

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

**CRIMINAL APPEAL NO: AAU 0073 OF 2012**  
**[High Court Case No: HAC 048/10Lab]**

**BETWEEN** : **URAIA WAQA** *Appellant*

**AND** : **THE STATE** *Respondent*

**Coram** : Goundar JA

**Counsel** : Mr. A. Vakaloloma for the Appellant  
Ms P. Madanavosa for the Respondent

**Date of Hearing** : 16 May 2014  
**Date of Ruling** : 6 March 2015

**RULING**

[1] Following a trial in the High Court at Labasa, the appellant was convicted on two counts of rape and sentenced to a total term of 13 years' imprisonment. This is his application for an extension of time for leave to appeal against conviction and sentence.

[2] The factors to be considered for an enlargement of time are:

- (i) The reason for the failure to comply.
- (ii) The length of the delay.
- (iii) Is there a question which justifies serious consideration?
- (iv) The degree of prejudice to the respondent in enlarging time (**Livai Nawalu v The State**, unreported Criminal Appeal No. CAV0012/2002; 28 August 2013).

- [3] The appellant was sentenced on 21 June 2011. He filed his appeal in person on 5 September 2012. Subsequently, he engaged Mr. Vakaloloma who also appeared for him at the trial.
- [4] The length of the delay is about 1 year and 3 months. The appellant has not given any compelling reasons for this long delay. The victim gave evidence at the trial. Finality in criminal litigations involving vulnerable victims is an important consideration. Long delays can cause stress or anxiety for the victims. In this case, the length of the delay weighs against the granting of an extension of time.
- [5] The question is whether there is merit in the grounds of appeal. The grounds of appeal are:
- i) That the learned trial judge failed to give a balanced summing up that resulted in the conviction to be unsafe and unsatisfactory;
  - ii) That the learned trial judge failed to properly direct himself and direct assessors according to law when the assessors gave verdict of guilty in this case largely built on the states of mind and identification evidence of the complainant that under all the circumstances of the case, the finding of guilt was unsafe and unsatisfactorily; and
  - iii) That the learned trial judge failed to properly direct himself and assessors according to law and facts of identification evidence as in this case, the complainant identified the person who rape her to be having a gold filling in the upper interior teeth, the assessors and the court were shown in court during the hearing that the appellant had no gold teeth in the upper interior teeth, and were shown by opening his mouth that the Appellant has missing teeth in the front interior of his mouth, assessors continue and found him guilty although the identification evidence is important to be considered under all the circumstances of the case, the finding of guilt is unsafe and is unsatisfactory; and
  - iv) That the learned trial judge failed to direct assessors on the absence of interviewing officer who were supposed to give evidence, and was not able to be cross examined by the Defence, and was not there to confirm and tender his interview records after the Defence objected and insisted that the interviewing officer to be called to confirm the complainant statement that she identified the rapist at the time of the committal of the offence of rape that the person has gold teeth in the front teeth.



- v) That the learned trial judge failed to direct Prosecution to ensure all its witnesses are present and be called to give evidence and be cross examined by the Defence for the purpose of fair trial, and that such non direction placed the Appellant to disadvantage and that the verdict was therefore unsafe; and
- vi) That the learned judge placed undue emphasis and weight in summing up to the evidence paragraph H – The analysis of the evidence subparagraph (ix) and (x) of the identification but never place any emphasis on the issue of the complainant’s identification and recollection of the rapist who has gold teeth and evidence of A/IP Viliame Tokalauvere the officer who was told of the identification and assisted in the identification parade, and gave evidence of what he saw during the parade against the Appellant, but failed to confirm when Appellant was asked by the Court to open his mouth and see that the he has no gold teeth in front and has no teeth for that matter to draw any evidential reference which would have impacted the prosecution’s case; and
- vii) That the learned judge failed to properly direct himself and the assessors in law and in fact on the issue of “Gold Teeth” that it was a matter of identification to confirm the offender’s identification then a person without a gold tooth cannot be evidently correct to be the offender without gold teeth.

[6] The grounds of appeal are indeed poorly drafted. All grounds can be condensed into two issues. The first issue relates to one particular aspect of the identification of the appellant by the complainant. The second issue relates to the prosecution not calling certain witnesses.

[7] The complainant was a 50 year old woman. She was a widow. She lived with her youngest son in a farming community at the outskirts of Labasa town. The first incident happened in September 2010. In relaying about the first incident, she said she was in her farm at around 10 am when the appellant approached her. He spoke to her for about 30 minutes. She noticed that he had a gold plated tooth. He convinced her that someone was stealing her goat. The complainant left to see if that was true. He followed her and forced her to the ground by pressing her mouth. He then had sexual intercourse without her consent. When he left, the victim said she was too embarrassed to report to anyone.

- [8] On 14 December 2010, the appellant returned to the victim's home at around 10 am. She was outside collecting coconuts when the appellant approached her. He forced her to the ground, covered her mouth and raped her. She again noticed that he had a gold plated tooth.
- [9] On 17 December 2010, that is, three days after the second incident, the victim identified the appellant in a police identification parade. In his caution interview, the appellant denied the allegations.
- [10] At trial the appellant elected to give evidence. He denied the allegation. He said he did not have a gold plated tooth. He opened his mouth and showed it to the court that he did not have a gold plated tooth. However, it was noted that the appellant had some of his teeth missing when he gave evidence at the trial.
- [11] The appellant contends that the trial judge did not give a fair and balanced summing up on the defence case, that is, the appellant did not have a gold plated tooth as alleged by the complainant. At paragraph 13 of the summing up, the trial judge gave directions that the appellant's case was that since he did not have a gold plated tooth, he was not the man who raped the complainant as alleged by her. The trial judge left this issue to the assessors to determine by giving clear directions on the identification evidence in accordance with the guidelines in **Turnbull** [1976] 2 ALL ER 549. The directions are contained at paragraphs 26,27,28,29 and 30 of the summing up. The directions are correct in law and fact. If there were indeed any misdirection, counsel for the appellant could have raised it with the trial judge (**Anand Abhay Raj v The State** unreported Criminal Appeal No. CAV003 of 2014; 20 August 2014). No re-direction was sought by counsel at trial. This issue of identification is not arguable.
- [12] As far as the issue of calling of the witnesses is concerned, the prosecution did not rely on those witnesses. Nor did the prosecution rely on the appellant's caution interview. There was no need for the interviewing officer to give evidence. In any event, if the defence required the interviewing officer or any other witness who was not called by the

prosecution, they could have made an application before the trial judge to have the witness available for cross-examination. By not seeking to have the witness available for cross-examination, the appellant has waived any arguable complaint.

[13] The appellant has not advanced any ground of appeal against sentence.

**Result**

Extension of time refused.

Leave to appeal refused.



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Hon. Mr. Justice D. Goundar  
**Justice of Appeal**

**Solicitors:**

Vakaloloma and Associate for the Appellant  
Office of the Director of Public Prosecutions for the State