

IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

Criminal Petition No. CAV 003 of 2017
[on appeal from Court of Appeal No. AAU036/2013]

BETWEEN: ILAITIA MATAISAVUI **Petitioner**

AND: THE STATE **Respondent**

Coram: The Hon. Chief Justice Anthony Gates
President of the Supreme Court
The Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court
The Hon. Mr. Justice William Calanchini
Judge of the Supreme Court

Counsel: Mr. Thomson Lee for Petitioner
Mr. S. Vodokisolomone for the Respondent

Hearing: Thursday 12th October 2017

Date of Judgment: Friday 27th October 2017

JUDGMENT OF THE COURT

Gates P:

- [1] The petitioner filed his own petition without the assistance of counsel. This was an informal document dated 10.2.17 and stamped for the Supreme Court Registry on 14.2.17.
- [2] The judgment of the Court of Appeal which the petitioner challenges is dated 30th September 2017. Accepting the date of the petition rather than its lodging as the commencement date of the proceedings in this court, namely 1st February 2017, the lodging of the petition is late by approximately 2 months 20 days.

- [3] This means that the court must consider whether to grant an enlargement of time to permit the appeal to be considered.
- [4] The High Court after hearing evidence convicted the petitioner of 3 counts of rape contrary to sections 207(1) and 207(2)(b) of the Crimes Act. The petitioner was sentenced to 12 years imprisonment on each count concurrent to each other. The judge imposed a non-parole period of 11 years.

The Facts

- [5] The complainant, a married woman with 3 children, was a neighbour of the petitioner in Lakena Hill, Nausori. Her husband was a security guard. On 14th September 2011 morning her husband was sleeping after returning home from a night shift. Meanwhile she went out to collect firewood. At around midday she was about to return home when she was grabbed by someone from behind. She saw it was her neighbour the Petitioner. He was holding a cane knife and put it to her neck. He then committed the various acts of rape.
- [6] She was ashamed to tell her husband at first. But her husband could tell something was wrong and she eventually told him. Her husband went to look for the Petitioner but could not find him. They reported the matter at Nausori Police Station the same day.
- [7] They were taken to the Health Centre for the complainant to be medically examined. That day the doctor was too busy and could not see her. She had to come back to see the doctor the next day 15.9.11.
- [8] The doctor considered the injuries in the vulva area lent support to the complainant's account of forced sexual penetration. There were superficial cuts noted at the labial fold which were tender and painful.
- [9] In his caution interview statement the petitioner admitted he went to the same place to collect firewood. He even said he and the complainant had gone there together. This was denied by the complainant. He admitted he had been holding a cane knife but denied that any sex had occurred or any rape committed.

[10] The petitioner gave sworn evidence. He said the complainant came to his house and told him to go with her to the river, to have a swim, and collect firewood. He alleged that 3 weeks prior to the incident he had seen the complainant and another having sexual intercourse near the river. In the cross-examination of the complainant it was suggested to her that she had been having sex with her father.

The Grounds

[11] The petitioner was represented before us by counsel as he was at trial and in the Court of Appeal. However he himself had submitted to this court the following grounds:

1. The prosecution evidence does not support the rape elements.
2. The independent material particular given in court and in the complainant's police statement was not tendered in court therefore making inconsistent the facts of the allegation.
3. That the law on rape that it does not require corroboration is being abused and prejudiced the defendant because I ask the honourable Supreme Court – what constitute corroboration?
4. Further if there are statements made by the complainant regarding torn clothes and knife, is it not relevant to tender this independent material particulars in court to show:
 - a. That a crime has been committed
 - b. That the evidence implicates the accused
 - c. That the evidence is independent source tending to connect or affects an accused person.

That I raised this questions on the basis that rape is a crime of violence or obtaining sex without consent but in my case the medical examination was done 1 day later and the evidence is not even questioned as doubtful with respect to recent complainant principle. On the above basis I ask the Supreme Court to hear my appeal because it qualify under section 7(2) of the Supreme Court Act.

