

**IN THE SUPREME COURT OF FIJI**  
**AT SUVA**

**CRIMINAL PETITION NO: CAV 0005 OF 2020**  
**Criminal Appeal No. AAU of 2014**  
**(High Court Criminal Case: HAC 34 of 2013)**

**BETWEEN:**           **ESEROMA VAKACEGU**

***Petitioner***

**AND:**                 **THE STATE**

***Respondent***

**Coram:**               **The Hon. Mr. Justice Anthony Gates**  
**Judge of the Supreme Court**

**The Hon. Mr. Justice Filimone Jitoko**  
**Judge of the Supreme Court**

**The Hon. Mr. Justice Isikeli Maitaitoga**  
**Judge of the Supreme Court**

**Counsel:**           **Petitioner in person**  
**Mr R. Kumar for the Respondent**

**Date of Hearing:**   **9 June 2023**

**Date of Judgment:** **29 June 2023**

**JUDGMENT**

**Gates, J**

[1] I have had the advantage of reading the judgment of Maitaitoga J in draft. I agree with its conclusions and orders.

**Jitoko, J**

- [2] I have had the opportunity of considering the draft judgment by Mataitoga J. I agree with it, and for the reasons he gives would dismiss the appeal.

**Mataitoga, J**

**Background**

**High Court**

- [3] The Petitioner was charged for having abducted a young girl below the age of eighteen years, an offence punishable under Section 285 of the Crimes Act, 2009, in count No (1); for committing rape by penetrating the mouth of the girl, an offence punishable under Section 207 (1) read with (2) (c) in count No (2) ; and, for having carnal knowledge with the girl, an offence punishable under Section 207 (1) read with (2) (a) in count No (3), of the Crimes Act, 2009. The charges, as presented by the Director of Public Prosecutions (DPP) on the information dated 04 April 2013, were as follows:

**"First Count**

**Statement of Offence**

**ABDUCTION** : *Contrary to section 285 of the Crimes Decree 44 of 2009*

**Particulars of Offence**

*ESEROMA VAKACEGU, on the 18<sup>th</sup> day of January 2013 at Suva in the Central Division, unlawfully took 'UT', being under the age of 18 years, out of the possession and against the will of her father.*

**Second Count**

**Statement of Offence**

**RAPE** : *Contrary to section 207(1) and (2) of the Crimes Decree 44 of 2009.*

**Particulars of Offence**

*ESEROMA VAKACEGU, on the 18<sup>th</sup> day of January 2013 at Suva in the Central Division, penetrated the mouth of 'UT' with his penis, without her consent.*

**Third Count**

**Statement of Offence**

**RAPE** : *Contrary to section 207(1) and (2) (a) of the Crimes Decree 44 of 2009.*

**Particulars of Offence**

*ESEROMA VAKACEGU, on the 18<sup>th</sup> day of January 2013 at Suva in the Central Division, had carnal knowledge of 'UT' without her consent."*

- [4] After trial, the petitioner was found guilty of the charges in counts (1) and (3) by the unanimous opinion of the assessors. He was found guilty of the charge in count (2) by a majority opinion. The learned trial judge, having directed himself on the legal principles given in the summing-up and the evidence, agreed with the opinions of the assessors. The appellant was, accordingly convicted on 07 March 2014
- [5] The petitioner was, thereupon, sentenced on 11 March 2014 to a term of two-year imprisonment for count (1); and, to a term of thirteen-year imprisonment each in respect of counts (2) and (3). Applying the totality principle in sentencing, the terms of imprisonment were ordered to take effect concurrently. Having taken into account the provisions of Section 18 (1) of the Sentencing and Penalties Act, 2009, the appellant was ordered to serve a ten-year term of imprisonment before being eligible for parole.

### **Court of Appeal**

- [6] In the Court of Appeal the petitioner (appellant) sought leave to appeal out of time by filing an application in terms of Section 26 (1) of the Court of Appeal Act both against the conviction and the sentence. The application against the sentence was subsequently withdrawn when the petitioner filed an amended notice of appeal on 18 May 2016. The single Justice of Appeal, in his ruling dated 28 October 2016 after a hearing, refused the application for leave to appeal out of time against the conviction.
- [7] The Legal Aid Commission, appearing on behalf of the petitioner in the Court of Appeal, filed a renewal notice for enlargement of time for leave to appeal against the conviction on 16 July 2019, which was supported by written-submissions dated 16 January 2020. Learned counsel for the state, too, filed written-submissions in reply dated 22 January 2020 resisting the application for renewal. Both parties relied on written-submissions and supplemented their arguments at the formal hearing before the full court on 12 February 2020.
- [8] The petitioner's renewal application for leave to appeal out of time was made in terms of Section 35 (3) of the Court of Appeal Act in consequence of the refusal of the application for leave by the single Justice of Appeal in the exercise of jurisdiction of the court under Section 35 (1) (b) of the Court of Appeal Act. The petitioner, as urged in his renewal notice for the enlargement of time to appeal dated 16 July 2019, relied on the following grounds against the sentence. They were:

