IN THE COURT OF APPEAL, FIJI
On appeal from the High Court of Fiji

CRIMINAL APPEAL AAU 114 OF 2014
(High Court HAC 152 of 2010)

BETWEEN : **NAVEEN SINGH**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr J Savou for the Appellant**
Mr S Babitu with Mr A Singh for the Respondent

Date of Hearing : **8 July 2016**

Date of Ruling : **28 October 2016**

RULING

[1] This is an application for an enlargement of time to enable the Appellant to file an application for leave to appeal against conviction and sentence. The application is made under section 26(1) of the Court of Appeal Act Cap 12 (the Act) and comes before a judge of the Court of Appeal pursuant to section 35(1) of the Act.

[2] The Appellant appeared before the High Court at Lautoka charged with 3 counts of rape and 3 counts of indecent assault. The complainant was seven years old at the time of the offences that were alleged to have occurred in October and early November 2010.

[3] Following a trial lasting 4 days the three assessors returned unanimous opinions of guilty on all charges. The learned trial Judge agreed with the opinions of the assessors and formally convicted the Appellant on all counts. On 10 September 2013 the Appellant was sentenced to 13 years imprisonment on each of the rape offences and 3 years imprisonment on each of the indecent assault offences. All sentences were ordered to be served concurrently with a non-parole term of 11 years imprisonment.

[4] In his sentencing decision the learned trial Judge stated:

> *"The following facts were proven in evidence during the trial. The 7 year old victim was living in the front house and used to come to your house to watch movies. You have taken her to the wash room and the store room during the period 1 October 2010 to 1 November 2010 on several occasions and had raped her, had sexually abused her. From the evidence it is clear that you breached the relationship between neighbours and had forced the child to have sexual acts with you."*

[5] The principles to be considered when determining an application for an enlargement of time are well known and were conveniently summarized by the Supreme Court in **Sinu and Kumar –v- The State** ([2012] FJSC 17, CAV 1 of 2009; 21 August 2012). They are (a) the length of the delay, (b) the reason for the delay, (c) whether there is a ground of merit justifying the appellate court's consideration or, where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (d) if time is enlarged, will the Respondent be unfairly prejudiced? The Appellant carries the onus of establishing that in all the circumstances it would be just to grant the application.

[6] The Appellant's typed notice of appeal was filed on 22 September 2014 although it was dated 18 September 2014. In any event it was about 11 months out of time. The

application for an enlargement of time was formalized by the Legal Aid Commission by way of an amended notice filed on 1 May 2015. The application was supported by an affidavit sworn on 29 April 2015 by Naveen Singh.

[7] The reasons for the delay are stated in the supporting affidavit. The Appellant deposes to the usual problems that are faced by any incarcerated Appellant acting in person. However by themselves they do not justify failing to at least file a notice of appeal within the time prescribed by the Rules.

[8] As the delay must be described as substantial and the reasons for the delay unconvincing, the issue becomes whether there is a ground of appeal that will probably succeed. In his supporting affidavit the Appellant has annexed an amended notice of appeal setting out the grounds upon which he relies for his appeal against conviction and sentence in the event that an enlargement of time is granted. Those grounds are:

> *"(a) The learned trial Judge erred in law and in fact when he failed to direct the assessors on how to approach the unsworn evidence of a child witness and the weight to be attached to such evidence.*
>
> *(b) The learned trial Judge erred in law and in fact by allowing a dock identification where there had not been any police identification parade and failed to direct the assessors correctly on the dangers of identification evidence.*
>
> *(c) The learned trial Judge erred in law and in fact when he failed to direct and guide the assessors on how to approach the evidence contained on the caution interview and the weight to be attached to the disputed confession.*
>
> *(d) The learned trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence resulting in much more severe punishment."*

[9] In relation to ground 1 it must be acknowledged that the decision of this Court in **Rahul Kumar –v- The State** (AAU 49 of 2012; 4 March 2015) is the correct position in relation to evidence by children. It is not necessary for a trial Judge to give any warning

in relation to the uncorroborated evidence of a child complainant whether that evidence was sworn or unsworn. In this case there was no requirement for the trial Judge to give any further directions to either the assessors or to himself other than the directions in paragraph 32 – 34 of the summing up which were both correct and appropriate. This ground is not likely to succeed.

[10] In so far as the second ground is concerned I am satisfied that the dock identification was not improper. The issue in the trial was not really a matter of identification. The issue was veracity. The complainant and her mother knew and were known by the Appellant. The defence was that he did not know the complainant. Once the assessors accepted that the incidents did take place then there was sufficient evidence to conclude that it was the Appellant who performed the actions. If the complainant identified the Appellant when he was in the dock she was not only identifying him as her neighbor but also as the man with whom she watched movies and also as the man who had performed sexual acts on the complainant. This ground is not likely to succeed.

[11] In relation to the third ground the learned trial Judge has adequately directed the assessors in paragraph 44 as to what are the relevant considerations concerning the caution interview. This ground is not likely to succeed.

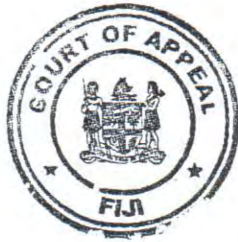
[12] In relation to the sentence appeal, I do consider the non-parole term of 11 years to be too close to the head sentence of 13 years as a result of any error by the Judge. These were extremely serious offences which required a lengthy non-parole term in order to re-inforce the principle of deterrence.

[13] I should add that this was an application for leave to appeal sentence under section 21(1) (c) of the Act. Leave was required. This ground is not likely to proceed.

[14] In conclusion none of the Appellant's grounds of appeal meet the standard necessary for the court to grant an enlargement of time which is therefore dismissed.

Orders:

1. *Application for an enlargement of time to file an application for leave to appeal against conviction and sentence is dismissed.*
2. *Leave to appeal is refused.*



W. Calanchini

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Hon. Mr. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL