IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0008.2017
(On Appeal from Court of Appeal No: AAU 060.2013)

BETWEEN : **JOELI TAWATATAU**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court**
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court

Counsel : **Mr. T. Lee for the Petitioner**
Ms. J. Prasad for the Respondent

Date of Hearing: **13 April 2018**

Date of Judgment: **26 April 2018**

JUDGMENT

Saleem Marsoof, J

Introduction

[1] On 7th June 2017, the Petitioner Joeli Tawatatau gave Notice of Appeal communicating his intention to commence appellate proceedings before this Court against the unanimous decision of the Court of Appeal [Chandra JA, Prematillake JA and Perera JA] dated 26th

May 2017, which affirmed his conviction and sentence for the offence of rape contrary to section 207(1) and (2)(a) of the Crimes Act, 2009, alleged to have been committed on the morning of 22nd September 2011.

[2] The sentence imposed on the Petitioner by the High Court was 8 years imprisonment with a non-parole period of 6 years. The victim was admittedly his girl-friend, who in the judgment of the Court of Appeal is described as "P", withholding her name to protect her right to privacy.

[3] The purported Notice of Appeal dated 7th June 2007 did not set out any grounds of appeal. After intimating his intention to appeal against the decision of the Court of Appeal, the Petitioner had stated in his notice that-

> "Proper grounds and submission shall be formulated upon perusal of copy records currently with the Legal Aid Commission."

[4] On 19th March 2018, the Petitioner lodged his Notice of Motion for Enlargement of Time dated 17th March 2018, but no grounds for seeking leave to appeal were set out in the said motion and supporting affidavit. Written submissions were filed on behalf of the Petitioner on 27th March 2018, wherein for the first time, some grounds for seeking leave to appeal were formulated and submissions of facts and law relating thereto were also included.

[5] In the circumstances, the question of enlargement of time had to be considered at the very commencement of the hearing before this Court.

The Procedure for seeking Leave to Appeal

[6] In view of the fact that there is an increasing tendency on the part of persons seeking to invoke the appellate jurisdiction of this Court not to comply with the procedural rules relating to the lodging of applications seeking leave to appeal, it may be useful to refer to the provisions of the Constitution of the Republic of Fiji 2013, the Supreme Court Rules of

2016 that *inter alia* deal with the procedure and time limit for seeking leave to appeal to this Court from any final decision of the Court of Appeal, and the Supreme Court Act No. 14 of 1998.

[7] The exclusive jurisdiction of the Supreme Court of Fiji to hear and determine appeals from all final judgments of the Court of Appeal is derived from section 98(3)(b) of the Constitution of the Republic of Fiji. Section 98(4) of the said Constitution provides that an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

[8] The procedure and time limits for lodging an application seeking leave to appeal from this Court are set out in the Supreme Court Rules 2016. In regard to the procedure, Rule 4 of the said Rules provides as follows:-

> "(1) An application to the Court for leave to appeal under section 98(4) of the Constitution must be *by way of Petition*.
>
> (2) A Petition under paragraph (1) must-
>
> (a) state succinctly and clearly *all facts* it may be necessary to state relating to the Petition;
>
> (b) deal with the *merits of the case only so far as is necessary to explain the grounds* upon which leave to appeal is sought; and
>
> (c) be *signed by the Petitioner's legal practitioner or by the party if the party appears in person*;
>
> (3) A Petition must be *supported by an affidavit* verifying the allegations made in the Petition.
>
> (4) For the purposes of this Rule, Forms 6 and 7 set out in Atkin's Encyclopedia of Court forms (Second Edition) Volume 5 (1984 issue) at page 189 *et sequentes*

must be used with any modifications or variations the circumstances of the particular case may require. These forms are set out in Schedule1."

[9] Rule 5 (a) of the said Supreme Court Rules also provides that such an application must "be lodged at the Court registry within 42 days of the date of the decision from which special leave to appeal is sought." It is noteworthy that the said procedure and time limits are substantially the same as those prescribed in the Supreme Court Rules of 1998, which were applicable prior to 31st October 2016.

Application for Enlargement of Time

[10] Despite the absence of any provision in the Constitution of the Republic of Fiji or any other legislation that seek to confer on the Supreme Court the power to grant enlargement of time, this Court has in a long line of decisions including *The State v Ramesh Patel* Criminal Appeal No.AAU0002 of 2002S (15 November 2002), CAV0003.09 (1 May 2012), *McCaig v Manu* [2012] FJSC 18; CBV0002.2012 (27 August 2012), *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), *Tiritiri v. The State* [2014] FJSC 15 CAV9.2014 (14th November 2014), *Nabainivalu v State* [2015] FJSC 22; CAV027.2014 (22 October 2015), *Tukana v State* [2016] FJSC 23; CAV 0024.2015 (22 June 2016) and *Lal v State* [2017] FJSC 20; CAV0036-0037 and 0039.2016 (20 July 2017), assumed that it possesses jurisdiction to grant enlargement of time in appropriate cases.

[11] However, the enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application in the prescribed manner. As the Judicial Committee of the Privy Council emphasised in *Ratnam v Cumarasamy* [1964] 3 All ER 933 at 935 at 935, "rules of court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion."

[12] Enlargement of time has generally been permitted by courts only exceptionally, and only in an endeavor to avoid or redress some grave injustice that might otherwise occur from the

strict application of rules of court. As McHugh J observed in *Gallo v Dawson* [1990] HCA 30; (1990) 93 ALR 479 at 480 to 481-

> "The grant of an extension of time under this rule is not automatic. *The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the court or justice to do justice between the parties*: see *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 92; *Jess v Scott* (1986) 12 FCR 187 at 194-5; 70 ALR 185. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v Grigg* [1967] VR 871 at 872; *Hughes*, at 263-4; *Mitchelson v Mitchelson* (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has "a vested right to retain the judgment" unless the application is granted: *Vilenius v Heinegar* (1962) 36 ALJR 200 at 201. *It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice.*"*(emphasis added)*

[13] In paragraph 4 of his judgment in *Kamalesh Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), Chief Justice Anthony Gates enumerated the factors that will be considered by a court in Fiji for granting enlargement of time 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?

[14] As his Lordship the Chief Justice went on to observe in paragraph 4 of the said judgment, the abovementioned factors "may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time." His Lordship summed up the legal position as follows:-

> *"Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court".* (*emphasis added*)

[15] The Petitioner therefore has to satisfy this Court in the first instance that there are grounds for granting the Petitioner enlargement of time for seeking leave to appeal. For this purpose, it is necessary to examine the facts and circumstances of this case in the light of the factors enumerated by His Lordship the Chief Justice in the *Kamalesh Kumar* case.

Reason for the Failure to File within Time

[16] Factors (i) and (ii) highlighted by his Lordship the Chief Justice in the *Kamalesh Kumar* case may be considered together, as they involve the question of the length and reason for the delay. In computing the length of delay, it is necessary to stress that a proper petition of appeal supported by affidavit, as required by Rule 4 of the Rules of the Supreme Court 2016, has not been filed by or on behalf of the Petitioner so far, and it had taken the Petitioner 9 months to formulate his grounds of appeal, which may be sufficient along with

his written submissions, for this Court to consider granting enlargement of time for filing an application for leave to appeal.

[17] In fairness to the Petitioner, it has to be stated that he had been conscious of the time constraints, and it appears from paragraph 5 of the Petitioner's affidavit in support of his application for enlargement of time dated 17th March 2018 that the Petitioner had made a formal application to the Legal Aid Commission on 30th May 2017, that is just 3 days after the pronouncement of the judgment of the Court of Appeal, to represent him in his application for leave to appeal to the Supreme Court.

[18] He has also stated in paragraph 6 of his said affidavit, that after a week awaiting the reply of the Commission, he had lodged his Notice of Appeal in the Registry of this Court on 7th June 2017 sans the grounds of appeal, but had explained therein that "proper grounds and submissions shall be formulated upon perusal of copy records currently with the Legal Aid Commission." It is pertinent to note that from the records of proceedings in the lower courts it is clear that the Petitioner had been represented in the High Court and the Court of Appeal by the Legal Aid Commission, and it is the position of the Petitioner that the said Commission held on to his copy of the records after concluding the hearing in the Court of Appeal.

[19] It is also noteworthy that Mr. Kunal Sen, Senior Court of Officer of the Supreme Court had by his letter dated 14th June 2017, acknowledged receipt of the Petitioner's Notice of Appeal and had advised the Petitioner to "seek legal advice and / representation by either the Legal Aid Commission or a private legal practitioner." He had also been advised that he is free to represent himself in the appeal proceedings, if he prefers to do so.

[20] Even on 8th August 2017, which was a call over date in the Supreme Court, the Petitioner had appeared in person and after noting that no proper papers have been filed pursuant to the Notice of Appeal issued by the Petitioner, the Honourable Chief Justice had made order directing the Petitioner to file proper papers seeking enlargement of time and setting out proper grounds. His Lordship the Chief Justice had also directed the prison authorities to escort the Petitioner to the office of the Legal Aid Commission after the hearing to pursue his application for legal aid dated 30th May 2017.

[21] By the next call over date, namely 28th February 2018, no application for enlargement of time had been filed. The Petitioner appeared before the Supreme Court in person and the Court made order fixing the case for hearing on 13th April 2018 and granting time to the Petitioner to file his written submissions by 20th March 2018 and for the Respondent to file its written submissions by 3rd April 2018.

[22] The Petitioner filed his application for enlargement of time by way of affidavit dated 17th March 2017 without assistance from the Legal Aid Commission. The Petitioner disclosed in paragraph 9 of his said affidavit that the Petitioner had been intimated by the Legal Aid Commission as far back as on 21st August 2017 that his appeal will be handled by Mr. Thompson Lee of the said Commission, but even by the date of his swearing his affidavit, namely 17th March 2018, Mr. Lee has not gone to see the Petitioner or sought to take his instructions.

[23] As already noted, the Petitioner's Notice of Appeal dated 7th June 2017, did not set out the facts of the case, or any specific grounds of appeal. Nor has he set out any grounds of appeal in his Motion for Enlargement of Time dated 17th March 2018, except that he has pleaded generally in paragraphs 14 and 15 thereof that since general questions of law and substantial questions of principle are involved, substantial and grave injustice will occur if the enlargement of time and special leave is not granted. He has also said in paragraph 16 of the said Notice of Motion for Enlargement of Time that he intends to file "further grounds of appeal upon the grant of enlargement of time and special leave."

[24] The grounds of appeal relied upon by the Petitioner and some of the material facts and allegations are set out for the first time in the written submissions filed on his behalf by the Legal Aid Commission in the Registry of this Court on 27th March 2018, though none of these facts and allegations have been verified by affidavit. Mr. Thomoson Lee has settled these written submissions.

[25] At the hearing of this application, Mr. Lee apologised to Court for the delay in filing proper papers for enlargement of time, and in particular stated that he was not aware of the order of this Court dated 8th August 2017 requiring that proper papers be filed for enlargement of

time setting out grounds of appeal. He stated that there had been some miscommunication between him and the Petitioner.

[26] Even if the failure to comply strictly with the requirements of the Supreme Court Rules of 2016 that all applications for leave to appeal should be by way of petition supported by affidavit is overlooked for the reason that the Petitioner was at all relevant times an incarcerated prisoner, the grounds of appeal which constitute an essential part of any application for leave to appeal have been made known to this Court and the Respondent to this case only on 27th March 2018, which is exactly 9 months from the date of the judgment of the Court of Appeal, and very much outside the period of 42 days prescribed in Rule 5(a) of the Supreme Court Rules for the lodging of a proper application seeking leave to appeal.

