

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court of Fiji]**

**CRIMINAL APPEAL NO:AAU0087 of 2015**  
**[High Court Case No. HAC198 of 2012S]**

**BETWEEN** : **ILAINAVAKI**  
*Appellant*

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

**Coram** : Hon. Mr. Justice Daniel Goundar

**Counsel** : Mr M Fesaitu for the Appellant  
Ms S Puamau for the Respondent

**Date of Hearing** : 1 August 2017

**Date of Ruling** : 8 August 2017

**RULING**

[1] This is an application for an extension of time to seek leave to appeal against conviction only. The appellant was charged with one count of rape contrary to section 149 of the Penal Code. He elected to be tried in the Magistrates' Court. Following a trial, he was convicted of the charge. After recording the conviction, the learned trial magistrate transferred the case to the High Court for sentence pursuant to section 190(1) (b) of the Criminal Procedure Act 2009. On 18 October 2012, the High Court sentenced the appellant to 15 years' imprisonment with a non parole period of 12 years. On 13 July 2015, the appellant filed his untimely notice of appeal. The appellant also seeks bail pending appeal.

[3] Section 35(1) of the Court of Appeal Act gives a single judge power to grant an enlargement of time to appeal and bail pending appeal. The factors that are relevant to the determination of an extension of time to appeal are:

- (i) The reason for the failure to file within time.
- (ii) The length of the delay.
- (iii) Whether there is a ground of merit justifying the appellate courts consideration?
- (iv) Where there has been substantial delay, nonetheless is there a ground that will probably succeed?
- (v) If time is enlarged, will the respondent be unfairly prejudiced? (*Kumar v State* unreported Cr App No CAV0001 of 2009; 21 August 2012).

[4] The length of the delay is 2 years and 9 months. The reasons for the delay are explained in the appellant's affidavit. The appellant states that he was not aware of his right of appeal because he is illiterate and the learned High Court judge did not inform him of his right of appeal after sentencing him. Appellate courts have stressed on numerous occasions that ignorance is not a good reason for not complying with the appeal rules and procedures. In the present case, the learned trial magistrate informed the appellant of his right of appeal in the judgment of conviction. When the appellant appeared in the High Court for sentence, he was represented by counsel. There is no suggestion that the appellant was not informed of his right of appeal by his counsel.

[5] The real question is whether there is a ground of merit justifying the appellate courts consideration? The grounds of appeal are:

- (1) The Learned Magistrate erred in law and in fact when he did (sic) accord a fair trial to the Appellant when he did not enquire from the Legal Aid office through the Magistrate Court registry why there was no Legal Aid lawyer present on the day of the trial given that the Legal Aid lawyer as per the court record was present on one occasion previously and there was no record of withdrawal of legal representation to ensure legal representation.
- (2) The Learned Magistrate erred in law and in fact when he did in his judgement predetermined the guilt of the appellant when he used the word

“victim” much earlier on in his summary of the evidence way before he came to his decision.

- (3) The Learned Magistrate erred in law and in fact when he allowed and considered was contained presumably under the heading of “history relayed by the victim” in the medical report when the State through the complainant did not lead any evidence to that regard nor called the examining medical doctor to give evidence.

#### **Right to counsel**

- [6] Although the right to counsel is a constitutional right of an accused, the right is not absolute (*Balaggan v State* [2016] FJSC 47; CAV0022.2016 (4 November 2016)). The appellant was aware of his right to counsel. When the appellant was arraigned in the Magistrates’ Court on 22 June 2010, he was represented by legal aid counsel. Thereafter, counsel did not appear in the matter. Obviously, the appellant was informed of his right to counsel. There was no legal obligation on the trial court to arrange counsel for the appellant. The onus was on the appellant to engage counsel who could represent him especially when he was on bail pending trial. The fact that the appellant was unrepresented at the trial was his own making. This ground is unarguable.

#### **Complainant referred to as the victim in the judgment**

- [7] The complainant was a child. In his judgment, the learned trial magistrate referred to her as the victim. The appellant contends that the referral of the complainant as the victim shows lack of objectivity and fairness in the judgment. No authority has been cited for this contention. The complainant no doubt was a victim of an alleged crime. The issue was whether the appellant was the perpetrator of that alleged crime. The use of the word victim to refer to the complainant in the judgment is not an appealable error (*Kaiyum v State* [2014] FJCA 35; AAU0071.2012 (14 March 2014) at [21].

#### **Relying on inadmissible hearsay evidence to convict**

- [8] The prosecution tendered the complainant’s medical report in evidence. The examining doctor was not called to give evidence. The medical report contained the history relayed to the examining doctor by the complainant. That history was recorded by the examining doctor. Since the doctor was not called to give evidence, what was recorded

in the report was hearsay and was inadmissible (*Senikarawa v State* [2006] FJCA 25; AAU0005.2004S (24 March 2006) at [22]). In his written judgment, the learned trial magistrate referred to the inadmissible hearsay evidence to determine whether the complainant was a credible witness. This is a ground of appeal which will probably succeed. But I am not satisfied that the ground of appeal has a very high likelihood of success for the appellant to be released on bail pending appeal.

**Result**

[9] Extension of time granted.

Leave to appeal granted on ground three only.

Bail refused.



A handwritten signature in black ink, appearing to be "Daniel Goundar", followed by a horizontal line extending to the right.

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Hon. Mr. Justice Daniel Goundar  
**JUSTICE OF APPEAL**

**Solicitors:**

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the State