IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 26 OF 2012
(High Court HAC 17 of 2011 at Labasa)

BETWEEN : **MOHAMMED JABBAR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr J Singh for the Appellant**
Mr M Korovou for the Respondent

Date of Hearing : **24 June 2014**

Date of Judgment : **29 August 2014**

JUDGMENT

[1] The Appellant was charged with one count of rape and one count of sexual assault contrary to the Crimes Decree 2009. Following a two day trial in the High Court at Labasa the assessors unanimously returned opinions of guilty on the first count and not guilty on the second count. The learned trial Judge agreed with the opinions of

the assessors and in his judgment on 25 November 2011 formally convicted the Appellant on the count of rape and acquitted him of sexual assault.

[2] The Appellant was sentenced on 29 November 2011 to a term of imprisonment of 12 years with a non-parole term of 10 years.

[3] By Notice of Motion dated 25 February 2012 the Appellant applied for an enlargement of time for filing a notice of appeal against conviction and sentence. Although the notice was not received in the Court of Appeal Registry until 2 May 2012, it was accepted that the delay between February and May was not the fault of the Appellant.

[4] Pursuant to section 26 of the Court of Appeal Act Cap 12 (The Act), the Appellant was required to file his notice of appeal within 30 days. His notice of appeal should have been filed by 29 December 2011 and was as a result almost 8 weeks out of time. The Appellant had also filed at the same time an affidavit sworn on 25 February 2011 in support of his application for an enlargement of time. The application and the affidavit had been filed by the Appellant in person. At the trial in the High Court at Labasa the Appellant had been represented by Counsel.

[5] Pursuant to section 26 of the Act, the Court of Appeal may extend at any time the time within which notice of an application for leave to appeal may be given. Pursuant to section 35 of the Act a judge of the Court of Appeal may exercise the power of the Court to extend the time within which a notice of an application for leave to appeal may be given. And finally, in this case pursuant to section 21 of the Act the Appellant is required to seek leave to appeal against conviction and sentence.

[6] The principles governing an application for an extension of time to file an application for leave to appeal were discussed by the Supreme Court in **Sinu –v- The State** (unreported CAV 1 of 2009; 21 August 2012; [2012] FJSC 17). The court in exercising its discretion is required to consider (a) the length of the delay, (b) the reason for failing to file within time, (c) whether there is a ground of merit justifying the appellate court's consideration, (d) where there has been substantial delay,

nonetheless is there a ground of appeal that will probably succeed and (e) if time is enlarged, will the Respondent be unfairly prejudiced.

[7] The explanations offered by the Appellant for the delay of about 8 weeks are set out in paragraph 6 of his affidavit. The explanations relate to a lack of knowledge about the appeal process and a lack of financial assistance and support from family and friends. The explanations are not by themselves sufficient to grant the application.

[8] I do not consider the delay of about 8 weeks to be substantial. In reaching that conclusion I have had regard to the observations in **Koro v The State** (unreported AAU 28 of 2008; 14 May 2008), the effect of which is that the Court is prepared in the case of an unrepresented appellant to extend some latitude up to three months beyond the 30 days specified in section 26 of the Act.

[9] However in order to obtain an enlargement of time to file his application, it is necessary for the Appellant to establish that his appeal raises a ground of merit justifying the consideration of the Court of Appeal and excusing non-compliance with the Act.

[10] The Appellant's grounds of appeal against conviction and sentence were initially set out in a document exhibited to his affidavit in support of the application. In that draft notice there were nine grounds of appeal, all of which related to the appeal against conviction and all of which related to alleged misdirections or omissions by the trial judge in the course of his summing up to the assessors.

[11] By an amended notice of appeal filed on 15 May 2014 the Appellant relied on the following grounds of appeal:

> *"a. Appeal against Conviction*
>
> *1. **THAT** the Honorable Trial Judge erred in law and fact when directing the assessors at paragraph 7 of the Summing Up that if the assessors do not believe the accused's sworn testimony then it would mean that he has not discredited the evidence of prosecution witnesses in any way.*

2. ***THAT*** *the Honorable Trial Judge erred in law and fact by not directing the assessors that they may chose to accept the accused version of events, or accept some part of it and reject some part of it, or reject the whole of it.*

3. ***THAT*** *the Honorable Trial Judge did not adequately direct the assessors on the law and principles of prior inconsistent statements.*

4. ***THAT*** *the Honorable Trial Judge erred in law and fact when failing to give adequate directions on the law and onus of proof on the defence of alibi.*

5. ***THAT*** *the Honorable Trial Judge erred in law and fact when allowing hearsay evidence of the prosecution witness namely Talim and then not directing the assessors on the rule against hearsay.*

6. ***THAT*** *the Honorable Trial Judge failed to direct the assessors that if the alleged offence occurred on 23rd October 2010, then the appellant is not guilty of the offence charged.*

b. Appeal against sentence

1. ***THAT*** *the sentence is harsh and excessive in all the circumstances of the case."*

[12] Ground one is concerned with the directions given in paragraph 7 of the summing up. The words about which objection is taken are that if the assessors reject the Appellant's evidence then *"the situation would then be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way."* The Appellant submits that prosecution evidence may also be discredited through cross-examination revealing inconsistencies and/or unreliable memory. The Appellant submitted that the directions gave the impression to the assessors that they should accept the evidence of the prosecution witnesses if they do not accept the Appellant's evidence without explaining that the prosecution evidence may be discredited in other ways. Although the directions in other parts of the summing up do clearly explain the burden of proof, the ground is arguable.

[13] Ground 2 is essentially related to the claim that different directions were given to the assessors by the trial judge in paragraph 15 as to the manner in which they may consider the evidence of witnesses when compared with the directions given in

paragraph 7 as to the manner in which the assessors may consider the evidence given by the Appellant. It is claimed that as a result the assessors were put in a position where they were required to either accept or reject the whole of the evidence given by the Appellant. The point is arguable.

[14] Ground 3 relates to the direction given by the learned Judge in paragraph 17 of his summing up to the assessors concerning prior inconsistent statements. The essential ingredient of any direction concerning prior inconsistent statements should be to indicate that the inconsistency goes to credit and the weight to be attached to the evidence. The earlier statement cannot be treated as evidence of the truth of the contents of that earlier statement. The directions given by the learned Judge are to the point and there is no merit in this ground. Leave to appeal is refused

[15] Ground 4 is concerned with the lack of directions concerning the defence of alibi. It is claimed that a full direction on the onus proof should be given whenever the defence of alibi is raised. On the material that is presently available to the Court, there is no indication that an alibi defence was raised in accordance with the requirements specified in section 125 of the Criminal Procedure Decree 2009. Under those circumstances there was no requirement to give a specific direction as to the onus of proof as it applied when an alibi defence has been raised. The application for leave on this ground is refused.

[16] Ground 5 is concerned with the issue of hearsay evidence. In this case this ground raises a question of mixed fact and law. Although the transcript is not available at the leave stage, it appears not to be disputed that the evidence given by one of the witnesses was hearsay. The reference to that evidence appears in paragraph 30 of the summing up. The learned Judge reminded the assessors that Talim (the complainant's grandfather) gave evidence of the complaint made to him by the complainant. Then in paragraph 31 the learned Judge noted that the complaint had been made some days after the last incident and could hardly be regarded as recent. The only direction given by the learned Judge on this evidence is in the last sentence of paragraph 32:

"While this evidence is before you, very little assistance however can be derived from this particular evidence for the reasons I have given."

[17] Then the same warning is repeated at the beginning of paragraph 34 of the summing up. Apart from one or two notable exceptions, the common law rules of evidence apply in criminal trials in Fiji. Whether the evidence should have been admitted and whether the directions were sufficient raise arguable points and leave is granted.

[18] At the hearing of the application Counsel for the Appellant informed the Court that ground 6 was being withdrawn.

[19] The appeal against sentence is based on the ground that the sentence was harsh and excessive in all the circumstances. Any application for leave to appeal against sentence under section 21 (1) (c) of the Act is determined by asking whether there is an arguable error in the exercise of the sentencing discretion of the trial judge. The Appellant submits that in selecting the tariff that applies for rape of a child (which was not disputed as being the correct approach) the learned Judge has noted the vulnerability of the complainant. The Appellant then submits that vulnerability should not then be included or treated again as an aggravating factor. The point is arguable and leave is granted.

Orders:

(1) Leave to appeal against conviction on grounds 1, 2 and 5 is granted.

(2) Leave to appeal against sentence is granted.

COURT OF APPEAL FIJI

W. D. Calanchini

HON. MR JUSTICE W. D. CALANCHINI
PRESIDENT, COURT OF APPEAL