

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

CRIMINAL APPEAL NO. AAU 0019 OF 2021
[High Court: HAC0021 of 2019S]

BETWEEN : **SALACIELI RATUMAI DRAVUWALU**

Appellant

AND : **THE STATE**

Respondent

Coram : Mataitoga, P

Counsel : Ratidara L., for the Appellant
Semisi K., for the Respondent [ODPP]

Date of Hearing : 3 December, 2024

Date of Ruling : 3 February, 2025

RULING

1. The appellant [Salaciel Ratumaidravuwalu] was charged with two counts of Rape in the High Court at Suva. The Information filed by the DPP containing the following charges:

“COUNT 1

Statement of Offence

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

Particulars of Offence

SALACIELI RATUMAIDRAVUWALU between the 1st day of October 2018 and the 31st day of October 2018 at Lami in the Central Division had carnal knowledge of MTN without her consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

SALACIELI RATUMAIDRAVUWALU on the 4th day of November 2018 at Lami in the Central Division had carnal knowledge of MTN without her consent.”

2. Following the trial the appellant was found guilty and convicted of both counts of Rape on 8 June 2020. He was sentenced to 15 years imprisonment with a non-parole period of 12 years imprisonment.
3. The appellant was represented by counsel at the trial.

The Appeal

4. The appellant filed a late application to appeal against conviction and sentence on 17 January 2021. It was received in the court registry on 16 February 2021. This appeal was untimely by 8 months and 9 days.
5. There was some difficulty in explaining to the appellant that he needs to apply for Enlargement of Time to Appeal, before the court will hear his leave to appeal application.
6. The court then requested Legal Aid Commission [LAC] to assist the appellant in preparing the Enlargement of Time to Appeal application. This was attended to by a counsel from the LAC.

7. With assistance from LAC Counsel the appellant filed an Application for Enlargement of Time to Appeal against Conviction on 30 September 2024, supported with submissions covering the grounds of appeal to support the Enlargement application.

Governing Principles

8. The application for the enlargement of time to appeal conviction is made pursuant to section 26(1) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court of Appeal power to enlarge time. The application for leave to appeal against sentence is made pursuant to section 21(1)(c) of the Act and under section 35(1) of the Act, a single judge has the power to grant leave.
9. 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.
10. The test for granting leave to appeal against sentence is whether there has been an arguable error in the exercise of the sentencing discretion (**Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013).

Assessment of the Appellant's Ground

11. The delay in filing the application for leave to appeal against conviction is 8 months and 9 days. This is a substantial delay.

Reasons for the delay

12. The appellant's affidavit filed with his application for enlargement of time set out the following reasons at paragraphs 5 to 7:

“5. I had advised my counsel that I wished to appeal my conviction and sentence for I was of the opinion that it was harsh and excessive.

6. *My Counsel never visited me or called me to ask me or update me on my appeal. I also did not know how to draft appeal.*
7. *In 2021, after waiting for some time, I then realised my trial counsel will not visit me so I asked an inmate to help me prepare my appeal grounds. I then asked the Corrections Officers at Naboro to file the same, My appeal grounds were filed on 18 February 2021."*

13. The Supreme Court in **Kumar & Sinu v State** (supra) referred to the right to appeal in these terms:

"The rights of appeal are granted by statute within a framework of rules. Enlargement normally can only be granted because of specific powers granted to the appellate courts. No doubt because of a need to bring litigation to finality, once there is non-compliance, the courts can only exercise a limited discretion. Viliame Caubati AAU0022.03S 14th November 2003 at p.5.

[8] *In Rhodes [5 Cr. App. R 35](#) at 36 it was said:*

"A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons."

[9] *The approach was explained shortly in [The Queen v Brown \(1963\) SASR 190](#) at 191:*

"The practice is that, if any reasonable explanation is forthcoming, and if the delay is, relatively, slight, say for a few days or even a week or two, the Court will readily extend the time, provided that there is a question which justifies serious consideration."

[10] *Neither applicant has explained sufficiently the failure to proceed to the next tier court after the Court of Appeal expeditiously: [Shaheed Mohammed v R \(1964\) 10 Fiji LR 68](#) at 70F and G."*

14. The delay in this case is substantial and the reasons provided by the appellant, is simply inadequate and the grounds of appeal is generic and raise no issue of public importance.

Any Meritorious Grounds

15. There were two grounds of appeal against conviction advanced by the appellant. The first was: the trial judge erred in law and fact in convicting the appellant when the evidence in totality does not support the conviction.

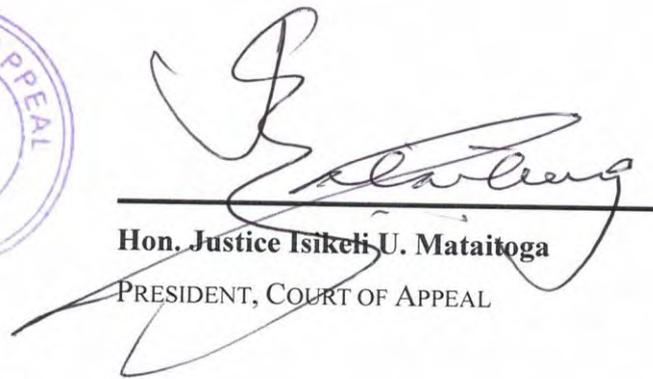
16. This was trial with assessors and in his submission in support of this ground, at paragraph 16 of the summing up was left with the assessors to decide and they did not consider the issue raised by the appellant as mitigating conviction. The summing was correct in so far as it summarises the facts and the evidence. It was open to assessors to find as they did, which the trial judge also accepted.
17. This ground has no merit
18. The second ground of appeal is that the trial judge erred, in failing to properly consider the issue of delayed reporting of the complainant.
19. I note that the appellant was represented by counsel at the trial in the High Court. The issue of recent complaint appears not to have been raised by him, as evident from the judgement and the Summing up. It may have been raised in cross-examination of the complainant during the trial. If that is so, the full court record may throw light on it.
20. At the trial proper the appellant did not give evidence; an opportunity he had to raise this issue of lack of recent complaint. If this was made, it would have required the trial judge address it when giving directions to the assessors. It is more likely that it was an afterthought to support late application.
21. In **Dayal v State [2023] FJSC 21** (CAV 0027/2019) the court state the following with regard to issues not raised at the trial which are brought in later at leave to appeal stage:

“[63] This is a new ground of appeal which was not canvassed in the Court of Appeal. These issues raised ought to have been raised at the beginning or during the trial. The respondent had conducted the prosecution case in line with the charges lawfully levelled against the accused. The totality of the evidence adduced by the prosecution has led the assessors to return a verdict of guilty on all counts., and the learned trial Judge accepted the unanimous verdict of the assessors. The ground does not meet the requirements for the introduction of new evidence in an appellate court, and does not satisfy the requirement for the grant of special leave to appeal under Section 7(2) of the [Supreme Court Act.](#)”

22. The second ground of appeal should have been raised as a live issue for the defence at the trial. It was not. It cannot now be raised.
23. This second ground against conviction has no merit.
24. In light of the Supreme Court decision in *Vulaca v State* [2012] FJSC 22 (CAV 005/2011) referred to *Praveen Ram v State* [2012] FJSC 12 (CAV 001/2011), where it stated
- “35. *Praveen Ram vs State (supra) distinguishes the duty of a trial judge and an appellate court. The trial judge having seen and heard the witnesses testifying in court like in the case of assessors could independently assess the evidence and decide whether he could confirm the opinion of the Assessors or differ from the opinion of the assessors. If the Judge differs he has to give his reasons.*
36. *The Supreme courts observed in Praveen Ram Vs Sate (supra,) that the function of the Court of Appeal and this Court is of a supervisory nature. As the appellate courts have not seen and heard the witnesses it cannot independently assess and evaluate the evidence led at the trial to the extent of a trial court judge. But an analysis of evidence is necessary for two reasons one is to ascertain whether there is evidence to convict the accused. If there is no evidence it is a question of law, the Court of Appeal have to take into consideration in arriving at its finding. The other is to ascertain whether on the given facts if a properly directed panel of assessors would have come to the same decision. This is to ascertain whether the assessors were properly directed in the application of law on the given facts. However the Court of Appeal will not set aside a verdict of a High Court on a question of law (s.21(1)(a)) or fact (s.21(1)(b)) unless a substantial miscarriage of justice has in fact occurred (s.22(6)).*
25. I conclude that there is no substantial miscarriage of justice occurred.
26. The Respondent concedes that allowing the extension of time would not prejudice the respondent.
27. The appellant in his application included appeal against sentence but that was not submitted as part of the leave application. I have not considered it.

ORDERS:

1. *Application for Enlargement of time to appeal is declined*
2. *Application for Leave to appeal is declined.*



Hon. Justice Isikeli U. Maitoga
PRESIDENT, COURT OF APPEAL