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: 8 April 2008

Counsel: Mr. T. Nalawa in Person
Ms A. Driu for Respondent

Date of Judgment: 25 April 2008

JUDGMENT OF SCUTT, JA

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1. **Introduction**

Mr Nalawa makes application for leave to appeal out of time.

2. Mr Nalawa was charged on 29 January 2003 on two charges, one under section 149 of the Penal Code (Cap. 17), the other under sections 149 and 150 of the Penal Code. On 31 March 2006 he was convicted of both charges, the particulars being:

- TEVITA NALAWA, between January and June 2001, at Lautoka in the Western Division unlawfully and indecently assaulted [KKS]; and

- TEVITA NALAWA, between January and June 2001, at Lautoka in the Western Division unlawfully had carnal knowledge of [KKS] without her consent.

3. On 7 April 2006 he was sentenced to one year's imprisonment on the first charge, 10 years' imprisonment on the second, to be served concurrently with the first charge but consecutive to a term of imprisonment he was serving at that time: Court Record, p. 67

4. Mr Nalawa appealed against conviction and sentence, his appeal being in relation to the second charge only. In the High Court, his conviction for rape was quashed. By reference to section 176 of the Criminal Procedure Code, the appeal judge substituted a conviction for defilement under the Criminal Code (Cap 17): ss. 155(1) On the other charge, Mr Nalawa's conviction and sentence were left undisturbed: Court Record, pp. 16-17

5. Before a single Judge of the Court of Appeal, Mr Nalawa sought to leave to appeal against conviction and sentence, both in respect of the Magistrates Court and the High Court.

6. The High Court decision against which Mr Nalawa sought to appeal was made on 2 February 2007. Mr Nalawa's letter seeking to appeal against the High Court decision is dated 12 March 2007. Section 26 of the Court of Appeal Act (Cap 12) provides that the time for appealing against a conviction is 30 days. Mr Nalawa's petition was made on the thirty-eighth day.

7. On 1 June 2007, Mr Nalawa's application for leave to appeal out of time was refused by Ward, P. with Mr Nalawa's being advised he could apply to the Full Court for Leave: Court Record, p. 12

8. Albeit Mr Nalawa appears to have provided no reasons for his appeal application being out of time, it was a matter of days only (on my calculations, at the most eight days).

9. Timelimits exist to be observed: ***Rupeni Silimuana Momoivalu v. Telecom Fiji Limited*** (HCCA No. 527 of 1997, CA No. ABU0037 of 2006, 7 September 2007) However, Mr Nalawa is and was at the relevant time a person serving a term of imprisonment. A person in custody is not in the same position as a person at large 'in the world'. Eight days over the limit, in my opinion, can fairly be taken into account in the circumstances facing Mr Nalawa – of being in custody, meaning his petition seeking to appeal had first to be composed, then to travel through the prison system and thence to the Appeal Court Registry. He could not attend at the Court to lodge it himself and was dependent upon prison authorities. Mr Nalawa does appear to have had some assistance in drawing up his petition and written submissions, however albeit he would have been able to access legal advice through a request to prison authorities, he was not at liberty to seek legal advice in

the same way as would be a person unconstrained by his sentence. He appeared in the High Court and in the Court of Appeal (single Judge and Full Court) without legal representation. All these factors are self-evident and on that basis may be taken effectively to be put by Mr Nalawa.

10. As to the grounds, section 22(1) of the Court of Appeal Act (Cap 12) provides that any party to an appeal from a Magistrate's Court to the High Court may appeal, under Part IV – Appeals in Criminal Cases:

> ... against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only.

11. Mr Nalawa puts the grounds forward as follows:

i. That the learned magistrate or the judge erred in law regarding corroboration.
ii. That the learned judge erred when he convicted the appellant for defilement when there is no medical evidence to confirm it.
iii. That the evidence of the complainant is inconsistent with [the] medical report.
iv. That there had been unreasonable delay and the appellant did not get a fair trial under section 29(1) of the Constitution and as such should be permanently stayed.
v. Pray to you honourable Judge Justice exclusive intervention in entertaining my humble request for the prosperity of fairness before the court of law: Court Record, p. 1

12. As well as law, some of the grounds constitute matters of fact, some of mixed fact and law. Mr Nalawa acknowledges this, stating in the final paragraph of his written submissions:

> I ask the full court of the Fiji Court of Appeal to grant me an appeal and that I make submissions on errors of Law and fact at the trial magistrate court and the appellate High Court of Lautoka: Court Record, p. 7

13. In his written submissions to this Court, in conclusion Mr Nalawa sought to consolidate these five grounds into two main grounds:

1. That the magistrate court erred in finding me guilty of rape thus no penetration without consent.
2. That the appellate high court was correct in finding not guilty of rape but was wrong in finding me guilty of Defilement, thus no penetration occurred: Court Record, p. 7

14. In the 'two main grounds' Mr Nalawa omits reference to the ground he raises under the Constitution. As noted earlier, Mr Nalawa was charged on 29 January 2003 and sentenced on 7 April 2006. Taking into account this bald recitation of the dates, it can appear that Mr Nalawa has a claim under section 29(1) and/or section 29(3) of the Constitution.

15. Upon that basis, at least one of Mr Nalawa's grounds provides room for argument. In this regard I observe also that at the hearing of the application for leave, the State acceded to the position that this ground had some merit.

16. At the sentencing hearing in the Magistrate's Court, Mr Nalawa said that he had been in custody since 2003: Court Record, p.62 The Court Record shows that was not correct. At the first application for leave to appeal to this Court, His Lordship said that delay had not been raised in the High Court. That, too, was incorrect. In the High Court, '[s]tarting with 9 years', Mr Nalawa was given 'a discount of 1 year for lapse of time': Court Record, p.17

17. Notwithstanding this, a right to a speedy trial is enshrined in the Constitution:

> 29 (1) Every person charged with an offence has the right to a fair trial before a court of law.
> (2) ....
> (3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.

18. Delay in the criminal justice system is a matter of public importance, going as it does to the rights of accused persons, victims and survivors, the interests of all their families, and the rights of witnesses including principal witnesses and in particular child witnesses, the State and the community as a whole.

19. In ***Mohammed Sharif Sahim f/n Mohammed Janif v. The State*** Misc. Action No. 17 of 2007, 25 March 2008, this Court dealt with delay in the context of stay applications. It is appropriate that this Court should now address delay in the context arising in Mr Nalawa's case, where pre- and post-charge delay are contended for, and Mr Nalawa has already been convicted and sentenced.

20. Hence, leave to appeal out of time should be granted.

21. Leave having been granted, it appears to me appropriate to leave to this Court at the hearing of the appeal all the grounds as put by Mr Nalawa, for a determination to be made at that time as to the grounds the Court considers are within the purview of section 22(1) of the Court of Appeal Act.

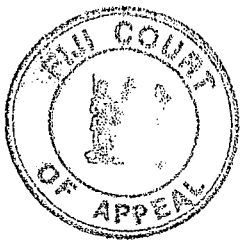
22. As a final matter, in ***Mungroo v. The Queen*** [1991] 1 WLR 1351, involving a claim of undue or unreasonable delay under section 10(1) of the Mauritius Constitution, the English Privy Council said that in 'any future case in which excessive delay is alleged, the prosecution should place before the court an affidavit which sets out the history of the case and the reasons (if any) for the relevant periods of delay': at 1355, para **[E]**

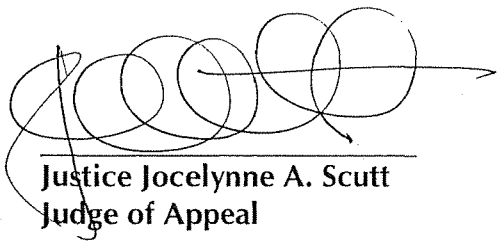
23. In ***R. v. Haig*** [1996] 1 NZLR 184 such an affidavit was filed by the Registrar of the Invercargill Court, the court wherein delay was said to have occurred. In considering the matters in the affidavit, the High Court said it was satisfied 'there was no action on the part of the Crown, justified or otherwise, that caused any delay. Any delays that have been caused in this particular case have been occasioned by problems with Court resources': at 193

24. A lack of resources was, however, accepted as being 'no excuse for delay': at 193

25. In the present case, it may be considered that the Court Record sufficiently sets out the history so as to enable the Court sitting on the appeal to make a fair and proper determination on the question of delay. It appears to me that the Court would, however, be entitled to receive affidavit material as suggested by the English Privy Council and accepted by the Aotearoa/New Zealand High Court, in accordance with section 28 of the Court of Appeal Act.

26. Ultimately, however, this is a matter for the Court in hearing the appeal.





Justice Jocelynne A. Scutt
Judge of Appeal

Solicitors: Appellant in Person
Director of Public Prosecutions