

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

**CRIMINAL APPEAL NO. AAU 120 OF 2016**  
**(High Court HAC 83 of 2013)**

**BETWEEN** : **SEMI TUBUDUADUA** *Appellant*

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

**Coram** : **Calanchini P**

**Counsel** : **Mr T Lee for the Appellant**  
**Mr S Vodokisolomone for the Respondent**

**Date of Hearing** : **19 September 2018**

**Date of Ruling** : **29 November 2018**

**RULING**

[1] Following a trial in the High Court at Suva the appellant was convicted on one count of rape contrary to section 207(1) and (2)(b) of the Crimes Act 2009. The particulars were that the appellant on 16 February 2013 at Velau Drive, Kinoya inserted his finger into the complainant's vagina without her consent. On 10 February 2016 the appellant was

sentenced to 6 years 11 months and 2 weeks imprisonment with a non-parole term of 5 years.

- [2] This is his application for an enlargement of time for leave to appeal against conviction and sentence. The application is made under section 26(1) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives power to a single judge of the Court 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 notice of appeal filed by the appellant was dated 26 August 2016 and as a result was about 5½ months out of time. The reason for the delay is set out in the affidavit sworn on 27 June 2018 by the appellant in support of his application. The delay is succinctly explained in paragraph 7 as being caused by the appellant's mistaken belief that his trial Counsel (from the Legal Aid Commission) would have filed his grounds of appeal against conviction within time. However the appellant does not depose that he instructed his trial Counsel to file within time nor is there any affidavit filed by Counsel who represented the appellant at the trial. I do not consider the explanation to be sufficiently compelling to excuse the delay which must necessarily be regarded as substantial. As a result the question at this stage is whether any of the grounds of appeal are likely to succeed.
- [5] The grounds of appeal set out in the Amended Notice of Appeal filed on 6 July 2018 are as follows:-

"1. THAT the learned Trial Judge erred in law:-

- (a) *By not directing the assessors adequately and properly on the weakness of identification before the [assessors] could act upon it.*
  - (b) *By not directing the assessors as to why there is a need for special caution and why it is given. Failure to do so denied the Appellant a fair trial.*
2. THAT *the learned Trial Judge erred in principle and fact by lacking to provide a fair and balance Summing Up when directing the assessors, in particular, to the following:*
- (a) *Directing to the assessors the experience of the Courts regarding reactions of victims of rape and/or sexual offences; and*
  - (b) *Directing to the assessors to speculate on the mental condition of the complainant to consent when no expert evidence was given regarding the mental condition of a person [complainant] who is/was intoxicated.*
3. THAT *the conviction was unsatisfactory 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 lack of consent; and*
  - (b) *by drawing inferences to the complainants reaction when no satisfactory evidence was produced to justify the change of complainant's intoxicated state of mind to that of an "alert mind"; and*
  - (c) *disregarding the law on identity and drawing inferences to justify that complainant motherly instinct is the reason for her to look at her daughter rather than to look at the person who had committed an consensual act on her; and*
4. THE *Learned Trial Judge erred in principle when sentencing the Appellant, in particular, to the following:*
- (a) *Considering a disputed (sic) to enhance the sentence; and*
  - (b) *Relying on unsupported medical facts to enhance the sentence; and*
  - (c) *Not properly considering the mitigating factors to adequately decrease the sentence."*



[6] The first ground of appeal against conviction relates to the adequacy of the directions on the voice recognition evidence given by the complainant. As the judge noted in his summing up at paragraph 86 “*It is clear that the prosecution has only evidence of identification by voice to connect the accused to the offending act.*” The directions on voice recognition are set out in paragraphs 86 and 87 of the summing up.

[7] In **Davis -v- R** [2004] EWCA Crim. 2521 the Court of Appeal noted at paragraph 29:

*“... we accept that voice identification (or here more precisely recognition) evidence needs to be approached with even greater care than usual identification or recognition evidence. But the general principles governing identification stated in Turnbull (emphasis added) apply to both cf e.g. Hersey [1997] EWCA Crim. 3106 (1 December 1997) (1998) Crim. L.R. 281.”*

[8] In my opinion the submission that in the circumstances of this case the directions and the judgment have not sufficiently considered the inherent dangers of relying on voice recognition evidence alone to support a finding of guilt beyond reasonable doubt raises a strong argument.

[9] In ground 2 the appellant raises two issues arising out of the summing up to the assessors. The first issue relates to observations in paragraphs 14 and 15 of the summing up concerning the reactions of rape victims. However in a reasoned judgment delivered on 8 February 2016 the trial judge has clearly outlined the evidence upon which he relied for agreeing with the majority opinions of the assessors. The observations in the summing up were not stated as matters upon which the trial Judge relied when he accepted the majority guilty opinions.

[10] The second issue can be considered as raising an issue that ignores the nature of a criminal trial in Fiji. It is ultimately a matter for the final trier of fact (i.e. the trial judge) to draw inferences. There is no indication of speculation in his judgment. Ground 2 is not likely to succeed.

[11] Ground 3 raises three issues. The first issue is consent and whether the State proved lack of consent beyond reasonable doubt. The statutory definition of consent in section 206 is sufficient on the evidence to enable the learned Judge to conclude beyond reasonable doubt that the complainant had not consented. The appellant's defence was that the act never took place. The other two issues challenge the findings on the evidence made by the trial Judge. It is alleged that the conviction was unsafe and unsatisfactory having regard to the totality of the evidence. However unsafe and unsatisfactory are concepts that are not recognized under section 23 of the Act as grounds for setting aside a conviction. In my view ground 3 is not likely to succeed.

[12] As for the sentence appeal, the reference by the trial judge to the complainant being vulnerable may be considered as being a reference to the fact that when the appellant placed himself next to her she was asleep and was only awoken by his proximity to her. The effect of the incident on the complainant does not require specific medical evidence. That she had felt insecure due to the absence of her husband added to the trauma of having been violated by her brother in law. The starting point was at the lowest end of the tariff for rape and the discount for mitigating factors was reasonable. The issues raised in the ground of appeal against sentence are unlikely to succeed as there has been no error in the exercise of the sentencing discretion.

Orders:

1. *Application for enlargement of time to appeal conviction is granted on ground 1 and is refused on grounds 2 and 3.*
2. *Leave to appeal on ground 1 is granted.*
3. *Application for enlargement of time to appeal sentence is refused.*



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