[12] The grounds challenge the conviction and not the sentence. Petitioner's counsel in his submissions said the petitioner was not pursuing an appeal against sentence before us. Indeed no part of the petition challenged the Court of Appeal's decision in this regard.

[13] The single judge had granted leave to appeal to the Court of Appeal on 2 grounds:

“Ground 1(ii)

- (i) At paragraph 27 line 6 when he made the observation that if the victim were not telling the truth, she would not have gone through the trouble to have her private part medically examined by a doctor.

Ground 2

- (ii) That the learned trial judge erred in law and principle when he told the Appellant in full view of the Assessors that the Appellant was not credible.”

Ground 1(ii) Unfair Summing Up – “why would she bother to be medically examined?”

[14] The judge’s remarks were:

“You may ask yourselves, if the complainant was not telling the truth, why would she take all the trouble to have her private part been medically examined by a professional.”

[15] The question posed is perhaps not helpful. A person who fabricates a serious charge against someone they dislike, are jealous of, or wish to be avenged on, can go to considerable lengths to make up their case.

[16] The single judge said [at para 9]:

“The above question is arguably unfair to the appellant. Such question has a tendency to diminish the burden of proof. In **Joseph Ben Vasu v. The State** (unreported Criminal Appeal No. AAU0011 of 2006S; 24 November 2006) the trial Magistrate posed the question “why the complainant was crying and complaining of being raped” before convicting the accused. The Court of Appeal held the question why would a complainant make up a story of being raped, is a forbidden question because it assumes that the absence of a persuasive reason for the complainant behaving in a particular way enhances the prosecution case.”

[17] It must be remembered also that this was a police investigation. The victim had no choice in the matter, and she was obliged to be examined by the doctor as part of the

evidence gathering in the case. If there had been no supportive evidence for her account of what had happened, this could become a factor in the Director of Public Prosecution's decision whether to proceed on her complaint alone.

- [18] Prematilaka J in the Court of Appeal [at para 21] referred to the need for counsel to seek re-directions in cases where it is believed a wrong direction in law has occurred or there is a need to correct a mistake of some kind Anand Abhay Raj v The State CAV0003 of 2014 [2014 FJSC 12]. Counsel had the opportunity but did not so apply for re-directions.
- [19] The Court of Appeal was right to conclude that no substantial prejudice to the Petitioner had resulted from these directions, and rejected the ground. That decision was correct and this ground would fail.

Ground 2 – Allegation that Judge said Petitioner “not credible”

- [20] This was the second ground for which Goundar J granted leave to appeal to the Court of Appeal. At the hearing in the court below petitioner's counsel conceded “there is no such statement in the proceedings at all.”
- [21] Nor has there been any application to supplement the record, see Practice Direction No. 2 of 1982 Tuivaga CJ.
- [22] Noted by the trial judge in the record [at p81 cross-examination of DW1 the petitioner] are these passages:

“I don't accompany women to collect firewood. (Evasive witness). I accompanied Prosecution Witness 2 to collect firewood.

(Question and answer 46 of interview notes shown to Defence witness 1) That answer is correct. (Evasive witness). The answer I'm giving now as the reason for Prosecution Witness 2's allegations is different from what I told police in question and answer 46 of Prosecution Exhibit 2(a) and 2(b) on 21.9.11. I am telling the truth. I have never told the court about the above.”

- [23] The question and answer in the interview was:

"Q46: Why did X lodge a report at the police station that you raped her?"

A: I don't know."

[24] In the trial he said her reason was because she had realised that he had seen her having intercourse with her father. This late allegation was no doubt thought not to be worthy of belief by the assessors and the judge and was accordingly rejected when considering who was telling the truth.

[25] In his summing up the trial judge at page 24 said this of the inconsistency:

"The accused, on the other hand, in his sworn evidence, totally denied the complainant's above allegations. He said, he did not lick her vagina, nor inserted his finger into the same, nor did he penetrate her vagina with his penis. He said, the complainant was fabricating the allegations against him, because he witnessed the complainant have sex with her father, one or two weeks prior to the alleged rape incidents. However, in question and answer 46 of his police caution interview statement dated 21st September, 2011, which was tendered as Prosecution Exhibit No. 2(a) and 2(b), he admitted he didn't know why the complainant lodge the rape allegations to police on 14th September, 2011."

[26] The single judge had said [para 7]:

"A material inconsistency affects the veracity of the evidence. There is nothing unfair about such direction."

[27] In the Full Court Prematilaka J concluded:

"[26] There is no credible motive for the victim to have falsely implicated the Appellant whose evidence that his having seen the victim in the act of having sexual intercourse with her father three weeks back near "the river" as a motive for her having implicated him falsely lacks any creditworthiness, for *inter alia* he had come out with it for the first time at the trial. I have no doubt that on the evidence before court the case against the Appellant has been proved beyond reasonable doubt."

[28] Keeping in mind, that the burden of proof was always with the prosecution, it was a factual dispute which had to be resolved by the assessors before giving their opinions, and by the judge in deciding which witness he believed. The learned judge put the inconsistencies fairly for consideration with the Petitioner's explanation. There was nothing unfair in the judge's directions on this part of the evidence.

[29] This ground was bound to fail.

Other Submissions on grounds lodged (not argued)

[30] The Petitioner was anxious that we should look also at a written submission on the grounds which he personally had lodged.

[31] Some of those points indicate a misconception on aspects of necessary proof for the offence of rape. For instance one ground suggests the defence had been handicapped because the prosecution chose not to tender the knife that he is said to have held at the neck of the complainant. Similarly the prosecution did not tender the complainant's T-shirt said to have been torn in this incident.

[32] It was not necessary for this evidence to be tendered. If it were not produced the defence could address that omission if thought significant. But it could not prejudice the case for the petitioner.

[33] This case turned on who was believed. Little reliance was placed on the recent complaint to the complainant's husband. It went to bolster her creditworthiness, it was not corroborative of her account. In the petitioner's submissions he complained for this purpose of the non-tendering of the exhibits, the torn T-shirt and the knife. It has to be said that the submission is largely misconceived in its evaluation of the importance of such evidence.

[34] No ground can succeed on those arguments.

[35] For the question of leave to appeal to be considered, the petitioner has to overcome the non-compliance with timely lodgement requirements for the petition. Many cases

have set out the principles to be applied. It is said “appellate courts consider five factors to ensure a principled approach to the exercise of a judicial discretion.” Those 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 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?

NLTB v Ahmed Khan and Anor, CBV0002.2013 [15 March 2013]

- [36] No affidavit has been filed setting out the facts that might explain the delay and why it occurred. The lateness has not been considered.
- [37] The reason for the late lodgement remains unexplained. The delay itself 2 months 20 days is itself comparatively short.
- [38] However none of the grounds filed or argued are meritorious or sufficient to invoke the intervention of this court. There will be prejudice to the Respondent to the extent the litigation would still not be concluded.
- [39] Finally, the case for the petitioner cannot meet the threshold requirements of the Supreme Court set out in section 7(2), for the Court must not grant 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.

Marsoof J:

- [40] I concur with the judgment of Gates P and agree with his reasoning and the orders proposed.

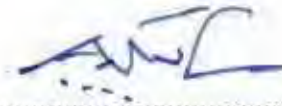
Calanchini J:

[41] I have read the draft judgment of Gates P and agree with his reasoning and his conclusions.

Conclusion

[43] In the result the orders of the Court are:

- (i) Enlargement of time within which to appeal is refused;
- (ii) The petition is dismissed;
- (iii) The decision of the lower court is upheld.



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Hon. Justice Anthony Gates
President Supreme Court




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Hon. Justice Marsoof
Judge of the Supreme Court



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Hon. Justice Calanchini
Judge of the Supreme Court

Solicitors for the Petitioner:
Solicitors for the Respondent:

Office of the Director Legal Aid Commission
Office of the Director of Public Prosecutions