[27] In the circumstances it is clear that the Petitioner has been sufficiently vigilant and had done everything possible to pursue his appeal, but the Legal Aid Commission has been remiss in discharging its duties. The practice in this Court is to show some leniency towards accused persons and incarcerated prisoners in regard to compliance with procedural rules, and the Petitioner's application for enlargement of time shall be considered as favourably as it could despite any omission or default of the Legal Aid Commission in this case.

[28] It is unfortunate that the Legal Aid Commission did not return the Petitioner's documents to him in time for him to seek advice and file a petition in the Supreme Court seeking leave to appeal, or if it was inclined to continue representing the Petitioner, to take prompt action to obtain instructions and file a timely application for leave to appeal, despite its obligations under sections 14(2)(d), 15(10) and 118(2) of the Constitution of the Republic of Fiji, even after the Petitioner had formally made an application to the said Commission on 30th May 2017.

[29] Supplementing the powers of the relevant Minister to make regulations in terms of section 35 of the Legal Aid Act No. 10 of 1996 for carrying out or giving effect to the said Act, the Legal Aid Commission is also empowered by section 118(4) of the Constitution of the Republic of Fiji to make rules and regulations for facilitating the efficient performance of

its functions, and this Court is of the view that the Commission should make necessary guidelines and checklists to ensure that the rights of parties advised and represented by it are not jeopardised due to the failure to file appeals or other applications to redress any grievance an accused person or prisoner might have.

Grounds of Merit

[30] In regard to grounds of merit, factors (iii) and (iv) highlighted by the honourable Chief Justice in his judgment in the *Kamalesh Kumar* case, may conveniently be considered together. It is necessary to consider whether there is a ground of merit justifying the grant of enlargement of time, and in a case of substantial delay, whether there is a ground of appeal that will probably succeed.

[31] As already noted in paragraph 8 to 14 of this judgment, enlargement of time is at the discretion of court and is only sparingly exercised to avoid grave injustice. In paragraph 15 of its judgment in *Rasaku v The State*, supra, this Court made it clear that a Petitioner seeking a belated appeal in a criminal case, must *at the lowest*, be able to meet the threshold criteria set out in section 7(2) of the Supreme Court Act, No. 14 of 1998, and it is implicit that the criteria for granting enlargement of time are much more stringent than for the grant of leave in a timely application.

[32] In paragraph 3.8 of the written submissions of the Petitioner lodged in the Registry of this Court dated 27th March 2018, it has been submitted as follows:-

> "The Petitioner, through his Legal Counsel will rely on the Grounds filed and argued before the learned Appellate Court which is reproduced here:-
>
> ***Grounds of appeal against conviction:***
>
> **Ground 1**
>
> *(i) The Learned Trial Judge acted unfairly against the Appellant in his summing up at paragraph 26 line 9 to line 10, when he made an adverse inference after stating that Defence witness Siteri Gade admitted that she was a serving prisoner.*

Ground 2

(ii) The Learned Trial Judge erred in law and in fact when he failed to consider in his judgment that the complainant and the supporting witnesses had been inconsistent and significant material evidence being that the alleged bed sheet was not tendered.

Ground 3

(iii) The Learned Trial Judge erred in fact when he failed to consider in his judgment that the doctor was not called to confirm allegations via a medical certificate on the presence of injuries as alleged by the complainant (PW1) and her aunt (PW3).

Ground 4

(iv) That the learned judge erred in law and in fact in failing to direct himself that the guilty verdicts are unreasonable based on the paucity of evidence led by prosecution at the trial.

Grounds of appeal against sentence:

Ground 5

(v) The Learned Judge erred in law when he failed to discount the appellant's period in remand separately from the mitigating factors."

[33] It is manifest that the Petitioner is seeking to re-argue matters that have been fully argued in the Court of Appeal and the way the said grounds have been formulated, the Petitioner does not complain of any error made by the Court of Appeal. The Petitioner only complains in every one of the said grounds that the learned trial judge had acted unfairly or erred in fact or law in regard to the matters set out in the said grounds.

[34] For the grant of enlargement of time in this case, it is necessary to consider whether the 5 grounds urged by the Petitioner have been adequately dealt with in the impugned judgment so as not to give rise to any grave injustice.