*“(i) The learned judge erred in law and in fact when he did not properly consider the credibility of the complainant when she lied to her parents when they enquired why she came late although she said that she did not have the courage to tell them what happened;*

*(ii) The learned trial judge erred in law and in fact when he did not consider the opportunities of escape [sic] and raising alarm for assistance available to the complainant when the appellant left to go to the Ministry of Education; and,*

*(iii) The learned judge erred in law and in fact when he did not consider that the complainant had people to report to about the alleged rape soon after the alleged incident but she did not.”*

[9] The grant of enlargement of time to appeal out of time; or, the grant of renewal of the application for enlargement of time once refused by a single Justice of Appeal acting in terms of Section 35 (1) of the Court of Appeal Act, is not automatic. It, instead, involves a process by the full court where the application of the relevant criteria is considered in a stringent manner as laid down by judicial authorities. The criteria have been laid down bearing in mind the inviolable need to conform to the rules of the court; and, the justifiable need to ensure justice to a litigant at default.

[10] The courts power in this regard is discretionary. The discretion is not unfettered. That is a discretion that has to be exercised reasonably, fairly and lawfully by applying *inter alia* the principles enunciated in the judicial precedents on the facts and circumstances of each case. The principle laid down by the Judicial Committee of the Privy Council in the United Kingdom in Ratnam v Cumaraswamy [1964] 3 All ER 933 at 935, is a sound principle to start with. It said:

*“The 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”.*

[11] The exercise of the court’s powers is guided by the guidelines outlined by the Supreme Court of Fiji as it considered the matter on enlargement of time in Kumar v State and Sinu v State [2012] FJSC 17; CAV0001 of 2009; (21 August 2012), where it was held that:

*"Appellate courts examine five factors by way of a principled approach to such applications. Those 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 a substantial delay, nonetheless is there a ground of appeal that will probably succeed?; and, (v) if time is enlarged, will the respondent be unfairly prejudiced.?"*

- [12] The Supreme Court in **Rasaku v State** [2013] FJSC 4: CAV0009; 0013.2013: (24 April 2013; observed that:

*"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 specific period for lodging his application."*

- [13] The petitioner, by way of an affidavit sworn by him dated 18 May 2016 explained the delay. The delay was by about two months from the orders of the conviction and the sentence of the High Court to the filing of his handwritten initial notice of appeal dated 18 June 2014. The petitioner stated that he was not able to get the transcript of the court proceedings, copies of the summing-up and other relevant documents for the purpose of preparing a timely appeal. He further stated that other reasons such as his transfer among the places of his imprisonment, too, contributed to not being able to file a timely appeal.

- [14] While most of the reasons assigned for the failure to file a timely appeal are attributed to common occurrences, the extent of the difficulty in filing a timely appeal needs to be appreciated taking into account the relatively short delay of little over two months occasioned from a person who had been imprisoned.

- [15] In **Fisher v State** [2016] FJCA 57; AAU132.2014 (28 April 2016), the issues of delay; and, how such delays should be addressed in dealing with an application for enlargement of time to appeal by an imprisoned convict, were considered. It was observed in that decision that:

*"[12] The Supreme Court has acknowledged that incarcerated appellants who are unrepresented do face difficulties in the preparation of their appeals. However, those difficulties do not justify setting aside the requirements of the Act and the Rules: **Raitamata v- The State**[2008] FJSC 32, CAV 2 of 2007; 25 February 2008 and **Sheik Mohammed -v- The State** [2014] FJSC 2, CAV 02/2013; 27 February 2014. The*

explanation for the delay will not by itself ordinarily lead to the conclusion that an enlargement of would be granted. It is usually necessary to consider whether the appeal has sufficient merit to excuse the Appellant's non-compliance with the Rules. It is necessary for the Appellant to show that his **appeal grounds** have sufficient merit to (a) excuse the delay and (b) be considered by the Court of Appeal."

(underline for emphasis)

[16] The courts have, therefore, consistently taken the view that, even though the delay could be excused, that by itself would not allow the special leave application to be granted. In this case, the Court of Appeal decided to review all the grounds of appeal urged in support of the leave application for enlargement of time to file appeal first before deciding on the leave application.

