

IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0039 of 2024

[Lautoka High Court Case No: HAC 153/2020]

BETWEEN : **ARVEEN KRISHNA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Mataitoga, P**

Counsel : **Naidu J for the Appellant**
: **Lomaloma M for the Respondent [ODPP]**

Date of Hearing : **20 February, 2025**

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

RULING

[1] The appellant was charged with three counts of **Rape**, contrary to Section 207 (1), (2) (a) and two counts of **Sexual Assault**, contrary to Section 210 (1) (a) Crimes Act, 2009. The particulars of the charges are:

Count 1

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence

ARVEEN KRISHNA between the 17th day of August 2020 Nadi in the Western Division had carnal knowledge of “**KKK**” a child below the age of 13 years.

Count 2

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

ARVEEN KRISHNA, between the 17th day of August 2020 at Nadi, in the Western Division unlawfully and indecently assaulted “**KKK**”.

Count 3

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.*

Particulars of Offence

ARVEEN KRISHNA between the 24th day of August 2020 at Nadi, , in the Western Division had carnal knowledge of “**KKK**” a child below the age of 13 years.

Count 4

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

ARVEEN KRISHNA, between the 24th day of August 2020 at Nadi, in the Western Division unlawfully and indecently assaulted “**KKK**”.

Count 5

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.*

Particulars of Offence

ARVEEN KRISHNA between the 28th day of August 2020 at Nadi, in the Western Division had carnal knowledge of “**KKK**” a child below the age of 13 year.

[2] The appellant pleaded not guilty to three (03) counts of Rape and two (02) counts of Sexual Assault. The hearing was held from 16 and 17 August 2024 with the closing submission was made on 18 August and judgment delivered on 19 August 2024.

[3] The Prosecution called three witnesses; namely, the Complainant, her mother and the Doctor. After the Prosecution’s evidence, Counsel for the Prosecution conceded that

the Complainant provided no evidence for fourth (04) count and invited the Court to act under Section 231 (1) of the Criminal Procedure Act. The Court, accordingly, found the appellant not guilty of count four (04) of Sexual Assault in the Information and acquitted him of the same, thus leaving only the first (01) the third (03) and fifth (05) counts of Rape and the second count (02) of Sexual Assault to remain in the hearing. Upon completion of the prosecution's case, the Counsel for the Defence informed the Court that the accused [appellant] would give evidence and called witnesses for his Defence.

[4] At the end of the trial, the appellant was found guilty of all the offences he was charged with and **was convicted on 19 April 2024**. On 17 May 2024 the appellant was sentenced to 15 years and 9 months imprisonment with a non-parole period of 13 years and 9 months imprisonment.

The Appeal

[5] On 25 July 2024, appellant's counsel filed a Notice of Motion For leave to Appeal Out of Time against conviction and sentence. The appellant also filed an affidavit on the same day, setting out the reasons for the delay. The appellant was given 30 days to appeal from 17 May 2024, which means that the last day to file a timely appeal would be 18 May 2024. The appeal was untimely by 2 months 5 days and the court are prepared as matter of practice, to waive the requirement if the delay is within 3 months and there is a ground of appeal that has merit and has reasonable prospect of success if leave to appeal is granted.

[6] The appellant had submitted an application seeking leave of the court for enlargement of time to filed leave to appeal application. Section 26 (1) of the Court of Appeal Act gives the appellant legal basis **to appeal within 30 days of the date of the conviction**.

[7] In **Tukana v State [2016] FJSC 23** the supreme court stated:

“[16] Enlargement of time is not granted as a matter of course, but only if exceptional circumstances exist to justify the grant of additional time to comply with the rules of Court, in an endeavour to avoid or redress some grave injustice that might otherwise occur from the strict

application of such rules of court. The objective of the discretion possessed by this Court in this regard is to ensure that such a rule of court does not become an instrument of injustice.

*[17] The factors that should be taken into consideration when dealing with enlargement of time were summarised by this Court in its judgment in **Kamalesh Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009** (21 August 2012). They 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 court's consideration; (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[18] These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of these rules."

[8] The grounds of appeal submitted by the appellant are as follows: *[From Written submissions filed in court on 11 February 2025].*

Against conviction:

- i) The trial erred in law and fact in relying on and/or considering and or taking into consideration the following inconsistent and prejudicial evidence in finding the appellant guilty;
- ii) The trial judge erred in law and fact in not adequately directing himself and the assessors on the evidence relied on by the state
- iii) The trial judge erred failing to adequately evaluating the evidence prior to the verdict of guilty as charged and before failing to independently assess the evidence before confirming the said verdict, which give rise to miscarriage of justice
- iv) The trial judge erred in law and fact when he failed to consider the medical report in the its totality as it did not speak about vaginal penetration for the charge of rape to be sustained;

- v) The trial judge erred in law and in fact when he failed to consider the medical evidence in considering the credibility of the complainant;
- vi) The trial judge erred in law and fact when he failed to consider the first person the complainant had complained to was never interviewed or testified in court;
- vii) The trial erred in law and fact in not independently assessing the totality of the evidence when deciding on the verdict, resulting in a miscarriage of justice

Factors i) and ii) length and reason for Failure to file on time

[9] The appellant's affidavit sworn on 4 July 2024 and filed on 31 July 2024 gave the following reasons for the delay: i) that after his sentencing he was imprisoned at Natabua Prison and did not have an opportunity to arrange for my solicitor to appeal my judgement and ii) the family needed time to arrange money to pay for our solicitors, as I am not there to attend to that it took a lot of time for it to get sorted out. The length of the delay was 2 months 5 days. The court noted that the appellant was represented by counsel at his trial in the High Court and day of the judgement. He could have advised his counsel then that he would like to appeal the judgement.

[10] In **Tui v State [2008] FJCA 161** considered an application to appeal which was filed 8 months out of time. Appeals to the Court of Appeal must be filed within 30 days from the date of the decision appealed from (see, s. 26 of the Court of Appeal Act). Further, leave is required to appeal against sentence (s. 21(1) (c) of the Court of Appeal Act). To succeed in this application, the applicant must demonstrate good cause for the late filing of the appeal, the merits in the appeal, and the absence of prejudice to the State (see, State v Patel Criminal Appeal No. AAU0002 of 2002S). The reason advanced by the applicant for the delay is that he was not aware of the time limit on the filing of an appeal.

Merit in Grounds of Appeal

[11] After hearing counsel of the appellant and from the written submissions file in court, the basis of the grounds of appeal are: i) Lack of credibility of the complainant evidence due to her young age and why she did not run away from the taxi; the issue of the medical report and ii)lack of recent complainant evidence which according to

the appellant should have been given by Pinky (not called as witness by prosecution) who was the first person the complainant met after the rape and sexual assault took place; iii) On the totality of the evidence the verdict is unreasonable resulting in miscarriage of justice. Turning to briefly consider each of the heads of submission above:

i) Lack of credibility: the two specific basis, advanced by submission of appellant counsel for this was that when the taxi stopped for the complainant to relieve herself. She should have run away then. The trial judge covered this part of the evidence in paragraphs 84 to 86 of the judgement. At the leave hearing no issues were raised by the appellant [or counsel) to challenge this assessment by the trial judge. The statements from the bar table which were not issues raised at the trial.

ii) & iii) Delayed Complainant & Totality of Circumstances: In **Waivono v State [2022] FJCA 163 (AAU 141 of 2014)** the court of appeal stated:

“[23] In **State v Serelevu [2018] FJCA 163**; AAU141.2014 (4 October 2018), this court adopted a very important principle in dealing with the delay in making a complaint in relation to the commission of a crime. The principle operates with much vigour in cases of sexual offences because the element of consent, which forms the constituent element of the offence, is reflective of an agreement between the offender and the victim to the alleged wrongful conduct of the other party. The delay in making a complaint or failure to make a complaint at all promptly is, therefore, capable of creating a doubt as to the absence of consent in making-out the offence. The ‘totality of circumstances test’, which was adopted in Serelevu, in my opinion, is a suitable principle to be applied in this case considering its facts and circumstances. In Serelevu, this court held:

*“In law the test to be applied on the issue of the delay in making a complaint is described as “the totality of circumstances test”. In the case in the United States, in **Tuyford 186**, N.W. 2d at 548 it was decided that:*

The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken

into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.

This is a matter that operates between promptness and veracity. According to learned authors on the subject, the fresh complaint rule evolved from the Common Law requirement of “Hue and Cry” test which was based on the expectation that victims of violent crimes would cry out immediately and which required proof of the details of the victim’s prompt complaint as part of the prosecution’s evidence.”

- [12] The delay in the complaint by the complainant was raised but the submission made in support did not provide the circumstances which the trial judge should have considered and what would be the reasonable time in the circumstances of this case. The totality of the circumstances upon which the claim of delayed complainant must be clearly stated, to allow the court to assess whether lack of promptness and how it may have affected the veracity of the complainant evidence. This was not clearly made in this case.
- [13] There was unlikely to be any prejudice to the respondent, if the leave to appeal was allowed, except the inconvenience of having to argue the case again.

Appeal against sentence

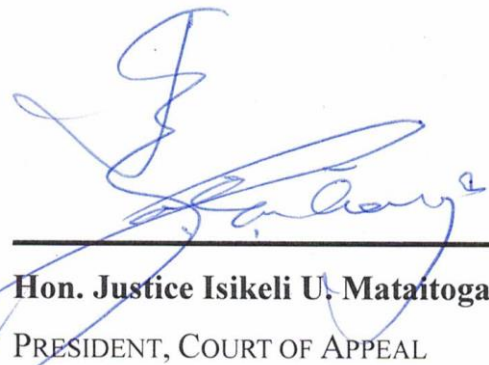
- [14] The appellant submitted 1 ground of appeal against sentence, namely, “*the sentencing judge failed to give proper discount for appellant’s mitigation, making the sentence harsh and excessive.*”
- [15] In reviewing the sentence judgement, it is clear that the appellant’s mitigation was considered by the trial judge at paragraph 26 to 31. At page 31 the judge stated:
“I accept that you are a person of previous good character. Accordingly, considering the aforesaid mitigating factor I reduce 2 years from your sentence.”
- [16] There were no other submissions made to support the claim that the sentence was harsh and excessive. The one ground and supporting submission have no merit.

[17] The conclusion is that there is no ground of appeal or the grounds taken together has sufficient merit that would have reasonable prospect of success if leave to appeal out of time is given.

ORDERS:

1. Application Seeking Enlargement of time to appeal against Conviction and sentence refused.
2. Leave to Appeal is refused.





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