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

CRIMINAL APPEAL NO. AAU 0049 OF 2014
(High Court HAC 207 of 2011)

BETWEEN : **OTETI SIVOINATOTO**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr S Karavaki for the Appellant**
Mr A Singh with Mr S Babitu for the Respondent

Date of Hearing : **2 June 2017**

Date of Ruling : **22 June 2017**

RULING

[1] This is an application for an enlargement of time to apply for leave to appeal conviction and sentence. The application is made under section 26(1) of the Court of Appeal Act

1949 (the Act) and comes before a judge of the Court of Appeal pursuant to section 35(1) of the Act.

[2] The Appellant appeared before the High Court at Lautoka charged with one count of rape contrary to section 207(1) and (2)(b) and one count of abortion contrary to section 234(1) and (4)(b) of the Crimes Act 2009.

[3] At the trial the Appellant pleaded not guilty to the first count of rape and guilty to the second of abortion. The learned trial Judge accepted the plea of guilty to the second count as being unequivocal and proceeded to convict the Appellant. On the first count a majority of the assessors returned opinions of guilty whilst the third assessor returned an opinion of not guilty on the rape charge but guilty on the alternative offence of defilement. In his reasoned judgment the learned Judge indicated that he accepted the evidence of the complainant that she had not consented to sexual intercourse. The trial Judge found the Appellant guilty on the first count of rape and proceeded to convict him accordingly. On 27 March 2014 the Appellant was sentenced to 13 years imprisonment on count one and 2 years imprisonment on count two. The terms of imprisonment were ordered to be served concurrently with a non-parole term of 10 years.

[4] On 19 May 2014 the Appellant filed a notice of appeal which should have been filed no later than 26 April 2014. The appeal was filed about 22 days out of time. The principles to be considered when determining an application for an enlargement of time are well settled and were conveniently summarized by the Supreme Court 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 . The Appellant carries the onus of establishing that in all the circumstances it would be just to grant the application.

[5] As already noted the notice of appeal was filed some 22 days out of time. Although the delay is not in itself substantial it does call for an explanation. In his affidavit in support the Appellant explains that although represented at his trial, his lawyer did not discuss the question of an appeal. After his trial he was in effect unrepresented until his church pastor visited him and then referred him to his present Counsel. Although there may be some sympathy for the Appellant's situation, the explanation alone would not be sufficient to excuse the delay. However, for the reasons that will be stated briefly below the Appellant should be granted an extension of time. There are at least three matters that should be considered by the Court of Appeal.

[6] The issue raised by the Appellant in the written submissions and at the hearing relates to the manner in which the learned Judge directed the assessors and himself concerning the significant omission of a knife threat when the complainant made her police statement and the inclusion of that evidence at the trial. Although the learned Judge has summarized her evidence in paragraphs 31 to 34 the only guidance provided as to how the assessors and the judge himself should assess the weight to be given to that evidence and the effect, if any, of the omission in the out of court police statement appears in paragraph 28 of the summary. It is arguable that the explanation is confusing and insufficient.

[7] However there are two further matters of some considerable significance. The first concerns the particulars of the offence of rape in the indictment. The offence appears to be worded as a specimen or representative count. Such a procedure is authorized under section 70(3) Criminal Procedure Act 2009. I say appears since if only one incident was the subject of the count, the particulars of the offence were not sufficiently particularized.

[8] The particulars of the offence were stated as:

> *"Oteti Sivoinatoto between September 2010 and May 2011 at Lautoka in the Western Division had carnal knowledge of MN without her consent."*

[9] Section 70(3) states:

"When a person is charged with any offence of a sexual nature and the evidence points to more than one separate act 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."

[10] Section 70(3) is in almost identical terms to the provision in the English legislation which was discussed in some detail by the Court of Appeal in **R v Hobsen** [2013] 1 WLR 3733.

[11] Apart from the statement of offence omitting the mandatory phrase, the issue is whether the complainant when giving her evidence described one specific incident or a pattern of sexual misconduct. If the complainant was giving evidence of one act of sexual misconduct, whether rape or defilement, the particulars of the offence could be said to be insufficient for the Appellant to properly prepare his defence. If the complainant described a pattern, then specific directions must be given to the assessors and the judge himself. This matter should be considered by the Full Court.

[12] Of even more concern is the basis upon which the learned judge accepted the majority opinions of the assessors and proceeded to find the Appellant guilty on the rape count. In paragraph 13 of his judgment delivered on 25 March 2014, the learned Judge remarked:

"The majority of the assessors have rejected the evidence of the accused. Considering all other evidence available and applying the test of probability to the accused's evidence, I agree with the decision to reject the evidence of the accused."

[13] It is arguable that the learned Judge has misdirected himself in relation to the burden of proof.

[14] For all of the above reasons I would grant an enlargement of time to appeal against conviction.

[15] In relation to the sentence for rape, the aggravating factors upon which the judge relied include *"(c) victim was subject to more than one sexual act"* and *"(d) you had made the victim sexually active at a young age."* It is arguable that these matters are not aggravating factors when sentencing on conviction for one count of rape.

[16] In relation to the sentence for abortion, it is noted that the Appellant has already served that sentence. It must be noted, however, that the Appellant's role was more akin to the offence under section 236 of the Crimes Act being the offence of *"supplying drugs or instruments to procure abortion."* Under these circumstances it is arguable that the sentencing discretion miscarried.

<u>*Order*</u>:

1. *Extension of time is granted for leave to appeal against conviction and sentence.*
2. *Leave to appeal conviction and sentence is granted.*
3. *Appellant is to file and serve a notice of appeal within 30 days from the date of the Ruling.*

W. Calanchini
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Hon. Mr. Justice W D Calanchini
<u>PRESIDENT, COURT OF APPEAL</u>