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

CRIMINAL APPEAL NO. AAU0073 of 2012
(High Court HAC 048 of 2010)

BETWEEN : **URAIA WAQA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Gamalath JA
Bandara JA

Counsel : **Mr A. Vakaloloma for the Appellant**
Mr S. Vodokisolomone for the Respondent

Date of Hearing : **8 May 2018**

Date of Judgment : **1 June 2018**

JUDGMENT

Calanchini P

[1] I agree that the renewed application for an enlargement of time should be refused.

Gamalath JA

The Background

[2] At the outset of the hearing of this appeal the issue that came up for the Court's consideration is regarding the nature of the present appeal, in the sense , as it evinces from the process followed in filing the present appeal, the appellant seemed to have been acting under the misconception that this is an appeal against the conviction, (the details of which shall be discussed later in the judgment), in terms of "section 21 (1)(b) of the Court of Appeal Act 1949. Originally, the appellant had delayed by one year and three months in filing his application for an enlargement of time. The learned Single Judge held that the appellant had failed to provide any "compelling reasons for this long delay" and hence "the length of the delay weighs against the granting of an extension of time". Based on such findings and also due to other well considered attendant circumstances the learned Single Judge decided finally "to refuse to grant the extension of time to prosecute the appeal and consequently the leave to appeal application was refused."

Consequent upon the ruling of the learned Single Judge, the appellant through his learned Counsel had lodged the present "notice of appeal before the full Court," and it states that the notice of appeal has been filed "pursuant to Section 21 (b) of the Court of Appeal Act 1949. It is important to note that the Single Judge's Ruling was handed down on 6 May 2015. However, the appellant had filed the present notice of appeal on 29 January 2018. In other words there is nothing on record to indicate that the appellant has taken any initiatives pursuant to Section 35(1) (a) read with Section 35(3) of the Court of Appeal Act 1949 to make a renewal application, between 6 May 2015 and 29 January 2018.This is where the misconception to which I made reference at the outset lies. Since of its importance and relevance to this appeal, I shall first deal with that issue.

The Details relating to the filing of the present Notice of Appeal

[3] The appellant was convicted on two counts of Rape on 20 June 2011at Labasa High Court and sentenced to a total of 13 years imprisonment with a non–parole period of 10 years imprisonment. He was imprisoned at Suva Correction Center. The learned Counsel appearing for the appellant submits that the appellant had lodged a timely

notice of appeal against his conviction and sentence and handed it over to the authorities at the Correction Center. As a matter of fact, according to the submissions of the learned Counsel for the appellant, the said notice of appeal was personally prepared by him and caused to be delivered to the appellant, so that the appellant could submit it after placing his signature and the date. The learned Counsel for the appellant further stated that the appellant had duly submitted the notice of appeal in time to the Prison Authorities. However, owing to a certain purported inadvertence on the part of the prison authorities the notice of appeal had not been forwarded to the Court Registry on time for follow up action. Pursuant to the submissions of the learned Counsel for the appellant, I went through the Court Record to find out whether there had been any such notice of appeal available in the Court Record. My finding is that such a notice of appeal is not available in the Court Record.

[4] Be that as it may, (as already alluded to in the first paragraph herein), the learned Counsel for the Appellant had taken subsequent steps to address the situation by filing an application before a single judge, which contained *inter alia* a request for an extension of time for leave to appeal against conviction and sentence. As borne out by the Court Record that matter was heard before the learned Single Judge on 16 May 2014, who in turn had refused to "grant extension of time and thus the application for leave to appeal was refused."

[5] Thereafter, the learned Counsel for the appellant, on 29 January 2018 had filed a fresh Notice of Appeal pursuant to Section 21(1) (b) of the Court of Appeal Act 1949 and stated that the grounds contained therein are "arguable on question of fact and law". I am constrained to state that this is clearly based on a misconception, for Section 21 has no application to the present situation relating to this appeal. It is my understanding that following the ruling of the Single Judge refusing to grant the leave to appeal on 6 May 2015, the appellant should have made a renewal application under Sec 35 (3) 0f the Court of Appeal Act 1949.

However, pursuing the course of justice by ignoring the legalities involved in the present appeal and while assuming that the ostensible renewal application has been made in conformity with the correct procedure I now wish to turn to the grounds of appeal contained in the present Notice of Appeal upon which the learned Counsel

had placed reliance before the learned Single Judge. In relation to such situations the settled law demands the fulfillment of certain threshold requirements for the successful consideration of a renewal application for enlargement of time.

[6] The learned Single Judge in his Ruling had referred to them by citing the decision in **Livai Nawalu v. The State**, (unreported) Criminal Appeal No. CAV 0012/2002; 28 August 2013, and accordingly in considering the grant of the enlargement of time the Court shall be satisfied on the following;

(i) The reason for the failure to comply;

(ii) The length of the delay;

(iii) Is there a question which justifies serious consideration?

(iv) The Degree of prejudice to the respondent in enlarging time.

[7] As far as this appeal is concerned, my main focus is on the (iii) factor above for in my opinion if there is any question that "justifies serious consideration" it would inevitably assume the force of being the deciding factor of this application.

[8] In other words under the (iii) factor above I shall now be examining the evidential matrix of this case to determine whether in the light of the evidence adduced at the trial in the High Court the appellant can claim a reasonable prospect of succeeding in his appeal? I shall now be focusing on the grounds of appeal contained in the Notice of Appeal, that were considered by the Single Judge at the leave to appeal hearing;

Grounds of Appeal

[9]

> *"(i) That the learned trial Judge failed to give a balanced summing up that resulted in the conviction to be unsafe and unsatisfactory.*
>
> *(ii) That the learned trial Judge failed to properly direct himself and direct assessors according to law when the assessors gave verdict of guilty in this case largely built on the states of mind and identification evidence of the complainant that under all the circumstances of the case, the finding of guilt was unsafe and unsatisfactory; and*

(iii) *That the learned trial Judge failed to properly direct himself and assessors according to law and facts of identification evidence as in this case, the complainant identified the person who raped her to be having a gold filling in the upper interior teeth, the assessors and the court were shown in court during the hearing that the appellant had no gold teeth, and were shown by opening his mouth that the Appellant has missing teeth in the front interior of his mouth, assessors continue and found him guilty although the identification evidence is important to be considered under all the circumstances of the case, the finding of guilt is unsafe and is unsatisfactory; and*

(iv) *That the learned trial Judge failed to direct assessors on the absence of interviewing officer who were supposed to give evidence, and was not able to be cross examined by the defence, and was not there to confirm and tender his interview records after the Defence objected and insisted that the interviewing officer to be called to confirm the complainant statement that she identified the rapist at the time of the committal of the offence of rape that the person has gold teeth in the front teeth.*

(v) *That the learned trial Judge failed to direct Prosecution to ensure all its witnesses are present and be called to give evidence and be cross examined by the Defence for the purpose of fair trial, and that such non direction placed the Appellant to disadvantage and that the verdict was therefore unsafe; and*

(vi) *That the learned Judge placed undue emphasis and weight in summing up to the evidence paragraph H – The analysis of the evidence sub-paragraph (ix) and (x) of the identification but never placed any emphasis on the issue of the complainant's identification and recollection of the rapist who has gold teeth and evidence of A/IP Viliame Tokalauvere the officer who was told of the identification and assisted in the identification parade, and gave evidence of what he saw during the parade against the Appellant, but failed to confirm when Appellant was asked by the court to open his mouth and see that he has no gold teeth in front and has no teeth for that matter to draw any evidential reference which would have impacted the prosecution's case.*

