basis that it is bound to fail because there is no right of appeal.

8. That was the judgment of the Court of Appeal leave to appeal was preferred by petitioner's document mentioned in preceding paragraph 1.

Special Leave to Appeal

9. Under Section 98 (3) of the Constitution the Supreme Court derives exclusive jurisdiction, to hear and determine appeals from all final judgments of the Court of Appeal. Section 98 thus reads as follows:-

> "(3) The Supreme Court—
>
> *(a)* is the final appellate court;
>
> *(b)* has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal; and
>
> *(c)* has original jurisdiction to hear and determine constitutional questions referred under section 91(5).

10. Section 7 of the Supreme Court Act No.14 of 1998 also becomes relevant.

> "Section 7 (1) of the above Act provides that:-
>
> 7 (1). In exercising its jurisdiction under Section 98 [formerly section 122] of the Constitution with respect to special leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstance of the case-
>
> (a) refuse to grant special leave to appeal;
>
> (b) grant special leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
>
> (c) grant special leave and allow the appeal and make such other orders as the circumstances of the case require.

Section 7(2) thereof sets out as follows:-

In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-

(a) a question of general legal importance is involved;

(b) a substantial question of principle affecting the administration of criminal justice is involved; or

(c) substantial and grave injustice may otherwise occur.

Section 7(3) – In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-

(a) a far-reaching question of law;

(b) a matter of great general or public importance;

(c) a matter that is otherwise of substantial general interest to the administration of civil justice.

11. The petitioner's document seeking leave to appeal against the impugned Court of Appeal judgment of 19/9/2014 was received by the Registry on 23/10/2015. Time for lodgement - namely 42 days, prescribed in the above Rule 8 had expired on 31/10/2014. Thus this application was late by about 8 months and 23 days.

12. A plain reading of the above Section 7(2) which relates to criminal matters would show that the Supreme Court must not grant special leave to appeal in a criminal matter unless the court is satisfied that a question of general legal importance is involved, or a substantial question of principle affecting the administration of criminal justice is involved or substantial or grave injustice may otherwise occur.

13. Needless to stress the importance of being mindful of the observations made by this Court in **Dip Chand v State** CAV 004 of 2010 (9 May 2012) when dealing with special leave to appeal applications, which were to the following effect:

> *"....Given that the criteria is set out in Section 7 (2) of the Supreme Court Act No. 14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course the fact that the majority of the grounds relied upon by the Petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the Petitioner of crossing satisfying (sic) the threshold requirements for special leave even more difficult."*

14. In other words the criteria set out in Section 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent and special leave to appeal should not be granted as a matter of course.

15. Whether to grant special leave to appeal or not is a matter that lies solely with the Court. This Court is the final Appellate Court. It is clear that special leave could be granted only in cases which satisfy the threshold criteria spelt out in Section 7(2) of the Supreme Court Act or in a rare case where there is an irremediable injustice compelling the intervention of the Supreme Court.

Enlargement of Time

16. In terms of Rule 5 (1) of Supreme Court Rules 1998 an application for special leave to appeal under Section 98 of the Constitution must be by way of petition. As prescribed in Rule 5(3) the petition must be supported by affidavit verifying the allegations made in the Petition. Petition with an affidavit in support must be lodged within the time frame prescribed in Rule 6 of the above Rules, that is within 42 days from the date of the impugned decision from which special leave to appeal is sought. The abovementioned Rule 6 is reproduced below:

"6. A petition and affidavit in support must –

(a) be lodged at the Court registry within 42 days of the date of the decision from which special leave to appeal is sought; and

(b) served upon the registrar and all parties to the proceedings who are directly affected by the petition".

17. In this matter, although the petitioner has failed to file petition and affidavit this Court is proceeding to consider his document which appears to have been received by this Court on 23/10/2015 as an application for special leave, to avoid any probable injustice that will be caused to him.

18. As stated in preceding paragraph 10, since the lodgement of the above document was late by 8 months and 23 days, it is undoubtedly a long and substantial delay. However, line of authorities in this jurisdiction have enunciated the principle that depending on facts and circumstances of each case the Court have a discretion to enlarge time so as to hear a meritorious appeal or petition. At this juncture it would be opt to cite the following observations made by Gates,P in paragraph 14 of **Mohammed Sahid v The State**; CAV 0025.2015(21/4/16) :-

> *"[14] The courts in these circumstances possess discretion to enlarge time so as to hear a meritorious appeal or petition. Several cases in this jurisdiction have dealt with the way the courts should evaluate these applications. Though the courts will not be rigid in examining certain factors, it has been established that fairness is best observed by following a principled approach:* ***Kumar v. The State****;* ***Sinu v. The State*** *CAV0001/09, CAV0001/10 21st August 2012."*

19. What has to be examined now is whether the petitioner has offered any explanation at all for this delay. Neither in his document received by this court on 23/10/15 nor in his submissions is any explanation given.

20. In an enlargement application to determine whether the interests of justice require allowing extension of time certain factors have to be examined. Those factors as laid down in the case of **Kamlesh Kumar vs. State** Criminal Appeal No. CAV 001/2009**;** by His Lordship the Chief Justice, Gates 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) 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?

21. When considering the length of the delay, the pronouncement in the case of **Edwin Rhodes** [1910] 5 Cr. App. R.35 at p36, would lend assistance. This being a case where an application for extension of time for leave to appeal was made by an applicant who was convicted for manslaughter, it was observed that;-

"it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons."

22. Further, in a Full Court decision of New South Wales namely – **R. v Albert Sunderland** [1927] 28 SR (NSW) 26; which also being a case involving an application for extension of time after conviction, the court held as follows:

"(1) – that want of means was not a sufficient ground on which to base the application, and

(2) – that in view of the delay in applying "very exceptional circumstances would have to be established before the court would be justified in granting the application."

23. The line of authorities here would amply demonstrate that if the delay is a very short one generally the discretion of the court could be exercised in favour of the petitioner. In enlargement applications the length of the delay has been extensively dealt with, in some of the recent Fiji Supreme Court decisions. In the case of **Eddie McCaig v Abhi Manu;** CBV 002/2012 (27th August 2012); Gates, P observed as follows:

> *"[22] The delay here was very short, a mere 2 days. In **C M Stillevoldt BV v EL Carriers** (1983) 1 WLR 207 it was 2 weeks, and the discretion was exercised in favour of the appellant. In **Palata** it was 3 days and Ackner CJ said at p.521b;*
> *...."we expressed the opinion that, in cases where the delay was very short and there was an acceptable excuse for the delay, as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal will arise. We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case."*

24. The above observations were made in an enlargement application in a civil case. Yet if the delay was very short and the petitioner was successful in offering an acceptable excuse for the same, as a general rule the appellant should not be deprived of his right of appeal. Of course as per **R v Albert Sunderland** 'very exceptional circumstances would have to be established'. Therefore necessity would arise to consider all the facts and circumstances in each case when exercising the discretion of the Court in granting an enlargement of time.

25. The length of the delay here is a long and substantial one. The petitioner has totally failed in offering any acceptable excuse for the delay or in satisfying court the existence of any exceptional circumstances justifying the delay.

26. What needs consideration now is whether there is a ground of merit justifying the appellate Court's consideration.

27. By the impugned judgment of the Court of Appeal dated 19/92014, the learned Justice of Appeal had dismissed the appeal preferred against conviction mainly on the basis that there was no right of appeal. The grounds of appeal advanced by the petitioner in the Court of Appeal are already produced in the preceding paragraph 6.

28. In paragraph 5 of the Court of Appeal Judgment the learned Judge had observed as follows:-

> *"[5] This being a second tier appeal, the appellant's right of appeal is governed by section 22 of the Court of Appeal Act. Section 22 provides:*
>
> *22(1) Any party to an appeal from a magistrate's court to the [High Court] may appeal, under this Part, against the decision of the [High Court] in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only ...."*

29. Further it is noted that the Court of Appeal had been satisfied that the petitioner had no right of appeal under Section 22 of the Court of Appeal Act for the following reasons :

a) All the grounds proposed in the Court of Appeal raised factual errors.
b) Clearly there was no question of law alone that arises from the grounds of appeal urged in the Court of Appeal.
c) The application to adduce fresh evidence does not raise a question of law alone.

