IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

Criminal Petition No. CAV0011 of 2017
[on appeal from Court of Appeal Cr. App. No: AAU057/2012]
[High Court Case No: HAC 57/11]

BETWEEN	:	**LEPANI ROKOLABA**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	The Hon. Mr. Justice Anthony Gates President of the Supreme Court
		The Hon. Mr. Justice Saleem Marsoof Judge of the Supreme Court
		The Hon. Mr. Justice Buwaneka Aluwihare Judge of the Supreme Court
Counsel	:	Ms S. Nasedra for Petitioner Mr. S. Babitu for the State
Date of Hearing	:	11th April 2018
Date of Judgment	:	26th April 2018

JUDGMENT OF THE COURT

Gates P

[1] On 4th July 2012 the Lautoka High Court found the Petitioner guilty of 3 counts of rape contrary to section 207(1) and (2)(a) of the Crimes Act. The Petitioner appealed to the Court of Appeal against conviction only. On the 26th May 2017 the Court of Appeal dismissed the appeal and affirmed the conviction and sentence of the High Court. It is necessary in this case to deal with some significant errors of procedure, after first setting out the facts.

The Facts

[2] At the time of his trial the Petitioner was a carpenter. Aged 35 he lived with his wife and children in a settlement at Nukusasa in Ra Province. The complainant was his brother's daughter and lived at Nasole in Suva.

[3] In 2010 she came for a while to live with her grandmother at Nukusasa. The complainant was 16 years old [born 15.1.95]. Her grandmother was also the mother of the Petitioner. The complainant gave evidence of 3 sexual incidents occurring between the petitioner and herself.

[4] On 24th January 2011 the Petitioner called the complainant to massage his leg. She did so. When she was leaving he told her to stay inside his house. He told her to take off all her clothes. He touched her vagina and lay on top of her kissing her mouth and touching her breast. He poked her vagina and used his hand. She reported the incident to her grandmother saying "Lepani raped me."

[5] The next day 25.2.11 the Petitioner approached the complainant and told her to lie down. She said "No." He told her to take off her clothes and she refused. He then took off her clothes. He touched her private part "and poked it." She said it was paining. He kissed her mouth and touched her breast. She did not feel anything she said. Again, she informed her grandmother, and said "Lepani raped me."

[6] On 6th February 2011 the Petitioner told her to look for coconuts and later for pumpkins. He called her to a lemon tree and told her to take off her clothes. She refused. He took off her panty, touched then poked her private part. She could feel pain. He touched her breast, laid on top of her and started kissing her. While on top of her he inserted his male organ into her vagina. She said she did not consent.

[7] Afterwards she said she felt very weak. She told her grandmother. The grandmother said she was troubled by these events but was worried as to what might happen if a report was made. The complainant was due to leave the settlement. Before she did so the Petitioner told her not to tell anyone or else he would bring kerosene and burn her house.

[8] The Petitioner was interviewed by the police under caution. At the time of the incidents he was farming and staying at his parents' home in the settlement. He said of the first incident he had asked the complainant to have sex with him and she had said yes. He had admitted he had raped her on the next day [the 2nd incident].

[9] For the 2nd incident he admitted "fiddling with her vagina" before having sex with her. She had refused and he had pushed her on top of the bed, and then had sex with her.

[10] On 6th February 2011 he had taken her to a nearby lemon tree and had sexual intercourse there.

[11] He gave sworn evidence at the trial and called no other witness. He gave evidence of full sexual intercourse on all three occasions, that is inserting his penis into her vagina. He said she liked it and had consented. She said she would not tell anyone about it. He said he was assaulted by the police on the way to the police station. He was hit on the head with a stick. His body had other injuries. Responding to the allegations he said:

> "I was ashamed all the things told by M. All I said to court is true. I did not harass her because of her consent I had sex. This honourable court I ask forgiveness."

Petition filed without accompanying grounds

[12] A purported petition of appeal was lodged with the court registry, perhaps on the date of signing, 7th June 2017. This was prepared and lodged within 11 days of the High Court's decision and was within time. It was in compliance at least with the requirement to lodge a petition within 42 days of the decision against which it is sought to appeal.

[13] The petition was worded:

> "Take notice that I intend to appeal against the decision of the Fiji Court of Appeal, dated 26 May, 2017.

> Proper grounds shall be formulated upon recipient (sic) of the copy Records currently with the Legal Aid Commission."

[14] Indeed there were no grounds set out in this "petition."

[15] On 28th February 2018 the Supreme Court Registry received a document headed "Notice of Amended Petition of Appeal and Enlargement of Time" dated 4th September 2017.

[16] There was no affidavit accompanying as required for an application for enlargement of time. The Court has no sworn evidence therefore explaining the reasons for the delay in providing a proper petition with grounds for the appeal. Nor have we received any explanation as to why the amplified appeal document dated 4th September 2017 was prepared and signed almost 2 months late, and why it was lodged over 7 months out of time.

