

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

CRIMINAL APPEAL NO. AAU 0009 of 2024
[Lautoka High Court Case No. HAC 130 of 2021]

BETWEEN : **VERAMO TIKOINAMENA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Mataitoga, P**

Counsel : **Appellant in Person**
: **Uce, R for the Respondent [ODPP]**

Date of Hearing : **11 February, 2025**

Date of Ruling : **26 March, 2025**

RULING

[1] The appellant [Veramo Tikoinamena] was charged and tried in the High Court at Lautoka for the following offences:

- i) Four counts of Rape, contrary to section 207(1) and (2)(a) of the Crimes Act 2009;

- ii) Four counts of Indecent Assault, contrary to section 212 of the Crimes Act 2009.

[2] After the trial the appellant was found guilty and was convicted of all the charges on 8 June 2023. He was sentenced on 26 June 2023 to 16 years, 4 months and 20 days imprisonment with a non-parole period of 14 years imprisonment.

[3] An untimely notice of appeal against conviction and sentence was filed on 24 March 2023. There were 4 grounds of appeal against conviction submitted with the notice.

[4] In letter dated 4 December 2023, the appellant submitted an Amended Notice of Appeal against conviction. This was received in the court registry on 11 December 2023. By this date the Notice of Appeal was untimely by 4 months 15 days. No application seeking Enlargement of Time to Appeal was filed until 2 August 2024 from this date the delay was 12 months 6 days.

[5] Since the Notice of Appeal Against conviction was filed out of time, the ground of appeal therein, will be considered as part of the enlargement of time application and governed by the law applicable.

Enlargement of Time to Appeal – Governing law

[6] In **Rasaku v State [2012] FJSC 4 (CAV 009 of 2009)** the Supreme Court stated the following, as factors to be considered by a Court in Fiji when considering an application for enlargement of time:

*[21] In paragraph 4 of his judgment in **Kamalesh Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012)**, Chief Justice Anthony Gates has summarized the factors that will be considered by a court in Fiji for granting enlargement of time as follows:-*

- (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 court's consideration.*

(iv) *Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*

(v) *time is enlarged; will the Respondent be unfairly prejudiced?*

Length and Reason for the Delay

[7] On the reasons for the failure to file within time, the appellant in his submission dated 2 August 2024, provided the reason for the delay as follows, the lack of legal knowledge to appreciate what to do and how to do it on time; he did not have the court record in his possession to prepare submission; there was an administrative lapse by the Correction Service in submitting his application and this was his first application.

[8] The rights of appeal are granted by statute within a framework of rules. Enlargement normally can only be granted because of specific powers granted to the appellate courts. No doubt because of a need to bring litigation to finality, once there is non-compliance, the courts can only exercise a limited discretion: **Cavubati v State [2003] FJCA 59**; (AAU0022/2003S) 14th November 2003.

[9] In *Rhodes* 5 Cr. App. R 35 at 36 it was said:

"A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons."

[10] A delay of 12 months 6 days is substantial indeed and unless the grounds of appeal have real merit, it will be refused. The court must ultimately uphold its rules and procedures, while endeavouring to avoid or redress any grave injustice.

Merit in the Grounds of Appeal – factors iii) and iv)

[11] The court when considering the merit of the appeal grounds submitted by the appellant, in support of an enlargement application, must understand that the threshold to be met, is higher than the leave to appeal threshold. To obtain enlargement of time,

the appellant must satisfy the court that his appeal has merit and has real prospect of success.

[12] The appellants submit the following grounds of appeal:

Delayed Reporting

i) The trial judge failed to assess the matter of delay in reporting by the complainant which created a doubt in the prosecution case. The appellant submission in support of this ground of appeal raises the issue of unfairness in the manner in which the prosecution conducted the case in the High Court. It relates to the fact that the complainant's aunt to whom the first complaint by the complainant was made before they informed the uncle who reported it to the police. The argument of the appellant is that the aunt should have been called as witness by the prosecution and she was not because her statement did not support the case of prosecution. In this regard the appellant claims that the aunt evidence would support his claim for consensual sex with the complainant. This claim by the appellant is not substantiated by evidence, but supposition on his part. However, the decision by the prosecution not to call the aunt as witness is critical from the appellant's case, and may be in violation of the accused rights under section 14 (2) (c) (e) of the Constitution. This cannot be established unless the full court record is available. At paragraphs 64 to 67 the judgement states:

“64. *The prosecution further states that the information given by the complainant to her uncle was sufficient to alert her uncle that the accused had done something wrong to the complainant. The prosecution also says although a bit late in time but when the opportunity presented itself she did not hesitate to tell her uncle about what the accused had done to her therefore she is more likely to be truthful.*

65. *On the other hand, the accused says the complainant did not tell the complete truth to her uncle. She did not tell him that she was having a sexual relationship with the accused which had resulted in her pregnancy. When the uncle came to know the truth, he got very furious that his niece was in a sexual relationship with her step father.*

66. *The complainant was 15 years of age at the time and it would be correct to say that she knew what was right and wrong. It took the*

complainant about six months after the first incident to tell her uncle a false story in order to blame the accused to save herself from embarrassment and therefore she should not be believed.

67. *It is for this court to decide whether the evidence of recent complaint helps in reaching a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is a matter for this court to decide whether it accepts the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it."*

[13] With regard to paragraph 64 and 65 of the judgement, the appellant claim these proves that the complainant was not truthful in her evidence about their relationship. He claimed that these 2 paragraphs support his claim that the sexual relationship with the complainant was with consent. At paragraph 138 of the judgement, the appellant in cross examination admitted he had apologized to the complainant for what he had done to her. Even if this were so, it does not mean that consent was not given. When the trial judge considered this late reporting at paragraph 129 to 135, he did not reasons for the basis of his accepting the victim's credibility as a witness. In **Matasavui v State [2016] FJCA 118**, the Court of Appeal stated:

"[23] Before acting upon the testimony of a witness the following questions should be posed by court. Both go to the credibility of the witness.

- (i) Is the witness truthful?*
- (ii) Is the witness's testimony reliable?*

[24] A truthful witness could sometimes be unreliable or his or her version could be distorted due to the intervention of extraneous factors. Therefore both tests are important. In determining whether a witness is truthful and reliable the court would be assessing the testimonial trustworthiness of the witness. Such assessment would have to be based on an objective application of several tests of credibility, probability/improbability, consistency/inconsistency, contradictions / omissions (inter se & per se) interestedness/disinterestedness/bias, the demeanour and deportment in court, and the availability of corroboration where relevant.

[14] Given that this is one of those cases where the evidence is one of "your word/my word" more would be expected from the trial judge in his analysis of the evidence and circumstances of the two witnesses whose evidence is in question. The tendency to

always believe what the victim alleged without carefully assessing their credibility is critical examination to establish what may be the truth is may result in injustice: **Dauvucu & Ors v State [2024] FJCA 108.**

- [15] This ground of appeal would benefit from a review by the full court to consider with all court records for trial in the High Court.

Unreasonable & Unsafe Verdict

- ii) The trial judge failed to assess fairly and adequately the evidence of the complainant, which can be taken to prove consensual sex. In that regard the trial judge erred in law and fact when he failed to consider the appellants conviction was unsafe, unsatisfactory and unsupported by the evidence. The test to determine a ‘verdict which is unreasonable or which cannot be supported by evidence’ as laid down by the Court of Appeal in Kumar v State [2021] FJCA 181, (AAU 102 of 2015) (29 April 2021) namely whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt. In this case since the trial was not before assessors, the trial judge is satisfied on the totality of the evidence before him, the guilt of the appellant is established beyond reasonable doubt. On the basis of the trial judge’s finding based on the evidence at the trial, at paragraphs 141 to 143, this ground of appeal has no merit.

Failure to convict on lesser offence of defilement

- iii) Counsel for the appellant submitted in her closing speech that the court may consider the lesser offence of defilement under section 215(1) of the crime Act 2009. As made clear by the trial judge at paragraphs 124 to 127 the lesser charge cannot be entertained since consent was not the defense to the offence of defilement. The court was satisfied that the complainant gave an honest account of what happened. Her evidence was not shaken regarding the basic version of her allegation, in cross examination. This ground of appeal has no merit.

Any Prejudice to the Respondent if time is Enlarged.

- [16] The Respondent did not specifically address any likely prejudice if enlargement of time is granted.
- [17] In conclusion, the case for Enlarge of Time to Appeal is not made out on the grounds and submission of the appellant.

ORDERS:

1. Application by the appellant for Enlargement of time to Appeal, is allowed.
2. Leave to appeal is allowed only on ground 1 of the appeal concerning the delayed reporting.





Hon. Justice Isikeli U. Maitoga
PRESIDENT, COURT OF APPEAL