

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 074 of 2023

BETWEEN : **SITIVENI GUSUIVALU** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Mataitoga, RJA**

Counsel : **Manulevu, L for the Appellant**

: **Latu, L for the Respondent**

Date of Hearing : **2 August 2024**

Date of Ruling : **30 September 2024**

RULING

1. The appellant [Sitiveni Gusuivalu] was charged, found guilty and convicted in the High Court at Suva, on **2 August 2022** of the following:
 - (i) One count of Indecent Assault, contrary to section 212 of the Crimes Act 2009; and
 - (ii) One count of Rape, contrary to section 207 of the Crimes Act 2009.

2. On **30 August 2022**, the appellant was sentenced to 10 years 9 months imprisonment, with a non-parole of 4 years imprisonment.
3. The appellant was represented by counsel at his trial.
4. On the 8 August 2023 by letter from Prison, the appellant submitted his Notice of Leave to appeal out of time for Suva Criminal Case No: HAC 273 of 2020. This delay is 11 months 28 days late against conviction.

Amended Notice of Motion for Enlargement of Time and Leave to appeal against Conviction

5. Under section 35 (1) (b) of the Court of Appeal Act, a single judge of the Court may extend the time within which notice of appeal or of an application for leave to appeal may be given.
6. Depending on circumstances of the appellant, the court as a matter of practice, may excuse delays of up to 3 months: **Seresere v State [2008] FJCA 71 (AAU 0092 of 2008S)**

Governing Principles

7. The Supreme Court in **Rasaku v State [2013] FJSC 4; (CAV 0013 of 2009)** stated at paragraphs 18 and 19 guideline statement:

'[18] 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. As the Judicial Committee of the Privy Council emphasised in Ratnaumarasamy [1964][1964] 3 All ER 933 at 935 at 935:

The rules of court must prima facie be obeyed, and in order to iffy 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.

Similar sentiments were expressed in Revici v Prentice Hall Incorporated and Others [1969] All ER 772 by Edmund Davis LJ at page 774 –

....the rules are there to be observed; and if there is non-compliance (other than of a minimal kind), that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted.

[19] 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. 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.'

8. The Supreme Court in **Kumar v State, Sinu v State** [212] FJSC 17 (CAV 001 of 2009) set out the factors appellate courts must consider when assessing an application for enlargement of time, as:

- '(i) the reason for the failure to file on time.
- (iii) The length of the delay
- (iv) Whether there is a ground that merit justifying the appellate court's consideration
- (v) Whether the delay is substantial; nonetheless is there a ground of appeal that will probably succeed
- (vi) If time is enlarged, will it unfairly prejudice the respondent.

9. The appellant was assisted by the counsel from LAC in preparing

10. A review of the submission of the appellant against the factors identified in **Kumar v State, Sinu v State** (supra) are as follows.

Reason for failure to file application on Time

11. The appellant submits that he was relying on his counsel from Legal Aid Commission [LAC] to submit the appeal on time. Counsel from LAC was asked by the Court to assist the appellant prepare and submit grounds of appeal and submissions in support. The appellant's affidavit dated 10 July 2024 filed in support of his grounds of appeal stated at paragraphs 7-9:

'7. That after being sentenced by the High Court I was advised by Mr. Kevin Skiba of LAC that he will file both conviction appeal and bail pending appeal. I was waiting for him to visit me in Prison. He did not come.

8. I was waiting for a date from FCA. I sought assistance from the Corrections (Chief Operations Officer) through a letter to follow up on the legal aid process and my appeal. I was able to get through to the office of the Legal Aid Commission with a phone call on 19 July 2023.

9. It was through this phone call that I was advised that Mr. Skiba has resigned from LAC and that there was no appeal file registered and more importantly no appeal grounds were filed. That was the failure on Mr. Skiba that led to not file grounds or application within time leading to the delay.'

12. It should be made clear that it is the appellant, who is dissatisfied with his conviction and sentence after a trial in the High Court, and wish to appeal to the court of appeal. He must take steps to ensure that his application for leave to appeal is filed within the dates advised by the Court at the end of the judgement and sentence ruling. If as this case, a counsel is engaged, a diligent appellant will take reasonable steps to check at the end of the 30 days that his grounds of appeal have been lodged with the Court Registry. There many other appellants who are serving prisoners who are able to file their leave to appeal application on time, even where there no counsel assisting them.

Length of the Delay

13. This case was late by 11 months 24 days, a substantial delay indeed. In **Nabainivalu v State** [2015] FJSC 22; CAV027.2014 (22 October 2015), this Court held that a delay of 141 days after the pronouncement of the Ruling that was sought to be impugned in that case amounted to substantive delay, and would not justify an enlargement of time in the absence of a question which justifies serious consideration.

14. This Court will be extremely reluctant to grant enlargement of time except in a case involving some blatant miscarriage of justice, that is evident from the trial of the case giving rise to the impugned judgement or sentence. Nothing has been submitted by the appellant to suggest that if enlargement of time is not granted there would be substantial miscarriage of justice.

Any ground that merit appellate court consideration

15. There were two grounds of appeal submitted by the appellant and they were:
- (i) Her Ladyship has not considered the evidence in totality, particularly the defence case and the lack of weight given and that there was some doubt as to whether the applicant committed the offence.

- (ii) The issue of inconsistencies were not properly addressed by her Ladyship during the trial.