[17] The Court of Appeal noted that:

*"[21] All three grounds, ..... are intrinsically connected to the questions of fact, which were primarily within the domain of the assessors. In this case, they revolved around the credibility of the complainant, who became a victim of sexual offences as alleged by the prosecution; and, the probability of the complainant's story, in order to consider whether her testimony was credible to find the appellant guilty of the charges."*

[18] The first ground urged by the petitioner in the Court of Appeal is:

*[33] The complaint of the appellant is that, the complainant on her late The second and third had happened on her that afternoon. It was contended on behalf of the appellant that, the act of lying on the part of the complainant, affected the credibility so as to displace her testimony in court.*

*[34] Learned counsel for the appellant further submitted that the finding of a fresh laceration four days after the incident by the medical doctor should have been considered along with the act of lying by the complainant and should have been dealt with in the judgment of the learned judge.*

[19] The second and third grounds urged by the petitioner in the Court of Appeal, that if there was an incident, the complainant had ample opportunity to raise alarm and seek assistance. This did not take place, so it rendered the testimony of the complainant less acceptable and less weight should be given to it.

[20] Given the precise nature of the grounds urged, it was necessary for the Court of Appeal refer to the contents of the summing-up. The petitioner's complaint alleges that the trial

judge did not consider the matters surrounding the complainant's credibility, and the probability of her story. The Court of Appeal referred to the following directions to the assessors on the issues raised:

[38] *The learned judge, in his summing-up giving general directions to the assessors said the following:*

*“(i) ...All matters of facts are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject (**paragraph 01**);*

*(ii) You have to decide what facts are proved and what inferences drawn from those facts (**paragraph 02**);*

*(iii) ... [Burden of Proof] means you must be satisfied so that you are sure of the accused's guilt before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty (**paragraph 06**);* *and,*

*(iv) Your duty is to find the facts based on the evidence, apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotions (**paragraph 11**)*

[39] *As regards the evidence, the learned trial judge referred to the following:*

*(i) ... Thereafter, Xavier Tikomailomai (aka **Eseroma Vakacegu**) went out to collect his marks sheet from Marella House. But, he came back very quickly. After his arrival, the victim wanted to go home but was not allowed (**paragraph 20**);*

*(ii) ... At the bus stand, though she met two of his friends, she did not tell anybody about the incident. She then got into the Cunningham bus and reach home after six o'clock. Though her parents inquired why she was late, she lied to them as she did not had the courage to tell them what had happened. On Sunday, after she came from church, she told her father about the incident. She did not tell her mother as she is a sickly person. ... (**Paragraph 22**);*

*(iii) Sakaraia gave evidence on behalf of the accused. According to him on 18/01/2013, at about 4.00pm when he was going to Totogo Police Station he met the accused with a girl. The girl seemed to be normal (**paragraph 31**);*

*(iv) She clearly narrated the ordeal she encountered on 18/01/2013. She admitted that she went to Sunset Motel on the request of the*

*accused. But she never consented for sex. She could not escape from the accused when he went to Ministry of Education as he had locked the door. She doesn't know where Totogo Police Station is situated. Also does not know where Wesley Church and the bank are situated. She only informed the incident to her father after she returned from church on Sunday. The doctor had noted fresh hymeneal laceration at 6 o'clock position in her vagina. In her history to the doctor, she had narrated the same. As assessors and judges of facts you have to consider her evidence with great care (Paragraph 32).*

[40] *Therefore, it would appear that the learned judge had not only referred to the matters of credibility in assessing the evidence of the complainant; but, also had summarized the salient points of the complainant's evidence and cautioned the assessors that her evidence had to be considered with great care in view of the attendant factors that could shake her credibility."*

[21] The Court of Appeal fully reviewed the grounds, the relevant parts of the evidence, including the trial judge's ruling, of the petitioner's submission. It concluded that none of the grounds had merit. The renewal application for enlargement of time was dismissed.

### **Supreme Court**

[22] This Court's power may be engaged only if any of the threshold criteria set out in Section 7(2) of the Supreme Court Act is satisfied. These are:

- (2) In relation to a criminal matter, the Supreme Court, **must not grant leave** to appeal unless:
  - (i) a question of **general legal importance** is involved;
  - (ii) a **substantial question of principle** affecting the administration of criminal justice is involved
  - (iii) **substantial and grave injustice** may otherwise occur

[23] It should be pointed out that none of the grounds submitted to this Court in support of petitioner's leave to appeal application, argued how it satisfied the requirements set out above. The grounds submitted in support of the special leave application is the same as those the petitioner submitted to the court below.



- [24] In the Court's assessment the grounds submitted by the petitioner does not raise a question of general legal importance; on the contrary they are run-of-the mill arguments that are often urged by petitioners in those situations. This first limb is not satisfied.
- [25] Before discussing what is required under *the second limb*, which deals with departures from normal procedures and trial processes in substantive way, reference to guideline decision is useful. This Court in **Livia Matalulu & Anor v DPP** [2003] FJSC 2; [2003] 4 LRC 712 their Lordships expressed the role of the Supreme Court of Fiji in special leave to appeal matters in the following words:

*"The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice"*

*Thus, it is clear that the Supreme Court, in exercising its powers vested under section 7 (2) of the, is not required to act as a second court of criminal appeal, but will only consider as to whether the question of law raised is one of general legal importance or a substantial question of principle affecting the administration of criminal justice is involved or whether substantial and grave injustice may occur in the event leave is not granted.*

[33] In the case of **So Yiu Fung v Hong Kong Special Administrative Region** [1999] 2HKCFAR 539; [2000] 1 HKLRD 179 the Court of Final Appeal of the Hong Kong Special Administrative Region considered the residual safeguard provided under the limb, "substantial and grave injustice" and held as follows:

*... Reviewing convictions to see if they are safe and satisfactory is entrusted to the intermediate appellate court [Court of Appeal in Fiji]. If the matter proceeds further to this Court, our task does not involve repeating that exercise. We perform a different one. In order for an appeal brought on the 'substantial and grave injustice' limb of S.32 (2) of the Hong Kong Court of Final Appeal Ordinance to succeed, it must be shown that there has been to the appellant's disadvantage a departure from accepted norms which departure is so serious as to constitute a substantial and grave injustice."*

[26] In outlining the detail references covering the manner and approach by the trial court and the Court of Appeal quoted in paragraph 14 to 18 above, it was to show what relevant principles and procedures were followed. Having done the Court of decided there was no basis for the complaint. There are no substantial principle affecting the administration of justice being affected in a manner requiring the intervention of the Supreme Court.

[27] Turning to consider *limb three*, what is required by the petitioner to show that there was such departure from accepted norms and that such departure is so serious as to constitute a substantial and grave injustice. But to rely on this basis, the petitioner must identify the specific way in which it is submitted the court below has departed from established norms and why such departure is so seriously wrong that justice demands a hearing before the Supreme Court. It will not, as was in this case, be sufficient to merely set out the arguments or slight variations of the same that was canvassed in the court below.

[28] In **Kosar Mahmood v HKSAR** (2012) FAMC No. 31 of 2012, The Hong Kong Court of Criminal Appeal stated:

*“6 ..in all future applications on substantial and grave injustice ground, the application for leave to appeal must identify the specific way in which it is submitted that the court below has departed from established legal norms; and why such departure is seriously wrong that justice demands a hearing before the Court of Final Appeal notwithstanding the absence of any real controversy on any point of law of great and general importance. It will simply not be sufficient merely to set out the same arguments that were canvassed in the court below.*

*7. If the application for leave does not disclose such grounds or does not provide a reasonably arguable basis for such submissions, it may expect to be dismissed summarily...’*

[29] The third limb of Section 7(2) of the Supreme Court Act on the basis of the above authorities, is not satisfied.

[30] In the light of the above assessments, the Court dismiss the Special Leave Application to appeal for enlargement of time against conviction.

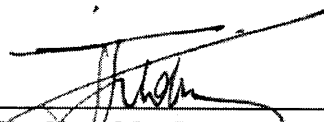
**ORDERS:**

1. Application for Special Leave for enlargement of time to appeal out of time against conviction is dismissed;
2. The Conviction of the petitioner in the High Court stands.



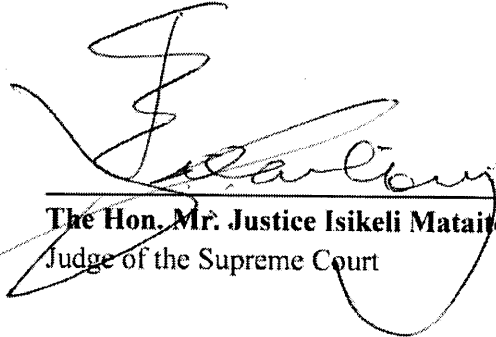
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**The Hon. Mr. Justice Anthony Gates**  
Judge of the Supreme Court



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