IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 141 OF 2014
(High Court HAC 228 of 2012)

BETWEEN	:	**THE STATE**
		Appellant
AND	:	**WATISONI SERELEVU**
		Respondent

Coram	:	**Calanchini P**
Counsel	:	**Mr L Burney with Ms S Tivao for the Appellant.** **Mr M Yunus for the Respondent**
Date of Hearing	:	**21 April 2015**
Date of Ruling	:	**13 July 2015**

RULING

[1] This is an application by the Appellant for an enlargement of time in which to file an application for leave to appeal against the acquittal of the Respondent by the trial judge. The power of the Court to grant an enlargement of time under section 26 of the Court of Appeal Act Cap 12 (the Act) may be exercised by a justice of appeal pursuant to section 35(1) of the Act.

[2] The application was supported by an affidavit sworn on 24 November 2014 by Shivendra Nath. The application was opposed. The Respondent did not file affidavit material. Both parties filed written submissions before the hearing of the application.

[3] The Respondent was charged with one count of digital rape of his biological daughter from 1 January 2011 to 31 December 2011 contrary to section 207(1), (2) (b) and (3) of the Crimes Decree 2009. The complainant was under 13 years old at the time of the offence. The Respondent pleaded not guilty. On 15 October 2014, after a trial lasting 3 days, the assessors returned unanimous opinions of guilty. On 16 October 2014 the learned trial Judge after directing himself in accordance with his summing up concluded that the opinions of the assessors were *"perverse"* and entered a judgment acquitting the Respondent. On 25 November 2014 the Appellant filed the present application.

[4] Pursuant to section 26 of the Act the Appellant was required to give notice of its application for leave to appeal or (in the case of an appeal relying on errors of law alone) a notice of appeal within 30 days of the date of the decision. In this case the judgment was delivered on 16 October 2014. On the basis that the application for leave to appeal should have been filed no later than 15 November 2014, the application was filed 10 days out of time. Section 26 also provides that the Court may extend at any time the time within which a notice of appeal or an application for leave to appeal may be given.

[5] Whether the time for appealing should be extended is a matter for judicial discretion which must be exercised in a principled manner. In **Kumar and Sinu –v- The State** (CAV 1 of 2009; 21 August 2013) the Supreme Court summarized the factors that should be considered when a court is called upon to determine an application for an enlargement of time as being (i) the length of the delay, (ii) the reason for the failure to file within time, (iii) whether there is a ground of merit justifying the appellate court's consideration or, where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (iv) if time is enlarged, will the Respondent be unfairly prejudiced. These are all matters that are relevant to a

determination as to whether it would be just in all the circumstances to grant or refuse the application.

[6] The explanation for the delay of 10 days was set out in the supporting affidavit. The explanation in paragraph 6 is the trial diary of counsel who appeared at the trial. The explanation is brief and vague. It is a wholly unsatisfactory explanation. Ordinarily a delay of 10 days would not be in issue for an incarcerated convicted appellant. However when the State is the appellant, with all its resources and qualified legal personnel, non-compliance with the Rules is not so readily excused. Although the delay is relatively short, the unsatisfactory nature of the explanation for that delay means that it is necessary to determine whether the appeal has sufficient merit to excuse that non-compliance.

[7] There is a document marked B attached to the affidavit in support which sets out the grounds of appeal upon which the Appellant proposes to rely in the event that an extension of time is granted. They are:

> *"1. That the learned judge erred in not providing cogent reasons for departing from the opinions of the assessors.*
>
> *2. That the learned judge misdirected himself on the evidence of the complainant when he stated that she only referred to one incident whereas she referred to one incident in her evidence in chief and a separate second incident in cross-examination.*
>
> *3. That the learned judge erred in taking into consideration irrelevant and/or inappropriate matters to cause himself to doubt the credibility of the complainant, a 14 year old girl (11 years old at the time of the offending) including that she had failed to provide a reason for a delay of several months in reporting the incident to the police. It is material in this regard that the Respondent is her biological father.*
>
> *4. That the learned judge wrongly considered the date and location of the offence to be material considerations in all the circumstances of the case."*

[8] Ground one is concerned with section 237 (4) of Criminal Procedure Decree 2009 (the Procedure Decree) which states:

"(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion which shall be:-

(a) written down; and

(b) Pronounced in open court."

[9] In my judgment section 237 (4) cannot be considered in isolation and should be read with section 237(5) which states:

"(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for all purposes."

[10] The judgment in this case when looked at in isolation does appear to be an insufficient explanation for rejecting the opinions of the assessors. Although the summing up was not referred to by the Appellant, it does appear to me that the judge has considered the relevant evidence. I am prepared to allow the ground to be argued before the Full Court to determine the merit of the ground. However in view of my observations in relation to the other grounds of appeal, this issue may be of no consequence to the outcome of the appeal.

[11] Grounds 2 and 4 raise an issue concerning section 70(3) of the Procedure Decree. This section states:

"When a person is charged with any offence of a sexual nature and the evidence points to more than one separate acts of sexual misconduct, it shall be sufficient to specify the dates between which the acts occurred in one count and the prosecution must prove that between the specified dates at least one act of a sexual nature occurred. In such a case the charge must specify in the statement of offence that the count is a representative count."

[12] The charge for which the Respondent appeared was tried before the High Court was:

*"**The Charge***

Statement of Offence

***Rape**: Contrary to section 207(1) and 207(2) (a) and (3) of the Crimes Decree 2009*

Particulars of the Offence

Watisoni Serelevu from the 1st day of January 2011 to the 31st day of December 2011 at Wailoku in the Central Division penetrated the vulva of U.L. a child under the age of 13 years, with his fingers."

[13] Although the statement of offence does not strictly comply with section 70(3) in the sense that there is no specification that the count is a representative count, it is nevertheless quite apparent from the wording of the particulars that the Appellant was proceeding on the basis that the Respondent had committed the acts complained of on more than one occasion in the period of 12 months.

[14] Indeed the opening remarks of the Appellant's written submissions refer to the count as a *"representative count."*

[15] However in his summing up to the assessors the learned Judge discusses the evidence given by the complainant in paragraph 14 and 15. Upon one reading of the summing up it is open to conclude that there was only one incident the subject matter of the complainant's complaint. In other words the incident to which reference is made in paragraph 14 is the same incident that is discussed in paragraph 15. Alternatively at its best, the Respondent's evidence pointed to two specific incidents about which the complainant gave sufficient information to indicate that she recalled each of them in some detail. There was no evidence to which the judge made reference in his summing up of other non-particularised incidents of a similar nature having been committed by the Respondent.

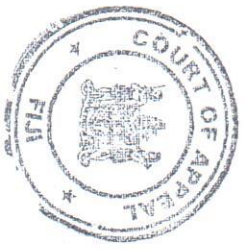
[16] In view of these comments it is necessary to consider whether the Appellant's grounds 2 and 4 require the consideration of the Full Court. I make that observation on account of the comments of the English Court of Appeal decision in **Hobson –v- R** [2013] 1 WLR 3733. A representative count may be relied upon by the prosecution where a complainant cannot particularise any specific incident and alleges a pattern of similar conduct. In such a case the assessors and the judge must determine whether they are sure that the account of the complainant is reliable so that they can be sure that the offence has been committed at least once. However in this case there was no evidence of a pattern of similar conduct.

[17] There was evidence given by the complainant of only one, or possibly two, specific incidents of similar conduct. The learned judge did not give a representative count direction in his summing up to the assessors nor to himself. On the evidence before the Court it is arguable that he was not required to do so.

[18] Nevertheless the Respondent was still entitled to know with such particularity as the circumstances allow what case he had to meet. It is on this basis that the Appellant's grounds 2 and 4 may be said to be at risk on the application of the proviso even though the points may be decided in the Appellant's favour. In the interests of fairness and justice greater particularity was required in respect of that one specific incident or those two specific incidents other than to allege that it or they occurred from 1 January 2011 to 31 December 2011.

[19] In relation to ground 3, it is quite apparent from the judgment delivered by the learned Judge that the basis for his not accepting the evidence of the complainant to the point of needing to be satisfied beyond reasonable doubt involved more than the delay in the making of the complaint.

[20] Although I have some reservations as to the merits of the grounds of appeal, the appeal does raise a significant issue in relation to how offences relating to sexual misconduct should proceed when there are allegations of specific incidents and when there is an allegation of a pattern of misconduct. For that reason an order enlarging time to appeal against acquittal is granted to the appellant.



W. Calanchini

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL