IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL AAU 132 of 2014
(High Court HAC 74 OF 2013)

BETWEEN : **HENRY FISHER**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr J Savou for the Appellant**
Ms S Puamau for the Respondent

Date of Hearing : **1 April 2016**

Date of Ruling : **28 April 2016**

RULING

[1] This is an application for an enlargement of time for leave to appeal against conviction and sentence. The application was filed by the Appellant in person. The hand written application was dated 6 October 2014. The application was typed by the

Corrections Centre at Suva but not filed until 6 November 2014, The filing of the application by the Corrections Centre is a matter that is beyond the control of the Appellant. The date of the application for leave to appeal will in this case be the date the Appellant handed his application to the Corrections Centre Office at Suva, being 6 October 2014.

[2] The application was formalised on behalf of the Appellant by the Legal Aid Commission by the filing on 4 March 2016 of a summons together with a supporting affidavit sworn on 20 January 2016 by the Appellant.

[3] The application for an enlargement of time is made pursuant to section 26(1) of the Court of Appeal Act Cap 12(the Act). The application comes before me pursuant to section 35(1) of the Act which provides that the powers of the Court of Appeal to enlarge time for appealing may be exercised by a judge of the Court.

[4] The Appellant appeared before the High Court charged with two counts of rape. The first count concerned digital rape while the second count related to penile rape. The offences were committed on two separate occasions on Yadua Island, Bua. The Appellant was the complainant's uncle and guardian. The complainant was 10 years old at the time of the offences and was attending a local primary school. The complainant's parents had entrusted their daughter to the Appellant for care and protection. At the time the Appellant resided with his wife and five children at Vukasa settlement in a house provided by his employer.

[5] The Appellant pleaded not guilty. Following the trial, the assessors returned unanimous opinions of guilty on both counts. The learned trial judge agreed with the opinions of the assessors and convicted the Appellant on both counts. On 3 July 2014 the Appellant was sentenced to terms of imprisonment of 11 years on each count of rape with non-parole terms of 8 years to be served concurrently.

[6] It is against those convictions and sentences that the Appellant now seeks an enlargement of time to apply for leave to appeal. The Supreme Court in **Rasuku and Another –v- The State** (CAV 9 and 13 of 2012; 24 April 2013) considered the principles involved and the criteria to be considered when an appellate court is called

upon to determine such an application. At page 4 of the unreported decision the Supreme Court 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 a specific period for lodging his application."*

[7] Then on page 5 the Court noted that:

> *"Enlargement of time has generally been permitted by courts only exceptionally, and only in an endeavour to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court."*

[8] In the course of its judgment the Supreme Court affirmed that the factors that should be considered in the exercise of the discretion included those that had been summarized in its earlier decision in **Sinu and Kumar –v- The State** [2012] FJSC 17; CAV 1 of 2009; 21 August 2012. They are (1) the length of the delay, (2) the reason for the delay, (3) 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 (4) if time is enlarged, will the Respondent be unfairly prejudiced?

[9] In considering the length of the delay it must be recalled that under section 26(1) of the Act the Appellant was required to give notice of his application for leave to appeal against conviction within 30 days of the date of conviction, or, on an application for leave to appeal against sentence that had been imposed on a different date, within 30 days of the date of that decision. The wording of section 26(1) indicates that the 30 days period starts from the date of conviction in respect of an appeal against conviction and 30 days from the date of the sentencing decision in respect of an appeal against sentence. Under those circumstances two notices are required to be filed, each within its time limit of 30 days. However in recent years the practice has evolved in the Court for the period to run from the date of the sentencing decision in respect of both conviction and sentence appeals. This approach has no doubt been adopted on account of most appellants filing in person their appeal papers as

incarcerated appellants without access to any legal advice within the 30 days following sentence even when appealing against conviction and/or sentence.

[10] In the present case the Appellant was convicted on 2 July and sentenced on 4 July 2014. Under section 26(1) of the Act the Appellant was required to file his appeal papers within 30 days being no later than 3 August 2014. On the basis that his application was filed on 6 October 2014, the appeal was about 8 weeks out of time.

[11] The reasons for the delay are explained by the Appellant in his supporting affidavit. In summary the Appellant deposes that he lacks formal education, misplaced his documents and obtained assistance for his appeal from another prisoner only after he was transferred to the Suva prison.

[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**, CAV 2 of 2007; 25 February 2008 and **Sheik Mohammed –v- The State**, CAV 2 of 2013; 27 February 2014. The explanation for the delay will not by itself ordinarily lead to the conclusion that an enlargement of time should 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.

[13] In his notice for leave to appeal the Appellant relied upon six grounds of appeal against conviction and one ground of appeal against sentence. In written submissions filed on 15 March 2016 on behalf of the Appellant, the Legal Aid Commission acknowledged that grounds 4, 5 and 6 were not arguable. The Appellant's remaining three grounds of appeal against conviction are:

> "1. *That the state failed to prove beyond reasonable doubt the salient element of the charge in issue where his Lordship erred in law to make a conviction regardless of the medical report which tainted inconsistent to the vital elements in question, thus cause the trial miscarry.*

> 2. *That the learned trial Judge erred in law in fact in his conviction when he allowed the inconsistent statement of the complainant and base his findings on emotional feelings, resulted a grave miscarriage of Justice.*
>
> 3. *The learned trial judge erred in law in fact when he failed to caution the assessors on the belatedness of the case and the reason it was given and to take great care in approaching the evidence, thereby causing a grave miscarriage of justice."*

[14] The Appellant's ground of appeal against sentence is:

> *"1. That the Sentence was mainly excessive and harsh in principle."*

[15] Ground 1 relates to the medical report and more specifically the directions given by the learned trial Judge in relation to that report. The victim was examined two months after the second alleged incident. The evidence in the medical report was that there was an undated tear in the hymen that could be consistent with penetrative sexual intercourse. The learned judge expressly directed the assessors in paragraph 29 of his summing up that:

> *"My direction to you is that the medical evidence does not implicate the accused _ _ _. What weight you give to this medical finding is entirely a matter for you."*

[16] It should be noted that not only is the learned Judge directing the assessors but he is at the same time also directing himself on the same matter since it is the weight that he attaches to the medical report that is relevant to the appeal.

[17] In paragraph 11 of his judgment the learned Judge indicated the probative value of the medical report when he stated that:

> *"I accept the medical evidence as confirming the complainant's version that penetration took place sometime before June 2011."*

[18] In that statement the learned Judge has done no more than indicate that the medical report is consistent with the complainant's claim that her vagina had been penetrated

some time before June 2011. There is no suggestion that the learned Judge relied on the medical report alone to conclude that it was the Appellant who was responsible for the offending act. There was direct evidence given by the complainant at the trial upon which the learned Judge was able to rely to conclude that the Appellant was guilty. I have concluded that there is insufficient merit in this ground to justify granting an enlargement of time.

[19] The second ground relates to the inconsistencies in the evidence given by the complainant. It is accepted by both parties that the learned Judge identified and discussed the inconsistencies during the course of his summing up. The Judge quite properly reminded the assessors and himself that it was a matter for them in the first place to determine for themselves the weight to be attached to the complainant's testimony in court as a result of her prior out of court statements. In his judgment the learned Judge explained in considerable detail the basis upon which he accepted the evidence given at the trial by the complainant. In considering the credibility of the complainant and the reliability of her evidence the learned Judge was entitled to rely upon his own assessment of the complainant as a witness. In doing so he was entitled to rely on his own observations as to her demeanour, on her age and on his own assessment of her credibility. There is no merit in this ground.

[20] The third ground relates to the complaint having been made two months after the alleged second incident. The learned Judge considered at length in his summing up the explanation given by the complainant. It was a matter first for the assessors and then for the learned Judge to attach to the explanation such weight as was considered appropriate. In my view there was nothing further that could reasonably have been added by the learned Judge. This ground fails.

[21] In an application for leave to appeal against sentence the test is whether the Appellant can demonstrate an arguable error in the exercise of the sentencing discretion by the learned Judge. In an application for an enlargement of time involving a two month delay the test is a little more onerous. Be that as it may the Appellant has not demonstrated an arguable error in the exercise of the sentencing discretion that would result in any variation in the sentence that was in every other respect within the range for two offences involving the rape of the same child on two separate occasions.

[22] For all of the above reasons the application for an enlargement of time is dismissed.

Order:

Application for enlargement of time to file an application for leave to appeal against conviction and sentence is refused.

Hon Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL