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

CRIMINAL APPEAL AAU 9 OF 2016
(High Court HAC 105 of 2014)

BETWEEN : **NAIBUKA RAVANUA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

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

Date of Hearing : **9 August 2018**

Date of Ruling : **23 October 2018**

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on one count of rape and on one count of sexual assault. On 3 July 2015 the appellant was sentenced to 11 years imprisonment on the count of rape and to 4 years imprisonment on the count of sexual assault. The sentences were ordered to be served concurrently with a non-parole

term of 9 years. This is his application for an enlargement of time for leave to appeal against conviction and sentence. The application is made under section 26(1) of the Court of Appeal Act 1949 (the Act). Section 35 of the Act gives power to a single judge of the Court of Appeal to enlarge time.

[2] The factors to be considered for an enlargement of time are (a) the length of the delay, (b) the reason for the failure to file within time, (c) whether there is a ground of merit justifying the appellate court's consideration and 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: **Kumar and Sinu -v- The State** [2012] FJSC 17; CAV 1 of 2009, 21 August 2012.

[3] The notice of appeal filed by the appellant was dated 23 December 2015 and as a result was about 4½ months out of time. The appellant has not given any compelling explanation for this delay. Consequently the question at this stage is whether any of the grounds of appeal are likely to succeed. The grounds of appeal against conviction and sentence are as follows:

> *"1. That the conviction was unsafe and unsatisfactory having regard to the totality of the evidence at trial, in particular to the following:*
>
> *(a) found that there was penetration but the State failed to prove beyond reasonable doubt the lack of consent; and*
> *(b) the failure to consider that the complainant was a sexually active person thereby the medical evidence was inconclusive and unreliable; and*
> *(c) the recent complaint made by the complainant did not implicate the appellant for rape.*
>
> *2. That the learned trial Judge erred in principle and fact by lacking (sic) to provide a fair and balanced summing up when directing the assessors, in particular to the following:*
>
> *(a) failure to warn the assessors on the incredible and inconclusive evidence regarding the medical report; and*
> *(b) failure to direct the assessors on the appellant's intention to offer a "tabua" as a sign of seeking forgiveness.*

3. *The learned trial Judge erred in principle when sentencing the appellant in particular to the following:*

(a) *Using the same features (double counting) to enhance the sentence, and*
(b) *Error in calculating the sentence."*

[4] In ground 1 the appellant contends that the conviction is unsafe and unsatisfactory on the basis of insufficient evidence to establish lack of consent beyond reasonable doubt, the previous sexual activity of the complainant and an inconclusive recent complaint. However unsatisfactory and unsafe are not the basis upon which this Court may allow or appeal under section 23(1) of the Act. Counsel for the appellant did not pursue ground 1 on the basis that the guilty verdict of the judge could not be supported by the evidence or was unreasonable. The complainant's evidence was accepted by the judge and was sufficient to establish lack of consent beyond reasonable doubt. Even if the medical evidence was inconclusive, the complainant's evidence was sufficient to establish the elements beyond reasonable doubt. Recent complainant evidence is not to be regarded as proof of guilt or otherwise. It goes no further than to the consistency of the evidence given by the complainant. This ground is not likely to succeed.

[5] In ground 2 the appellant contends that the trial judge did not give a fair and balanced summing up on the inconclusive nature of the medical evidence and the significance of the appellant's intention to offer a "tabua" as a sign of seeking forgiveness. The medical evidence is briefly summarized at paragraph 36 of the summing up and commented at paragraph 46 that the evidence was inconclusive as to the allegation made by the complainant. The trial judge left the issue to the assessors and in his judgment has relied on the complainant's evidence.

[6] There is no obligation on the part of the trial judge to give directions on the presentation of a Tabua as that evidence is irrelevant to the issue of guilt, while it may be relevant to mitigation. Apart from summarizing the evidence concerning the presentation of a Tabua, there was nothing further for the trial judge to comment on. There did not appear

to be any evidence adduced as to the customary or traditional significance of such an occasion. This ground is unlikely to succeed.

[7] For all of the above reasons the application for an enlargement of time to appeal against conviction is refused.

[8] So far as the application for an enlargement of time to appeal sentence is concerned, there is some merit in the argument concerning the matters that were considered to be aggravating factors. There does appear to be some repetition stated in different ways concerning breach of trust. More importantly it is not an aggravating factor to insist on a right to a trial thereby requiring the complainant to give evidence at such a trial.

[9] There are sufficient grounds for allowing an enlargement of time to appeal sentence.

Orders:

1. *Application for enlargement of time to appeal against conviction is refused.*
2. *Application for enlargement of time to appeal against sentence is granted.*
3. *The appellant is to file the appeal record for certification within 28 days from the date of this Ruling.*

W. Calanchini

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