[35] Ground 1 raised by the Petitioner is that the Learned Trial Judge acted unfairly against the Petitioner in his summing up at page 69 paragraph 26 line 9 to line 10 of the Supreme Court Record, when he made an adverse inference after stating that DW1 Siteri Gade admitted that she was a serving prisoner. Siteri Gade is the wife of Dike Manasa who is a friend of the Petitioner living with Siteri in a house in Tamole Street in Newtown, where the Petitioner is alleged to have raped the victim described as "P" on the morning of 22nd September 2011. The examination in chief of Siteri Gade commenced at page 130 of the Supreme Court Record with her statement that she is "currently staying at Women's Prison at Korovou."

[36] In paragraph 26 of his summing up, the learned trial judge was summarising the evidence of the defence witness Siteri and did not make any comment about what inference should be drawn from her evidence. Towards the end of paragraph 26, the learned judge made the following statement regarding Siteri:

> "She admitted, her husband and the accused were close friends. She admitted, she is serving time at Korovou Women's Prison. *What you make of DW1's evidence, is entirely a matter for you.*"(*emphasis added*)

[37] Mr. Thomson Lee appearing for the Petitioner has invited our attention to the decision of the Court of Appeal in *Merumeru v Reginam* [1968] 14 FLR 177 (1st October 1968) where the trial judge had warned the assessors in his summing up that while the testimony of a convict is not necessarily inadmissible or unbelievable, "it is testimony from a source which puts you on your guard." It is his contention that a similar direction should have been made by the trial judge in regard to the testimony of Siteri.

[38] Ms. Prasad, appearing for the Respondent submitted that the learned Judge did not impute anything to the defence witness being a serving prisoner, which had come out from Siteri's examination in chief, and relied on the observation of Hutchinson JA in *Merumeru v Reginam*, at page 179, wherein His Lordship observed that-

"It is quite clear from his own Judgement that he did not believe the two principal defence witnesses Viliame Vakarewakuila and Waisaki Madiqi and it may well be that his summing up conveyed that to the assessors. *But there is nothing wrong in that, provided he left the matter to the assessors to form their own opinions and he did that.*"(emphasis added)

[39] In my considered view, it is important to note that the phraseology of "is entirely a matter for you" has been used by the learned trial judge thrice in his summing up at paragraphs 1, 21 and 26, and was intended to convey that the assessors were free to come to their own conclusion based on their independent opinions, and the matter has been fully argued before the Court of Appeal which had found that there was no non-direction or misdirection. In arriving at this conclusion, the Court of Appeal had pointed out at paragraph [13] of its judgment that at the conclusion of his summing up, the learned trial judge had asked the learned Counsel appearing for the prosecution and the defence whether any redirections were necessary, and they had responded in the negative.

[40] Furthermore, the Court of Appeal has observed at paragraph [17] of its judgment that a plain reading of the sentence complained of makes it abundantly clear that the Learned High Court Judge *has not said* that Defence witness Siteri Gade admitted that she was a *serving prisoner*, and what the Judge had said was that Siteri Gade admitted that she was *serving time* at the Women's Prison at Korovou, and he did not convey any adverse inference about the witness Siteri in his summing up. In paragraph [18] of its judgment, the Court of Appeal had dealt with the submission that the assessors should have been warned in the lines of the warning in *Merumeru v Reginam*, and made the following pertinent observation:

"The Counsel for the Appellant also complained that the Learned Judge should have directed the assessors that they should disregard Siteri Gade's status in evaluating her evidence. What is the status of the witness that the Judge could possibly have requested the assessors to ignore? There was no evidence of her exact status before court vis-à-vis the prison. Had the Judge gone any further, the assessors, being laymen may have got the impression that Siteri was in fact serving a sentence as a convicted prisoner. The Judge had averted that danger by

not addressing the assessors any further other than reminding them of her own evidence but adding that they were free to arrive at any conclusion upon her evidence."

[41] In my opinion, Ground 1 raised by the Petitioner does not satisfy even the threshold criteria set out in section 7(2) of the Supreme Court Act, and necessarily does not give rise to any concern that the Petitioner's conviction gave rise to any grave injustice.

[42] The remaining grounds against conviction raised by the Petitioner, namely that the complainant and the supporting witnesses had been inconsistent (ground 2) and that the learned trial judge erred in law and in fact in failing to direct himself that the guilty verdicts are unreasonable based on purely the paucity of evidence (ground 4) are purely matters of fact and have been very carefully and properly examined by the Court of Appeal in denying the Petitioner relief.

[43] Ground 3 raised by the Petitioner is equally factual, and involved the failure by the prosecution, to produce the medical evidence which was available and indicated by the prosecution would be produced at the trial. However, as the Court of Appeal has observed at paragraph [32] of its judgment, the production of medical evidence was not a *sine qua non* in a case such as this which involved the question of whether the Petitioner had sexual intercourse with the victim "P" without her consent, where corroboration is no longer necessary in view of section 129 of the Criminal Procedure Act No. 43 of 2009. In this context, it is pertinent to quote below paragraphs 33 and 34 of the judgment of the Court of Appeal which has dealt with the question fully and properly:-

> [33] While it is true that medical evidence in a rape case could shed light on either one or both of the said elements, surprisingly, in this case the Appellant had not challenged either of them in the cross-examination of the complainant. There was not even a suggestion to the complainant that the Appellant had not penetrated her vagina or that it happened with her consent. The act of sexual intercourse and consent or lack of it, were matters within the exclusive knowledge of only the complainant and the Appellant. The complainant had testified to both the act of sexual intercourse and lack of consent. The Appellant had not challenged her

evidence in cross-examination. Neither had he testified to the contrary. The Appellant appears to have confronted the complainant only with Siteri Gade's position that the bed sheet had no blood stains only to get an answer from her that Siteri was lying.

[34] In the circumstances, the assessors were entitled to act purely on the evidence of the complainant if they had believed her version. Though there was no medical evidence the injuries on the complainant's body to a great degree had been corroborated by her aunt's evidence whose observations of the complainant's demeanour and injuries also had gone unchallenged in the cross-examination even by way of a suggestion. Further, defence witness Siteri Gade's evidence, by and large, had corroborated the complainant's evidence. Therefore, in my view the medical evidence, if led, would not have changed their opinion. The chances are that medical evidence might have further corroborated the complainant. Therefore, in my view failure to lead medical evidence has not resulted in a miscarriage of justice. I reject the third ground of appeal.

[44] I am therefore firmly of the opinion that Grounds 2, 3 and 4 raised by the Petitioner against his conviction do not satisfy the stringent criteria for granting leave to appeal set out in section 7(2) of the Supreme Court Act or the even more stringent test applicable for the grant of enlargement of time since no grave injustice has been occasioned to the Petitioner by the matters raised in these grounds of appeal.

[45] On the question of the sentence, the Petitioner has raised Ground (5) which simply is that the Petitioner's period of remand was not discounted by the learned trial judge in imposing a sentence of 8 years imprisonment with a non-parole period of 6 years. However, it is abundantly clear that the remand period of 1 year 8 months and 8 days was considered among the mitigating factors on account of which the head sentence was reduced by 4 years in arriving at the sentence imposed on the Petitioner by the High Court which has been affirmed by the Court of Appeal. I see no basis for granting enlargement of time for the Petitioner to seek leave to appeal against the decision of the Court of Appeal on the sentence.

Prejudice to the Respondent

[46] The final matter to be considered is factor (v) highlighted in the *Kamalesh Kumar* case, namely whether if time is enlarged, will the Respondent be unfairly prejudiced. This is a case in which the Petitioner did not set out any grounds for seeking leave in his timely Notice of Appeal or in his Motion for Enlargement of Time filed subsequently. For the first time, his grounds for seeking leave to appeal were set out in his written submissions lodged in the Registry of this Court with notice to the Respondent only on 27th March 2018, approximately 16 days prior to the date of hearing. The question here is whether the Respondent will have been prejudiced by knowing the grounds of appeal it had to meet much later than it would have done if the grounds of appeal had been included in the Notice of Appeal or at least in the Motion for Enlargement of Time. In my opinion, the Respondent had sufficient time to deal with the grounds of appeal even though they were only discovered from the written submission when the Petitioner's written submissions were served on the Respondent. Although it is easy to see that there was no relevant prejudice on this account, the absence of any merit in the grounds of appeal justifies the conclusion that time should not be enlarged.

[47] In this case, the Respondent represents the interests of society that the law and order should prevail and that the personal security, dignity, privacy, bodily integrity and mental wellbeing of all persons including their self-esteem should be respected and honoured. In this case, being the boy friend of "P", the Petitioner may be regarded as having been in a position of trust, which was blatantly violated by the Petitioner. In the circumstances, I am of the view that the Respondent will be unfairly prejudiced by the enlargement of time.

Conclusions

[48] For all the above reasons, I hold that the Petioner's Motion for Enlargement of Time should be refused and the application for leave to appeal dismissed.

Buwaneka Aluwihare, J

[49] I have read the judgment of Marsoof J in draft, and I agree with his reasoning and conclusions.

Brian Keith J.

[50] I have read a draft of the judgment of Marsoof J. I agree with it, and I only add a few words of my own on two topics which emerged in the course of the case.

[51] First, the unanimous opinion of the assessors was that the petitioner was guilty. Following that, the trial judge said in para 5 of his judgment:

> "The assessors' verdict was not perverse. It was open to them to reach such conclusion on the evidence. I accept the assessors' verdict and I find the accused Guilty as Charged and convict him accordingly."

[52] In that passage, the judge appeared to be saying that since it had been open to the assessors to find the petitioner guilty, he would accept their verdict. If that was what he meant, it could be argued that he was saying that he could only come to a different conclusion from that of the assessors if their opinions were perverse. That would, of course, have been an erroneous approach for him to have taken, because the determination of the guilt of a defendant is for the judge. He is not, to use the language of section 237(2) of the Criminal Procedure Decree, "bound to conform to the opinions of the assessors".

[53] Having considered the matter, I have concluded that the judge could not have meant what he might have appeared to be saying. This was a very experienced judge, and he would unquestionably have known that what he might have appeared to be saying would not have been the correct approach. Moreover, before this passage in his judgment, the judge had said that he had reviewed the evidence called in the trial, and that he had directed himself in accordance with his summing-up to the assessors. That observation would have been inconsistent with him thinking that he was obliged to follow their opinions unless their opinions were perverse. It might be said that the judge was a little unwise to use language which laid him open to possible criticism, but that is all.

[54] Secondly, the judge rightly reduced the sentence he would otherwise have passed on the petitioner to reflect the time he had been in custody awaiting trial. But the way the judge did that was to treat it as a mitigating factor. That would now be regarded as an error, though it would not have been thought of as an error in 2013 when the judge sentenced the

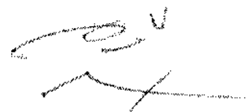
petitioner. That is because in *Domona v The State* [2017] FJSC 15, the Supreme Court endorsed what had been said by the Court of Appeal in *Koroitavalena v The State* [2014] FJCA 185 at [24]:

> "The period spent in remand before trial should be dealt with separately from the mitigating factors when imposing a sentence and cannot be subsumed in the mitigating factors."

That makes sense. Being in custody awaiting trial does not make a defendant's offence any the less serious. It simply means that the time he has spent in custody should count towards his sentence.

Orders of Court:

1. *The Petitioner's Motion for Enlargement of Time is refused.*
2. *The Petitioner's application for Leave to Appeal is dismissed.*
3. *The decision of the Court of Appeal is affirmed.*



Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

Hon. Mr. Justice Buwaneka Aluwihare
Judge of the Supreme Court

Hon. Mr. Justice Brian Keith

Judge of the Supreme Court

Solicitors

The Legal Aid Commission for the Petitioner

The Office of the Director of Public Prosecution for the Respondent