IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

Criminal Appeal No: AAU0031/07
[High Court Appeal No: HAA051/06L)

BETWEEN:

TEVITA NALAWA

Appellant

AND:

THE STATE

Respondent

Coram: Shameem JA
Scutt JA
Hickie JA

Hearing: 8th April 2008

Counsel: Appellant in person
Ms A. Driu for the respondent

Date of Judgment: 25th April 2008

JUDGMENT OF THE COURT

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[1] This is an application for leave to appeal against conviction and sentence entered in the Magistrates' Court. Leave was refused by Ward P on the 1st of June 2007. No judgment or ruling was delivered by his Lordship, but his notes read:

> *"Re: Application for Leave.*
>
> *Appellant: I did not have to discuss delay with counsel.*

> ***Court: Leave refused. No point in withdrawn and delay was not raised by counsel in the High Court. Advised he can apply to full court for leave."***

[2] This is the appellant's application to the Full Court. The application before Ward P, appears to have been treated by both his Lordship and the State as an application for leave to argue grounds of both law and fact. We have had the benefit of reading the judgment of our sister judge, Madam Justice Scutt, and we note that she has treated this application as one for leave to appeal out of time. Whilst we agree with her observations, the application before us was not argued on that basis by either the State or the appellant. Indeed, the written submissions of Counsel appearing for the State, specify the nature of the application as one for leave to appeal on grounds of fact and law. Having said this, we do note that the appellant was (according to the date in his handwritten letter to the Court of Appeal) eight days out of time and we have no hesitation in granting him leave to appeal out of time subject to our decision below.

[3] The appellant was convicted and sentenced by the Lautoka Magistrates' Court in March and April of 2006. The charge was laid on the 25th of January 2003. The alleged offences were committed between January and June 2001. On Count 1, the appellant was charged with indecent assault. On Count 2, he was charged with rape. On both counts, the victim was 10 years and 6 months old.

[4] The appellant first pleaded not guilty to the charges on the 29th of January 2003. There were then many adjournments, for legal aid, for illness (the prosecutor's) and, throughout the whole of 2005 for no obvious reason at all. The trial eventually commenced on the 6th of February 2006.

[5] The complainant's evidence was that in 2001, the appellant called her, put his hand on her lap, put his hand on her vagina then pulled her hand to touch his penis. A few days later, when she passed the appellant's house he called her inside saying that his wife was calling her. She went inside, he locked the door, spread a mattress on the floor, told her to massage him then had sexual intercourse with her. He then penetrated her vagina with his finger. She said in her evidence: "I felt bad as I did not agree with what he did." She went home, had a bath and saw blood coming out of her vagina. She told her sister what had occurred, then her mother. The matter was reported to the police. There was evidence of recent complaint and distress. The medical report showed that the complainant's hymen was broken.

[6] The appellant was interviewed under caution. He denied sexual intercourse and denied any indecent assault. The appellant made an unsworn statement saying that the allegations were false, that he had been in prison since 2003 and that the case was an old one.

[7] Judgment was delivered on the 31st of March. The learned magistrate believed the complainant and convicted the appellant of rape and indecent assault. The appellant was sentenced to 10 years imprisonment for the rape and 1 year for the indecent assault.

[8] The appellant appealed against conviction and sentence. The appeal judge allowed the appeal on the ground that the evidence of lack of consent, and of the appellant's belief in lack of consent was equivocal. He quashed the conviction for rape, and substituted it with a conviction for defilement under section 176 of the Criminal procedure code. Sentence was varied to 8 years imprisonment for defilement. The sentence imposed by the Magistrates' Court for indecent assault remained.

[9] The appellant now wishes to appeal against this decision of the appellate judge. His grounds are:

1. ***The trial magistrate erred in law in relation to corroboration.***
2. ***The medical evidence failed to disclose an offence of defilement.***
3. ***The evidence of the complainant was inconsistent with the medical report.***
4. ***There was unreasonable delay and a breach of section 29 of the Constitution.***
5. ***The appellant was given an unfair trial.***

[10] Four of the grounds of appeal are of mixed fact and law and require leave to appeal to the Court of Appeal. In our view, leave was rightly refused by Ward P in relation to grounds 1, 2, 3 and 5 when he considered this application as a single judge.

[11] Firstly the law of corroboration in sexual cases has now undergone change. It is no longer required of judges and magistrates to warn themselves (or the assessors) of the need to look for corroboration of the complainant's evidence. The rule was abolished because it was based on a belief that victims of sexual assault were inherently unreliable. That belief was an example of unfair gender discrimination and was abolished by this court, to be replaced by a general judicial discretion to administer a warning in all cases where a witness might be considered to be unreliable because he or she has an improper motive. Such witnesses are not necessarily victims of sexual assault, nor are they women.

[12] The rule has properly been abandoned. There was no need for the trial magistrate to look for corroboration. Indeed, reading the court record the complainant's evidence was coherent and articulate. No improper motive was alleged by the appellant at the trial. There was no error of law in relation to corroboration.

[13] The ground of appeal suggesting that the appellate judge had no powers to substitute a conviction for defilement is also misconceived. Section 176 of the Criminal Procedure Code provides:

> ***"When a person is charged with rape and the court is of opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 154(1), 155, 156, 158 and 178 of the Penal Code, he may be convicted of that offence although he was not charged with it."***

[14] Section 319 of the Criminal Procedure Code gives to the High Court powers to reverse or vary any finding or conviction of the magistrates' court, in its appellate jurisdiction. This power includes the substitution of a lesser offence under section 176. Clearly this was not an error of law.

[15] Nor is there any merit in the submission that the medical report was inconsistent with the evidence of the complainant. The fact that the hymen was broken did not prove penetration by penis. But this evidence did not rule out such penetration either. This ground is clearly misconceived.

[16] The ground of appeal alleging delay is however more problematic. There was a two year delay from the offence to the laying of the charge, and a further three year delay before the trial was concluded. Prima facie, the facts suggest unreasonable delay which warrants further argument on appeal. State counsel, very fairly conceded this.

[17] However, delay was not argued in the appeal in the High Court, and is raised for the first time in this court. Nevertheless, we grant leave to argue this ground. The authorities on delay, when it is unconstitutional and unreasonable, and what remedies are available have been ventilated at length in recent judgments of this court.

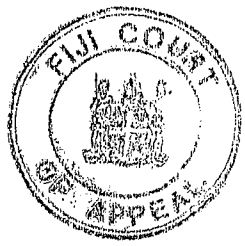
[18] The circumstances of this case suggest that the appellant has an arguable case for a finding of unconstitutional delay and for an appropriate remedy. Although this ground was not ventilated in the High Court, we grant leave to the appellant to argue it in this court, in the interests of justice.

Result

[19] Leave is granted to the appellant to argue one ground of appeal against conviction and sentence. It is that:

1. ***The appellant's trial was delayed unreasonably and unconstitutionally.***

Hon. Justice Nazhat Shameem
Judge of Appeal



Hon. Justice Thomas V. Hickie
Judge of Appeal

Solicitors:

Appellant in person
Office of the Director of Public Prosecutions for respondent