16. Before considering the ground of appeal submitted, the Court of Appeal in **Nasila v State** [2019] FJCA 84 (AAU 0004 of 2011) have set out the test for evaluating this factor when considering enlargement of time submission, as follows:

[22] The threshold that an appellant has to reach under this heading is higher than that of leave to appeal. The Court of Appeal in recent times has raised the bar even in timely leave to appeal applications by applying the test of 'reasonable prospect of success' to identify whether an arguable ground of appeal exists (see Caucau v State AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and State v Vakarau AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and Sione Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015: 06 June 2019.

[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see R v Miller [2002] QCA 56 (1 March 2002) on any of the grounds of appeal. If not, an appeal with a very substantial delay such as this does not deserve to reach the stage of full court hearing.

[24] The test of 'real prospect of success' would help achieve the criteria for enlargement of time as set out by the Supreme Court in Rasaku as follows

'[19] 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.'

[25] Otherwise, belated and unmeritorious appeals would consume the limited resources of the appellate court at the expense of timely and meritorious appeals which have successfully passed the threshold for leave to appeal and in such cases some of the appellants may be forced to serve the full sentence before their appeals finally reach the full court, as the roll of the court may already be clogged with underserving cases.

17. As regards ground (i) above, I refer to paragraphs 14 and 15, from the Judgement, which set out the basis of the prosecution case in these terms:

'14. The matter came to light after her parents discovered text messages from one Lepani on her mobile phone. Her father was angry. He asked her why Lepani was messaging her and whether he had done something to her. She said no and when her father kept asking her, she said that it was the accused who had done the things to her. She said that she had been hiding what the accuse had done to her and when her father questioned her, she thought it was time to reveal it. She did not tell anyone as her parents were strict and she was scared they would hit her.

15. The complainant's father testified to speaking to the complainant about the text messages from Lepani. The messages were sexual in nature so he asked the complainant about Lepani and whether she had touched her physically. It was then that she said it was Sitiveni who touched her private part..."

18. In the Court's analysis, the following appears at:

'28 The prosecution case relies on the credibility of the complainant. If her account is true, the accused will be found guilty of the charges against him.

29. If, on the other hand, the accused person's version is or maybe true, he must be found not guilty.

30. The rejection of his defence does not automatically lead to a conviction. The Prosecution must prove the charges in counts 1 and 3 beyond a reasonable doubt.

.....

30 I believe her evidence. I found her to be truthful witness. There were some inconsistencies in respect of the text message on her phone but this is peripheral matter affect her which did not affect her evidence and the allegations before the court."

19. On the above passages from the High Court Judgement, the issue of Lepani's text message is a live issue that should have been probed further. Without dealing with it in a more definitive way in the judgement, a reasonable doubt is created as to who the offender is. Is it Lepani or the appellant. The evidence of the text message on the complainant's mobile phone came from her father, a prosecution witness. This issue cannot be waived aside on a claim that the court found the complainant as truthful. The evidence of the Lepani text message was not introduced by the complainant but by her father.
20. The state in its submission on the above point responded accepting the classification by the trial judge that the 'Lepani text message' issue relates to an inconsistency in evidence. The evidence of the text message stand alone, it was not inconsistent to the complainant's evidence; it was the father of the complainant who found the text

message from Lepani, in the complainant mobile phone. He wanted to know if Lepani was the person that committed the offence. There was no inconsistency on that point.

21. At paragraph 14 of the written submission of the appellant, filed in court on 29 July 2024 he states:

'14. The appellant denies the allegations against him. As per judgement, he said that he saw messages on the complainant's phone from a Lepani. The messages were the same as the allegations against him. He also called another witness by the name of Savira Kilitale who stated she was going to the canteen in Vacako with the complainant and she saw Lepani kiss the complainant forehead and giving her a lolly. She never saw the appellant and the complainant together.

.....

17. An issue seems to arise and that issue is the issue of Lepani. He is not called as a witness. Her father has seen sexual messages from Lepani on her phone, and then somehow that is when the complainant brought up the issue of appellant.'

22. I am satisfied that the trial court's failure to explore the role that Lepani may have had on the charges for which the appellant was tried, merit fuller consideration of the full court, when the full court records is available to them.

Whether the delay is substantial; nonetheless is there a ground of appeal that will probably succeed.

23. It will be evident from the analysis of first ground of appeal submitted by the appellant and discussed at paragraphs 15 to 22 of this Ruling, that first ground of appeal submitted by the appellant has a reasonable prospect of success when considered by the full Court of Appeal.

Any Prejudice to the Respondent.

24. The respondent in their written submission submitted that the respondent will not be prejudiced if time is enlarged for the appeal to be heard by the full court.

Conclusion:

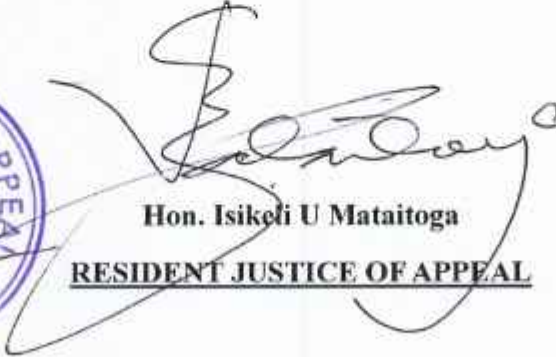
25. In light of the discussion above with respect to ground (i) of the Amended appeal grounds submitted by the appellant in support of his application for enlargement of time

to appeal, enlargement of time is granted. Consequently, leave to appeal on the first ground against conviction is allowed.

ORDERS:

1. Application for Enlargement of Time to Appeal is granted;
2. Leave to appeal against conviction is granted




Hon. Isikeli U Maitoga
RESIDENT JUSTICE OF APPEAL