[17] In cases involving indigent incarcerated petitioners the Supreme Court usually takes a lenient approach. It accepts informal petitions such as a letter to the court. A good deal of mutual assistance is given within the prisons and surprisingly well prepared petitions with grounds are drafted for lodgement at the registry. But leniency cannot extend to a document merely stating the petitioner "intends to appeal" without grounds. This is insufficient to commence an appeal. The respondent is rightly entitled to proper notice of the part of the proceedings impugned, what it is that is said to have miscarried. Fair trial as a concept must be observed throughout.

[18] The filing of grounds later may constitute an informal petition document. If late in lodgement, as here, the application will have to be treated as an application to enlarge time. Such applications must satisfy certain criteria before the petition itself can be considered.

[19] For many years the appeal Courts have been guided by a set approach to the question of whether or not to grant enlargement of time. **Kumar v. The State; Sinu v. The State** CAV0001/09, CAV0001/10 21st August 2012. The rules are elastic and are a guide only. The questions are these:

The reason for the failure to file within time

[20] There has been no explanation, other than to suggest the papers were with the Legal Aid Commission. Nothing has been put to the court of the attempts to contact Legal Aid to obtain their advice or drafting skills, or indeed to seek the return of the appeal papers. If his complaint were similar to the grounds before the Court of Appeal a petition with such grounds could have been lodged. What was his complaint on the handling of the appeal by the Court of Appeal? What was the error of the Court?

How long was the delay

[21] Here the grounds were lodged with the registry over 7 months late. That is a significant delay.

Nonetheless is there a ground of merit justifying the appellate court's consideration?

[22] There were 4 grounds lodged on 28th February 2018:

> "**Grounds against Conviction**
>
> A. The honourable Justice of Appeal erred when his Lordship failed in adequately analysing the caution interview of the Petitioner in determining the issue of the consent, regarding count 1 & 2.
>
> B. The prejudicial effects of the caution interview outweighs its probative value.
>
> C. The learned trial judge erred in law when he failed inadequately and or properly directing the assessors on the defence case.
>
> **Sentence grounds**
>
> A. The sentence is harsh and excessive.
>
> Take further notice that the Petitioner also seeks leave of your honourable Court for enlargement of time in order to seek legal advice."

[23] The single judge in the Court of Appeal had granted leave to appeal on 3 of those grounds. In summary they were:

1. The trial judge had erred in finding there was a case to answer on counts 1 and 2 even though the State had not adduced any evidence of carnal knowledge.

2. The judge erred in convicting on counts 1 and 2 when the evidence did not support those counts.

3. The judge had failed to direct the assessors on the elements for section 207(2)(c) and the State had failed to prove penile penetration for counts 1 and 2.

[24] The litigation issue was consent, not absence of penile penetration. For all 3 counts the petitioner had admitted in his caution interview statement that he had had sexual intercourse with the complainant. More importantly and more explicitly, he gave sworn evidence at his trial of the 3 events forming the 3 charges. There could be no doubt he was admitting in court penile penetration. He did so both in chief and in cross-examination. Any lack of explicitness in the complainant's evidence, (she was his brother's 16 year old daughter) was made up for by his own sworn testimony. In any event the trial was not conducted on the basis of a denial of full penile sexual intercourse. This ground may have arisen from an observation made by the single judge. A careful study of the full record puts the matter beyond dispute. On all 3 occasions it had been proven by his own testimony that there had been penile penetration. Those circumstances disposed of the single point aimed at by these three grounds.

[25] In view of that testimony in the trial proper, it is difficult to see how a detailed analysis of the caution interview remarks would improve the case for the defence on that issue.

[26] The decision of the trial court would very much depend on whether the prosecution had convinced the judge and assessors of the credibility of the complainant as against the petitioner on the issue of consent. Bearing in mind it was the burden of the prosecution to prove the lack of consent the two cases with the differing evidence was before them.

[27] Ground B was unarguable, and was not urged on us by counsel.

Inadequate directions on the Defence Case

[28] If there was inadequacy there had been no application for re-directions by defence counsel. If there had been an inadequacy in the presentation of the central plank of the defence case it should have been pointed out to the judge so that he could provide further emphasis to the summing up.

[29] This did not form a ground of appeal before the Court of Appeal. Indeed none of the grounds were first argued in the Court of Appeal for the court's decision.

[30] This court has pronounced on many occasions that an appeal to this court is an appeal against the decision of Court of Appeal. If a ground has not been brought to the Court of Appeal for a decision it will be difficult to persuade the Supreme Court that the Court of Appeal had been in error for not dealing with a ground that had not been brought before it. Only in exceptional and compelling circumstances will this court entertain a ground concerning the summing up when it was not raised at trial, and where no re-directions had been sought by counsel, and the ground had not been raised before the Court of Appeal: **Dip Chand v. The State** CAV0014/2012; **Eroni Vaqewa v. The State** CAV016/15 22nd April 2016.

[31] This was the trial judge's initial directions to the assessors:

> "18. As I told you the Prosecution bears the burden of proving all elements of the charge in this case. The Accused had admitted that he had sexual intercourse with the Complainant. Considering the admission except the element of consent all the other elements need not be proved.
>
> 19. The question before the Court is whether the Accused had sexual intercourse with M A with or without consent. If it is found the Accused had sex with consent then he cannot be convicted. If you find there is no consent the decision may be different.
>
> 20. We should consider all evidence before us to decide whether the Complainant gave consent to the Accused to have sexual intercourse with her."

[32] The judge reviewed all of the witnesses and their evidence in summing up. He also said:

> "29. Prosecution called seven witnesses to prove their case. I wish to summarize their evidence. It does not mean that you have to consider only my summary of the evidence; you are at liberty to consider all evidence before you. In fact I request you to consider the entire evidence of all witnesses before you."

[33] The judge pointed out to the assessors that the complainant had told the examining doctor that she had been raped by the Accused; but that the doctor did not find any injuries on her.

[34] The summing up occurred in the afternoon of the day, in the morning of which the petitioner gave his sworn evidence. The circumstances of the 3 encounters were before the assessors clearly. There was a difference in the complainant's and the Petitioner's stories, but it was small. The variation was chiefly on the issue of whether the intercourse had been consensual.

[35] The summary of the Petitioner's evidence could have been more detailed but mere repetition of the evidence (which was similar to that of the complainant) was not necessary. In a short trial the issue was clear from the directions.

Sentence

[36] There had been no ground against sentence nor was sentence argued before the Court of Appeal. The petitioner received a sentence of 15 years imprisonment with 11 years fixed as the non-parole period, with a Domestic Violence Restraining Order [DVRO] that permanently the petitioner was not to "get close to" or approach the victim.

[37] Nothing was submitted to this court by way of argument on sentence, either by counsel or the petitioner himself in his typed submissions.

[38] The learned judge gave a reserved judgment on sentence. His lordship examined the tariff. For multiple rapes the English case of **William Christopher Millbury and 2 others v. R** (2002) EWCA Crim. 2891 (9 December 2002) was referred to. It

recommended a starting point of 15 years and upwards for cases of repeated rapes over a course of time, as well as those involving multiple victims.

[39] Though starting points in Fiji for calculating sentence used to be, for adult victims, as low as 7 years – **Mohammed Kasim v. The State** C of A No. 14 of 1993 27 May 1994, the court said:

> "We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than the starting point."

[40] **Kasim** was decided in 1994. Tariffs for sexual offences and specially rape have moved upwards as befits such a serious offence under the Crimes Act, and which in turn reflects the community's increasing yet justified sense of outrage and horror for the crime. Presently the tariff for rape of an adult has been set between 7 and 15 years imprisonment - **State v. Marawa** [2004] FJHC 338. In really bad cases the tariff may have to be exceeded.

[41] Amongst the aggravating factors the judge listed chiefly that there was a betrayal of trust since the victim was the petitioner's niece. From the victim impact report it was said the victim had continued with feelings of uselessness and frustration. There were also 3 incidents of the abuse. The judge increased his starting point of 14 years by 5 years.

[42] Mitigation was put up that the Petitioner was:

(a) Looking after elderly parents [father was a stroke patient].
(b) An [unspecified] period had been spent in custody.
(c) He was married with children.
(d) and the sole breadwinner.

[43] In these serious cases of sexual offending very little mitigation can be derived from being "married with children" and "sole breadwinner". For a crime as serious as this, imprisonment must necessarily be imposed for a substantial period. Families invariably suffer greatly when the supporting member is to be imprisoned. In the

absence of strong social security support, vulnerable relatives of the Accused, elderly or sickly parents, children at school, and overworked wives and mothers have to endure harsh misfortune as a result of the Accused person's serious offending.

[44] The petitioner had 10 previous convictions, but none of them for sexual offences. The judge correctly did not regard them as an aggravating factor. He said he could not grant any discount on sentencing because of them and because of their gravity.

[45] The sentence arrived at was not one to be challenged in this court. There was fortunately no significant violence, but this was an offence involving force. There was no physical injury inflicted though there was a lingering effect on the complainant which was significant.

[46] There has been no ground to be raised in the petition which would lead us to grant an enlargement of time for this appeal. Nor could any of the grounds meet the criteria for the grant of leave by the Supreme Court [section 7(3) Supreme Court Act].

Marsoof J

[47] I have had the opportunity of reading the judgment of Gates P in draft. I agree with his reasoning and conclusions.

Aluwihare J

[48] I have read the judgment of Gates P in draft and I agree with the findings and conclusions.

Gates P

[49] In the result the orders of the Court are:

(a) Application for enlargement of time within which to appeal refused.

(b) Petition of appeal against conviction and sentence dismissed.

(c) Conviction and sentence affirmed.

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The Hon. Mr. Justice Anthony Gates
President of Supreme Court

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The Hon. Mr. Justice Saleem Marsoof
Judge of Supreme Court

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The Hon. Mr. Justice Buwaneka Aluwihare
Judge of Supreme Court

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