IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL AAU 50 OF 2012
(High Court HAC 52 of 2011)

BETWEEN : **PENIAME ROLIGALEVU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr S Tinivata for the Appellant**
Ms P Madanavosa for the Respondent

Date of Hearing : **15 September 2016**

Date of Ruling : **2 December 2016**

RULING

[1] The Appellant was charged with one count of rape contrary to section 207(1) and (2)(a) of the Crimes Decree 2009 and one count of defilement contrary to section 215(1) of the

Crimes Decree. The particulars of the rape charge were that the Appellant on 3 September 2010 at Narocake Village Nausori had carnal knowledge of the complainant without her consent. The particulars of the defilement charge were that the Appellant on 25 November 2010 at Narocake Village Nausori had unlawful carnal of the complainant being above the age of 13 years and below the age of 16 years.

[2] The Appellant pleaded not guilty. Following a trial in the High Court at Suva before a Judge sitting with three assessors, the assessors returned majority opinions of guilty in respect of the rape charge and unanimous opinions of guilty in respect of the defilement charge. The learned trial Judge agreed with both the majority opinions of guilty on the rape charge and the unanimous guilty opinions on the defilement charge and convicted the Appellant on both charges. On 18 May 2012 the Appellant was sentenced to 12 years imprisonment for the rape conviction and 4 years imprisonment for the defilement conviction to be served concurrently with a non-parole term of 10 years.

[3] The Appellant filed a notice of appeal against sentence on 22 June 2012. However the Appellant's handwritten notice was dated 13 June 2012. The version typed by the Corrections Office is dated 14 June 2012. Therefore although the notice was filed four days out of time, the Appellant had complied with section 26(1) of the Court of Appeal Act and could not be held responsible for the delay in filing. The appeal against sentence is to be regarded as timely.

[4] By notice dated 25 February 2013 the Appellant sought to amend his notice of appeal by adding grounds of appeal against conviction and by amending his grounds of appeal against sentence. The notice of appeal against conviction was, as a result, some 8 months out of time. Although there is no formal application for an enlargement of time to appeal conviction; the material filed by the Appellant will be regarded as such an application.

[5] By notice of motion dated 1 July 2014 the Appellant applied for leave to adduce fresh evidence at the trial. The application was supported by an affidavit sworn on 27 June 2014 by Peniame Roligalevu.

[6] The Appellant subsequently filed two notices of further amended grounds of appeal against conviction and sentence on 5 September 2014 and 17 June 2016. Both parties filed written submissions on the grounds of appeal against conviction and sentence. Neither party has addressed the issue of an enlargement of time for the appeal against conviction.

[7] The application for leave to adduce fresh evidence under section 28 of the Act is an application that can only be considered by the Court of Appeal if leave to appeal has been granted. In this jurisdiction the application for leave to adduce fresh evidence is usually heard at the same time as the appeal itself. There is no jurisdiction given to a judge of the Court under section 35(1) of the Act to hear an application made under section 28 of the Act.

[8] The application for an enlargement of time to file an appeal against conviction is made under section 26(1) of the Act and comes before a judge of the Court of Appeal pursuant to section 35(1) of the Act.

[9] The principles to be considered when an appellate court is called upon to determine an application for an enlargement of time were considered by the Supreme Court in **Rasuku and Another –v- The State** (CAV 9 and 13 of 2012; 24 April 2013). In the course of its judgment the Supreme Court affirmed that the factors that should be considered in the exercise of the discretion to enlarge time included those that were discussed in its earlier decision in **Sinu and Kumar –v- The State** ([2012] FJSC 17; CAV 1 of 2009; 21 August 2012). They are (a) the length of the delay, (b) the reason for the delay, (c) 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 (d) if time is enlarged, will the respondent be unfairly prejudiced.

[10] As already noted the delay is just over 8 months. Since Counsel did not address the issue there is no material before the Court to explain the delay. In view of the substantial delay

it is necessary to determine whether there is a ground of appeal against conviction that is likely to succeed. The grounds of appeal against conviction are set out in the Notice filed on 17 June 2016 at follows:

> *"1. THAT the composition of the assessors was unfair as there was two(2) female and one(10 male whilst the complainant was a female.*
>
> *2. THAT the Learned Trial Judge erred in the law by failing to clearly direct and define to the assessors during summing up the respective roles of the Judge and the assessors in respect to the case in the trial.*
>
> *3. THAT the Learned Trial Judge erred in law and in fact by failing to adequately put to the assessors all the necessary elements that must be proven for the count of rape by the prosecution as follows:*
>
> *(a) at paragraph 17 lines 2 and 3, the Learned Trial Judge failed to direct the assessors in summing up what carnal knowledge, or unlawful sexual intercourse means;*
>
> *(b) at paragraph 17 lines 5, 6 and 7, the Learned Trial Judge failed to direct the assessors in summing up that the unlawfulness of the physical act of intercourse must be proved and not just the act;*
>
> *(c) at paragraph 18, the Learned Trial Judge failed to direct the assessors in summing up what consent entails and what threats or intimidation alluded to mean; an*
>
> *(d) at paragraph 19, the Learned Trial Judge's direction was insufficient for the assessors to understand knowledge of the Appellant that the complainant did not consent, or recklessness of the Appellant as to whether the complainant consented.*
>
> *4. THAT the Learned Trial Judge erred in law and in fact by failing to adequately put to the assessors all the necessary elements that must be proven for the count of defilement by the prosecution as follows –*
>
> *(a) at paragraph 21, the Learned Trial Judge failed to direct the assessors in summing up what unlawful sexual intercourse means in the context of the offence of defilement as opposed to the offence of rape;*
>
> *(b) at paragraph 21, the Learned Trial Judge misdirected the assessors in summing up that the unlawfulness of the sexual intercourse is the penetration of the complainant's vagina with the Appellant's penis; and*

(c) *at paragraph 24, the Learned Trial Judge misdirected the assessors in summing up that the real issue the assessors to consider is whether the Appellant had sexual intercourse with the complainant.*

5. *THAT the Learned Trial Judge erred in law in failing to put to the Appellant the right to election on the second Count of defilement as to whether it should be trial in the Magistrate or High Court.*

6. *THAT the Learned Trial Judge erred in law and in fact by failing to direct the assessor in summing up that the prosecution must prove that the complainant did physically resist and/or she was forced to have sexual intercourse with Appellant.*

7. *THAT the Learned Trial Judge erred in law and in fact in failing to direct the assessors in summing up that in order to be convicted on Count 2, the prosecution must prove intention.*

8. *THAT the Learned Trial Judge erred in law and in fact in misdirecting the assessors when he stated at page 2 paragraph 4 line 4-5 of the summing up that "each element of the charge must be proved but not every element of the story".*

9. *THAT the Learned Trial Judge erred in law and in fact in failing to direct the assessors in summing up at paragraph 27 that the fact that the complainant was scared does not prove or mean that the complainant's fear was caused by the Appellant's threats or intimidation to submit to the sexual acts, for fear of bodily injury as directed in paragraph 18."*

[11] Ground 1 raises the issue of the composition of the assessors in so far as gender is concerned. It is claimed that, since the complainant was female and 2 of the assessors were female, prejudice ensured. Pursuant to section 224(2) of the Criminal Procedure Decree 2009 the learned trial Judge was required to ask the accused either personally or through his counsel if there was any objection to the selected assessors. There is no material presently before the Court to indicate that an objection had been taken by the Appellant's counsel or that any such objection had not been properly considered in accordance with section 224(3) of the Criminal Procedure Decree. This ground is not likely to succeed.

[12] Ground 2 alleges a failure by the learned Judge to direct the assessors on the respective roles of the trial judge and the assessors. The directions given in paragraphs 1 – 3 in relation to the respective roles of the judge and assessors are proper and sufficient. However leave is not required on a ground that involves a question of law only.

[13] Ground 3 raises an issue concerning the adequacy of the directions given to the assessors on the elements of rape. The directions given in paragraphs 16 to 20 of the summing up clearly explain the elements of rape and there is nothing further that could have been said. This ground raises a question of law only for which leave is not required.

[14] Ground 4 raises an issue concerning the adequacy of the directions given to the assessors on the elements of defilement under section 215(1) of the Crimes Decree 2009. In my judgment the directions given to the assessors in paragraphs 21 to 24 of the summing are again proper and clearly explains what is required of the prosecution to establish the offence of defilement under section 215(1) of the Crimes Decree. This ground involves a question of law alone. Leave is not required under section 21(1) (a) of the Act.

[15] Ground 5 raise the issue of a right to election to be tried in the Magistrate Court for the offence of defilement. It is only necessary to indicate that the offence of defilement is a summary offence under section 215(1) of the Crimes Decree. Under section 4(1)(b) of the Criminal Procedures Decree the right of the accused to elect is given only in relation to offences that are indictable but triable summarily. The power given to a magistrate to transfer a summary offence to the High Court is set out in section 188 and 191 of the Procedure Decree.

[16] Ground 6 raises an issue concerning consent. The Appellant alleges that the learned Judge should have directed the assessors to the effect that the prosecution must prove that the complainant did physically resist and/or that she was forced to have sexual intercourse with the Appellant. This ground can be considered with ground 9 which also raises the issue of consent. The issue of consent so far as was necessary for this trial was properly discussed by the trial Judge in paragraph 18 of his summing up and was

consistent with the definition of consent in section 206(2) of the Crimes Decree 2009. These grounds are not likely to succeed.

[17] Ground 7 raises an issue concerning the directions given by the trial Judge to the assessors on the offence of defilement. The Appellant claims that there was no reference to the requirement to prove intention. Under the Crimes Decree the term that is now used is fault element. Fault element includes intention and under section 19(1) of the Crimes Decree 2009 a person has intention with respect to conduct if he means to engage in that conduct. It was not suggested by the Appellant that he had sexual intercourse with the complainant but did not intend to do so. The defence was that the two incidents did not take place. The defence did not raise the issue of mistake as to the age of the complainant. This ground is not likely to succeed.

[18] Ground 8 claims that the Judge had erred when he told the assessors that *"each element of the charge must be proved but not every element of the story."* The quotation in the grounds of appeal is incorrect. In paragraph 4 of the summing up in the second last sentence the learned Judge explained that:

> *"Each element of the charge must be proved but not every fact of the story."*

There is no inconsistency in this statement nor are the observations inappropriate or prejudicial. This ground is not likely to succeed.

[19] In conclusion the grounds of appeal against conviction are unlikely to succeed and as a result the application for an enlargement of time is refused. Furthermore I have concluded that the grounds of appeal against conviction are vexatious and the appeal against conviction is dismissed under section 35(2) of the Act.

[20] The test for leave to appeal against sentence is whether the Appellant has established that there has been an arguable error by the trial Judge in the exercise of his sentencing discretion. The grounds of appeal against sentence are:

"10. THAT the Learned Trial Judge erred in law by failing to clearly state the aggravating facts that he is referring to whilst enhancing the sentence by five(5) years from the starting point of ten (10) years.

11. THAT the Learned Trial Judge erred in law in failing to use any guideline judgment to assist him in picking the starting point of sentencing.

12. THAT the sentence was unlawful as it was passed in consequence of an error of law."

[21] The first ground relates to aggravating factors. Although they have not he specifically listed in one paragraph, they are identified throughout the sentencing decision. They have been clearly stated. The five years added for aggravating factors does not constitute an arguable error by the judge in the exercise of the sentencing discretion.

[22] Ground 2 claims that the judge failed to state any authority for his selection of ten years as a starting point for determining the head sentence. The starting point is consistent with current sentencing practices in Fiji for the offence of rape of a child by an accused who is a family member, albeit the extended family. The starting point is consistent with the authority of **Drotini v The State** to which the learned Judge referred in his sentencing decision. There has been no error in the exercise of the sentencing discretion.

[23] So far in ground 3 is concerned, the Appellant has failed to identify the alleged error of law.

[24] In my judgment leave to appeal should be refused and the appeal against sentence dismissed under section 35(2) of the Act as being vexatious.

Orders:

1. *Application for enlargement of time to appeal conviction is refused*

2. *Appeal against conviction is dismissed under section 35(2) of the Court of Appeal Act.*

3. *Application for leave to appeal sentence is refused.*

4. *Appeal against sentence is dismissed under section 35(2) of the Court of Appeal Act.*

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