30. At the trial in the Magistrate's Court the victim (Tulia Rasovo) in her testimony has said that on 15/7/2007 when she was walking to go home from a drinking party, at the junction of Natogadravu village, the accused was following her to do something. Having asked the accused what he wanted, without saying anything he started to punch her a lot of times. While punching she fell on the ground and then the accused dragged her into a driveway - to a drain in the dalo plantation. Although she was crying and trying to stop him the accused laid her down. When she was shouting for help in a loud voice, the accused closed her mouth with his T- shirt. Then he took off her long pants. She had identified the clothes she was wearing at the time of the incident when shown to her in examination - in - chief. Further she had explained in detail what the accused did to her having her laid down, faced downwards. She had said that she was crying and struggling. Further she has said that penis

was inserted lot of times into her vagina the accused having put the T- shirt into her mouth and holding her hands at the back. She had been helpless. When she tried to get him off, she saw a couple walking on the road and she shouted for help. Then she had kicked him and run towards that woman. Having seen her naked, the woman had asked her husband to get a 'sulu' to cover the victim. And then they covered her with a 'sulu'and then taken her to a house of another woman. Thereafter taken to Nausori Police Station. There she had given a statement and then been taken to Suva Hospital.

31. In cross- examination whilst affirming her evidence given in examination – in- chief had further given a detailed account of what the accused did – such as licking her without her consent and how the accused had forcefully had sex with her when she was facing the ground throughout.

32. Her evidence was uncontradicted and credibility was not shaken during cross - examination.

33. There had been no medical or any other evidence with regard to any intoxicated state of the victim. Likewise there had been no evidence submitted at the trial of any state of intoxication in respect of the petitioner too at the time of the commission of the offence. Although in his testimony he had said that he was still drunk even at the Police station and he had a black out.

34. Further the victim had positively identified the petitioner during the police investigations and at the trial. Identity of the accused had never been an issue throughout the trial. It is observed that the petitioner was represented by Counsel throughout in the Magistrate's Court.

35. In the caution interview of the petitioner he had admitted that:

a) He continually punched her on the forehead when she was laid down on the ground,

b) When the victim was forced to lay down, he then stripped off her long pants, her panties, kissed her on both thighs and her vagina.

Petitioner's answers to question nos. 25, 27, 30 and 31, in the caution interview are reproduced below:

> *"Q25. It is also stated that after this you turned her over and that you penetrated your penis into her anus and at the same time you had held both hands behind her. Is this true or not?*
>
> *A. I asked her to turn to which she responded positively to, after which I went ahead to do those things.*
>
> *Q27. It is also stated that you then penetrated her vagina with your penis and at the same time shoved your thumb into her anus. Is this true?*
>
> *A. I think this to be true since I was drunk.*
>
> *Q30. From the bruises on the victim's forehead, she states that you had punched her in that area of her face, is it true or not?*
>
> *A. Yes it is true.*
>
> *Q31. Tell me the reason to which you raped this woman?*
>
> *A. On sighting her approach while I was talking with the security guard, I felt a strong urge to have sex with her. I then followed and abducted her."*

36. The counsel for the petitioner neither had challenged the admissibility of the caution interview nor had he made an application for a voire - dire inquiry before the trial proper commenced in the Magistrate's Court.

37. It appears that the petitioner in his testimony in the Magistrate's court had completely denied the incident whilst stating that he was drunk and in a state of black out, not only at the time of the offence even at the time of his arrest by the police. The Magistrate having

considered all the evidence led before him and the demeanour of all the witnesses had proceeded to convict the petitioner for the offence of rape.

38. On a careful examination of the medical report in respect of the victim shows that the findings therein were consistent with the history given by the victim. Further as per the medical report the doctor who examined the victim had not been able to express an opinion regarding penetration as the victim had delivered two full term infants vaginally. The victim's evidence had been supported by the medical evidence. The above matters had been considered even by the learned High Court Judge in his appeal judgment dated 29/3/2012.

39. The third ground of appeal that has been raised in the document of the petitioner received by this court on 23/10/2015 appears to be a query raised in respect of the evidence of the prosecution witness no. 4 called in the Magistrate Court namely, SGT 677 Koro. He had been the police witness who conducted the caution interview of the petitioner in the police station. He has narrated how the interview was recorded and translated and he had proceeded to tender the carbon copy of the same as PExibit 4. There had been no objection by the defence counsel for the tendering of the same. His evidence was not contradicted in cross – examination. Thus the Magistrate cannot be faulted for acting on his evidence.

40. For the above reasons, I am satisfied that the learned Magistrate had not committed an error in convicting the accused for the charged offence. A careful consideration of the sentencing order dated 27/10/2010 of the learned Magistrate, reveals that 7 years had been taken as the starting point. Having considered the mitigating factors outlined in the sentencing order had deducted 6 months. Further another one year had been added to the sentence having due consideration to the aggravating factors namely, use of violence and the ruthless manner in which the offence was committed. Finally he had fixed the head sentence at 7 ½ years imprisonment with a non - parole period of 5 years. In view of the reasons given in the

sentencing order I am unable to conclude that any error had been committed with regard to the sentence.

41. It is observed that in sexual offences no corroboration is required in terms of Section 129 of the Criminal Procedure Decree 2009. The said section 129 thus reads as follows:

> *"129. Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration".*

42. Further it has been held by the Fiji Court of Appeal in **Balelala v State** (2004) FJCA 49 AAU 003.2004(11/11/2014), that the issue of corroboration is no longer applicable or mandatorily required in proving sexual offences. It appears that learned High Court Judge's conclusion with regard to issue of corroboration is correct.

43. The learned High Court Judge sitting in appeal also had affirmed the conviction and sentence and dismissed the appeal.

44. Having carefully perused the impugned Court of Appeal judgment dated 19/9/2014, I am satisfied that the grounds advanced before the Court of Appeal by the petitioner were bound to fail as no question of law alone had arisen from the grounds.

45. In view of the above analysis, I conclude that no ground of merit exists justifying the Appellate Court's consideration.

46. I shall now advert to consider whether there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed.

47. It has already been observed in preceding paragraph 25 that the delay here is a long and substantial one. In view of the reasons enumerated in preceding paragraphs 30 to 43 the in escapable conclusion one could arrive upon is that there is no ground of appeal that will probably succeed.

48. Now I shall consider if time is enlarged will the respondent (State) be unfairly prejudiced?

49. Having given due regard to the facts and circumstances of this case, I am inclined to the view that whether the respondent would be unfairly prejudiced would largely depend on the answers to the following two questions namely:

i) Whether there exist any grounds that the trial was infected with error?, or
ii) Whether there are any meritorious grounds which demands appellate Court's consideration?

In view of the above analysis the answer to both the above questions should be no.

50. In addition it is noted that the petitioner had been represented by Counsel throughout the Magistrate's Court proceedings, before the High Court and in the appeal hearing before the Court of Appeal. On the reasons enumerated in the foregoing paragraphs, this Court has already concluded that there is no ground of appeal that will probably succeed here. In view of the above I conclude that the respondent will be unfairly prejudiced if enlargement of time is allowed.

51. For the reasons given in this judgment all the grounds that have been urged in the petitioner's document to this Court should fail.

52. Viewed in the above context, the application for enlargement of time lacks merit and same is refused. On a careful scrutiny of facts and circumstances of this case and submissions made, we are not satisfied that the grounds submitted fulfil the threshold criteria enumerated in Section 7(2) of the Supreme Court Act No. 14 of 1998. The application for leave to appeal too therefore should fail.

Dep, J

I agree with the reasons and conclusions of Ekanayake J.

The Orders of the Court:

1. Petitioner's application for enlargement of time is refused.
2. Special leave to appeal is also refused.
3. The judgment of the Court of Appeal dated 19/9/2014 is affirmed.

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Hon. Chief Justice, Anthony Gates
President of the Supreme Court

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Solicitors:
Petitioner in Person
Office of the Director of Public Prosecutions for the Respondent.