(vii) *That the learned Judge failed to properly direct himself and the assessors in law and in fact on the issue of 'Gold Teeth' that it was a matter of identification to confirm the offender's identification then a person without a gold tooth cannot be evidently correct to be the offender without gold teeth."*

[10] As can be seen, the grounds of appeal are unclear and ambiguous. The learned Single Judge had been quite correct in the observation spelt out in the paragraph [6] of his Ruling that "The grounds of appeal are indeed poorly drafted. All grounds can be condensed into two issues. The first issue relates to one particular aspect of the identification of the appellant by the complainant. The second issue relates to the prosecution not calling certain witnesses." I could not agree more with the learned Single Judge's aforementioned ruling. Since the grounds of appeal are capable of posing a problem with regard to their comprehension, I shall also follow the broad conceptualization proposed by the learned Single Judge in dealing with the Grounds of Appeal. Accordingly the aforementioned grounds can be consolidated into two main issues. The first relates to one particular aspect of the evidence of the complainant; accordingly, the main issue revolves around a missing golden tooth, the details of which shall be discussed in the following paragraphs more fully. The second issue is directed at the matter where the prosecution has not called certain witnesses to establish its case. Further the learned trial Judge's summing up lacks balance and objectivity. This is most certainly an unsatisfactory ground of appeal. I shall be dealing with that towards the end of the judgment.

The Evidence

[11] The victim, Shiri Wati, a widow had been living in Korowiri with her son for well over 30 years, when she fell victim to the alleged two incidents of rape referred to in the indictment. What can be gathered from the victim's evidence at the trial was that she was a hardworking, self-relying woman who used to sweat and toil on her farm on a daily basis to support her family.

At the trial, the victim started her testimony by referring to the events relating to the second count of rape, allegedly took place on 14 December 2010. Accordingly, in the morning of that day she had been emptying a sack of coconuts at a certain place near the bathroom on her farm, when she felt someone approaching her from behind. No

sooner she looked back than she was silenced by the man who approached her by pressing her mouth with one hand and with the other hand he had forced her to lie on the ground. Thereafter, he had sexual intercourse with her, for about five minutes. Shiri Wati claimed that she was frightened to death. In broad daylight looking straight in to his face the victim had *recognized* the appellant, who she had known for some time even before this incident had happened. (*emphasis added*)

At the trial the victim recognized the appellant in the dock; she had clear remembrance of the clothes he was wearing when he approached her from behind; accordingly, he was wearing 'a blue singlet and ¾ pair of shorts.' There was one dark blue lining in the front of the shorts; and the person was "fair and fit'' according to the description given by the victim in her testimony.

[12] The *remembrance* of the appellant as referred to above is directly related to the first count of Rape in the indictment. The sequence of events as unfolded in her evidence shows that approximately about two to three months prior to the above incident the appellant had raped her once before; accordingly, on that occasion the appellant had unexpectedly arrived at the paddy field where she had been working in the morning and tried to befriend her by getting her engaged in a conversation. He had inquired from her as to why she was doing the work of a man; he had been lingering around for about half an hour to strike up a conversation; He kept a distance of about 2 steps away from the victim and had been in her view all along. The appellant had told her that someone was trying to untie her goats and upon hearing it, the victim had started to walk towards the area where the goats were herded. The appellant had followed her and at one point along the way he had grabbed her with one hand and pulled her down on the ground, while pressing her mouth with the other hand to make her silent. There he has had sexual intercourse with her.

Out of embarrassment, she did not report the first incident to anyone. However, the second incident was promptly reported to her sister in law, the prosecution witness one Sushila Devi, whose testimony revealed that when the victim came to her house soon after the alleged second incident she looked traumatized and shaken by what had happened. This piece of evidence, according to trite law shows the consistency of the victim's version of events.

The issue of identification of the appellant

[13] Having referred to the victim's evidence in this case, it is quite clear that the identification of the appellant by the victim is not based on a mere recollection of her memory of a person who has had a brief encounter with her, but of a person who has had invaded her privacy on two occasions within a short span of mere two to three months. As already stated earlier, on the first occasion the appellant even spent a considerable length of time with her at the paddy field, making efforts to strike up a conversation with her. Both these incidents took place in broad daylight in close proximity. Importantly, at the trial the line of cross examination of the victim had been such that there was not even a suggestion put to the victim to challenge the visual identification of the appellant.

The evidence relating to the identification parade

[14] At the identification parades held on 17 December 2010the complainant identified the appellant. Although this is not directly relating to the issues of this appeal, at this point I wish to place on record a comment on a matter that attracts my concern. In conducting the identification parade, the investigating police following a rather peculiar procedure, had organized three different identification parades in a row, requiring the victim to point out the suspect. The appellant had elected to take up three different positions in the three parades. It is baffling as to why the police have followed this rather peculiar procedure, whereby three separate parades had been held, despite the clear and unequivocal identification made of the appellant by the victim at the very first identification parade itself. Taking the evidence of the victim as a whole it is abundantly clear that the recollection of the victim of the appellant as the perpetrator of the alleged two acts of rape was not solely dependent on a "fleeting glance taken under difficult circumstances". (see, *Turnbull guidelines*; [1976] 2 All ER 544). The positive identification of the appellant by the victim was based on clear evidence of remembrance. Importantly, there was nothing in proceedings to indicate that there was any objection raised by the defense against the procedure adopted in holding the three identification parades; however, since it is important for us to remind of the significance of the evidence relating identification parades I wish to briefly relate the relevant law;

> *"Identification parades must be conducted with scrupulous fairness, especially where the prosecution case on identification rests almost entirely on evidence of one witness. The only satisfactory method of identification where the suspect or suspects are paraded is where the suspect or suspects are placed amongst a sufficiently large number of persons of similar age, build, clothing, and conditions of life and the witness is then asked without prompting or assistance to recognize the offender."*

Lesumailau v. State [2001] FLR105, [2001] 1 FLR 446 (22 November 2001)

See also **R v. Jeffries** [1947]NZLR 595.

Cross on Evidence (NZ Edition) pgs 59 and 60, the Learned Author commented that

> *"The police must act with exemplary fairness. It would be wrong, for example, for a parade to be so composed that none of the other men in the parade could possibly be mistaken for the suspect.*
>
> *The only satisfactory method of identification where a suspect or suspects are paraded is where the suspect or suspects are placed amongst a sufficiently large number of persons of similar age, built, clothing and condition of life."*

However, as far as the present appeal is concerned there had never been any objection raised to the propriety of the procedure adopted in conducting the parades. Consequently, at the trial, the evidence relating to the parade was admitted in evidence without any objection being raised.

Appellant's evidence at the trial

[15] Against the background of such uncontroverted evidence the appellant testified at the trial. He denied the allegation totally. He claimed that he was elsewhere at the material time to the incident on 14 December 2010.

[16] Taking the appellant's evidence as a whole, his clear stance has been that on the one hand he denied the incident of rape contained in the second count and on the other hand he denied having any prior knowledge of the victim. Strangely, however, his testimony is devoid of any reference to the first incident of rape referred to in the first count of the indictment, which had been substantiated by the un-impeached evidence of the victim. Although there is no evidential or even legal burden cast on the

appellant to negative the allegations against him, the fact that the evidence for the prosecution stands uncontroverted is a significant matter that explains the final outcome of the trial in this case.

The main ground of appeal; the issue relating to "the missing gold tooth"

[17] As contained in the main ground of appeal the appellant's main thrust of the argument against the conviction revolves around one particular point relating to a "missing gold tooth", which the victim had observed as had been worn by the appellant in his upper jaw on both encounters she had had with him whilst she was being sexually assaulted.

[18] The evidence of the victim in relation to that fact is that on both occasions, when the appellant accosted her, she had seen him wearing "gold teeth on his left upper jaw."

[19] However, at the time of the holding of the parades, the appellant showed no indication of having any such gold teeth and based on that fact the main ground of appeal has been formed to say that the identification of the appellant is on a wrong footing and thus the prosecution had failed to prove beyond any reasonable doubt that the appellant is the actual perpetrator.

[20] In relation to this matter the un-contradicted evidence of the prosecution witness Sergeant 1058 Viliame Tokalauvere of Labasa Police Station is quite pertinent. According to his testimony, he had seen the appellant's 'gold teeth' before the commencement of the identification parade. Describing it more fully, the witness states as follows:

> *"During the conversation I saw a gold filing in the upper set of his teeth. It was at the upper frontage of his set of teeth."*

Further answering the cross-examination the witness had reaffirmed this position by stating that *"I saw the gold teeth during our conversation before the Identification Parade was held. That day when I saw him, he had a gold filling in his upper teeth i.e the gold was fixed to a tooth by way of a filling. The tooth is not there now. The tooth I saw with the gold filling on it is now missing."*

In the trial the defence had not been able to discredit the evidence of this witness who buttresses the testimony of the victim. In my view in the light of this evidence the ground of appeal raised to assail the testimonial trustworthiness of the victim becomes unmaintainable.

[21] I wish to turn to the other ground of appeal which is a condensation of the grounds of appeals of one and four. In relation to ground one the learned counsel for the appellant has not clearly stipulated the reasons for him to complain about the failure on the part of the learned trial Judge to give a balanced summing up. On the whole the summing up is quite adequate to address the issues based on facts and law. At the conclusion of the trial the counsel for the appellant had not made any request for a redirection on any matter that he deemed as necessary to bring the "balance" into the summing up. In the circumstances I find it difficult to agree with the complaint raised in ground 1. On the other hand with regard to the 6th ground of appeal the prosecution at the trial had not relied on the witnesses that they did not call to give evidence. Going through the proceedings of the trial in the High Court I find that the defence has never made an application to have the witnesses been called for the purpose of cross-examination. It is important to note that there is no complaint coming from the appellant that at the trial the prosecution had violated the "equality of arms" principle whereby the defence was deprived of having access to all the material that was necessary for him to obtain either exoneration or a reduction of sentence. (See *Archbold 2005; para 16-83 and pg 1664).*

The Summing Up

[22] In paragraph 33 the learned Trial Judge had extensively dealt with the issue relating to the missing gold tooth and left the matter for the determination of the assessors. There is absolutely no complaint that could be leveled against the tone and texture of the summing up and the assessors have returned a unanimous opinion of guilt against the appellant, with which the learned Trial Judge had agreed in the Judgment.

Conclusion

[23] As can be clearly seen the procedure adopted in holding the identification parades had been more for the advantage of the appellant for by placing the victim under an undue

strain the police had organized three different parades for which the victim had to attend, despite the fact that she had identified the appellant clearly at the very first parade itself. There has been no reason given to substantiate the complaint that the propriety of the procedure adopted in holding the identification parades was flawed or defective. In the circumstances the grounds of appeal sought to be advanced in prosecuting the appeal are devoid of having any strength to succeed and based on that "there is no question that justifies any serious consideration" in the event of granting extension of time and leave to appeal against the Ruling of the learned Single Judge.

[24] In the light of above the extension of time shall not be granted and there is no merit to any of the grounds sought to be advanced to prosecute the appeal.

Bandara JA

[25] I agree with the reasoning, conclusion and proposed orders of Gamalath JA.

Orders of the Court

(i) Renewed application for enlargement of time is refused.

(ii) Appeal dismissed.

W. Calanchini

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

COURT OF APPEAL FIJI

Hon. Justice S.Gamalath
JUSTICE OF APPEAL

Hon. Justice W.N.Bandara
JUSTICE OF APPEAL