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

CRIMINAL APPEAL AAU 102 OF 2016
(High Court HAC 64 of 2013)

BETWEEN : **ELIKI SERU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr T Lee with Mr K Prasad for the Appellant**
Mr M Korovou for the Respondent

Date of Hearing : **18 September 2018**

Date of Ruling : **23 October 2018**

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on one count of rape. On 21 September 2015 he was sentenced to 9 years imprisonment with a non-parole term of 6 years. However a period of 285 days was ordered to be deducted from

the sentence as time already served pursuant to section 24 of the Sentencing and Penalties Act 2009. This is his application for an enlargement of time to appeal against conviction.

[2] The application is made pursuant to section 26(1) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court of Appeal power to enlarge time.

[3] The factors to be considered for an enlargement of time are (a) the length of the delay, (b) the reason for the failure to file within time, (c) whether there is a ground of merit justifying the appellate court's consideration and 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: **Kumar and Sinu –v- The State** [2012] FJSC 17; CAV 1 of 2009, 21 August 2012.

[4] The delay in filing the application for leave to appeal against conviction is about 10 months. The reasons for what can only be described as a substantial delay are set out in the affidavit sworn on 11 June 2018 by Eliki Seru and relate to a mistaken belief that counsel at the trial would represent the appellant at the appeal, financial constraints and legal aid delay.

[5] In my judgment the appellant has not given any compelling reasons for this lengthy delay. The question is whether there is any ground of appeal against conviction that is likely to succeed.

[6] The background facts may be stated briefly. The appellant was drinking grog (kava/ yaqona) with the complainant and others at his aunt's place at Drekena from 9.00pm on 9 January to 2.00am on 10 January 2013. Thereafter from about 4.00am to 11.00am the appellant, the complainant and others drunk "*home brew*" at the Nasilai cemetery. After leaving the cemetery the appellant and the complainant were walking together on a path surrounded by high grass. The appellant pushed the complainant on to the ground nd then punched her on the left side of her mouth rendering her unconscious. The appellant

then proceeded to have sexual intercourse while the complainant was unconscious. When the complainant regained consciousness the appellant was on top of her with his penis inside her vagina. When the appellant realized that the complainant had regained consciousness he appeared surprised and stood up. The ground of appeal against conviction is:

> *"The conviction is not supported having regard to the totality of the evidence at trial, in particular, to the following:*
>
> *(a) found that there was penetration but the State failed to prove beyond reasonable doubt the Appellant's involvement through the medical evidence [i.e. Complainant's vaginal swap (sic) and the Appellant's (sic) siliva test]; and*
>
> *(b) the Learned Trial Judge had erred in law and fact in failing to caution himself and the assessors of the dangers of relying on the complainant's evidence regarding the rape; and*
>
> *(c) found that there was penetration but the learned Trial Judge failed to warn himself and the assessors of the dangers of convicting the Appellant on circumstantial evidence."*

[7] Ground (a) claims that the medical evidence failed to establish the appellant's involvement beyond reasonable doubt. However in this case, as in most cases, the medical evidence can go no further than to indicate whether there has been recent sexual activity that is consistent with the complainant's allegation. Very rarely can the medical evidence confirm whether sexual intercourse took place without consent or whether it was the appellant who was involved. The prosecution relied on the direct evidence of the complainant.

[8] All the issues raised by this ground of appeal are adequately considered by the learned Judge in his judgment delivered on 16 September 2015. The assessors had returned unanimous opinions of guilty. In a lengthy concurring judgment the trial judge sets out clearly his reasons for agreeing with the guilty opinions. In paragraph 26 the learned judge considers the identity of the offender. In paragraph 27 the Judge considers the issue of penetration. There was no requirement to consider the issue of circumstantial

evidence. The direct evidence given by the complainant was accepted by the trial judge for the reasons stated in his judgment.

[9] Although the trial judge has discussed the issue of consent, it is apparent from the material in the record that the appellant's defence was that the incident had never occurred and that the complainant was lying .

[10] The issue arising out of the grounds of appeal relating to the medical evidence is considered by the trial Judge in paragraphs 14 to 19 of the judgment.

[11] In my judgment none of the issues raised by the appellant in the grounds of appeal are likely to succeed. As a result the application for an enlargement of time to appeal conviction is refused.

Order:

Application for enlargement of time is refused.

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