

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

CRIMINAL APPEAL NO. AAU 0065 OF 2023
[Lautoka High Court: HAC 12 of 2019]

BETWEEN : **MOHAMMED RIZWAN ALI** *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 was charged with one count of Sexual Assault contrary to Section 210 (1)(a) of the Crimes Act 2009 (Count 1), and one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009 (Count 2).

- [2] The appellant pleaded not guilty to the charges. The trial commenced on the 6 February 2023 and concluded on 8 February 2023. The Prosecution presented the evidence of BA, the complainant, her mother and her eldest brother. At the end of the Prosecution case, the accused was put to his defence. The accused exercised his right to remain silent and did not call any witnesses. The counsel from both sides made oral submissions and supplemented the same with written submissions.
- [3] Following the trial the appellant was found guilty as charged and was convicted in a judgement dated 10 February 2023. He was sentenced on 13 February 2023 to 13 years imprisonment with a non-parole period of 10 years imprisonment.

The Appeal

- [4] On 9 August 2023, the appellant filed an application for leave to appeal against conviction only. The application submitted 2 grounds of appeal; i) the trial judge erred in law and fact when he failed to direct himself on the guidelines, given the contradictory version of the state and defence evidence; ii) the verdict is unreasonable and unsupported, having regards to the inconsistent, contradictions, omissions and implausibility's in the prosecution evidence. This leave application is delayed by 6 months.
- [5] It was pointed out to the appellant on 4 December 2024 that his leave application was untimely. He is required under Rule 40 of the Court of Appeal Rules to apply to the court for enlargement of time to appeal. Mindful of his incarcerated position, the court asked Legal Aid to assist in the preparation and filing this application for enlargement of time to appeal. This request did not extend to appearing as Counsel for the appellant at the hearing.
- [6] On 21 October 2024 the appellant submitted Amended Grounds of Leave to Appeal Against Conviction. These are:
- i) the trial judge erred in law and fact when he failed to direct himself of his judgement in paragraph 36 stated that corroboration evidence coming from an independent prosecution witness to assist the prosecution case presented at trial failed to prove the offence charges beyond reasonable doubt;

- ii) that whether the trial judge erred by failing to provide an independent assessment of evidence to determine that the conviction is supported by totality of evidence;
- iii) that the trial judge erred by failing to address the inconsistencies in prosecution evidence;
- iv) the trial judge erred in law and fact in not directing himself that the prosecution has failed to establish the guilt of the appellant on the elements of the offense of sexual assault and rape as charged on the fact of the identity of the appellant who allegedly committed the offence.

Hearing

[7] On 14 October 2024, the Court asked Legal Aid Counsel [Ms Dauvesi] if she would assist the appellant to prepare grounds of appeal and address the lateness of the filing of the leave to appeal. The delay in the leave application is 6 months. The appellant was asked to avail himself to any assistance from LAC; but he did not.

[8] On 22 January 2025 when this matter was called for mention to fix a hearing date, a new set of submission was filed by the appellant, as set out at paragraph 6 above. These were not prepared with assistance of LAC Counsel arrange by the court. There was no application for Leave for Enlargement of time to Appeal, despite the filing of Amended Grounds of appeal by the appellant.

[9] Without the court's granting leave to appeal out of time, the Leave to appeal against conviction is misconceived as it has not followed proper court procedure and rules. The purpose of an application for extension of time to accompany the notice of appeal or an application for leave to appeal as required by Rule 40 of the Court of Appeal Rules read with Form 6, is for the Court to assess whether there is a ground of merit or a ground of appeal that will have reasonable prospect of success, in deciding the issue whether an enlargement of time to file a belated application for leave to appeal should be granted or not: **Sauduadua v State [2019] FJCA 86 (AAU 053 of 2016)**

[10] In **Rasaku v State [2019] FJSC 4**, the Supreme Court held

“[18] The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of

*Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application. As the Judicial Committee of the Privy Council emphasised in **Ratnam v Cumarasamy [1964] 3 AC 933** at 935 at 93:*

The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion.”

[11] In **Waqamailau v State [2012] FJCA 90**, the Court of Appeal stated as follows:

“[12] *The practice of courts to accept delays of up to three months are excusable where the appellant has been in prison and if there is merit. Leave to appeal one month out of time is refused because the proposed appeal on rape of girlfriend has no merit as the court considered guilty plea, and is bound to fail: per Powel JA in Isimeli Seresere v State [2008] AAU 92/2008 (5 November 2008), State v. Ramesh Patel [2002] AAU 2/2002 (15 November 2002), Milio Nakoroluvu v. State [2007] AAU1 58/05(25 June 2007). The appellant must demonstrate that there is a good reason why he should be granted leave to appeal out of time. Appeal 4 months out of time was refused in Veretariki Vetaukula v State [2008] AAU 17/2008 (29 May.2008) An appeal received 2½ months out of time was refused in Opeti Delana Koro v State [2007] AAU 28/2008 (14 May 2008), Shakir Buksh, Jitoko Metui & Are Amea v State [2008] AAU 59/2006 (4 November 2008).*”

[12] The delay in the leave application is 6 months. Unless there is a substantive reason provided by the appellant to explain the delay, in not filing a timely appeal and to seek the court’s leave for enlargement of time to appeal, there is no material before the court on which it may exercise its discretion to extend the time for the appellant to appeal. There is no basis on which the court may base the exercise of discretion to grant enlargement of time.

[13] The appellant application cannot be considered when court procedure and rules are not followed. Without Leave of the court for the enlargement of time to appeal, the leave application by the appellant is misconceived.

[14] The court reviewed the grounds and noted that not one grounds has merit. The grounds have no reasonable prospect of success even if leave to appeal is granted. The first

ground has not merit because corroboration is not needed in prosecution of charges involving sexual offences in Fiji: section 129 Criminal Procedure Act 2009.

- [15] Grounds 2 and 3 relates to claim of inconsistencies in the prosecution evidence without referencing parts of the judgement where the alleged inconsistencies are allowed by the trial judge. From this claim the appellant submit that the verdict cannot be supported by the totality of the evidence. The trial judge covered these alleged inconsistencies and improbabilities from paragraph 30 to 35. These grounds have no merit.
- [16] The last ground submitted is a claim by the appellant that there was insufficient identification evidence. This submission was largely inspired by the evidence of Rehan who failed to identify the appellant in court when he was cross-examined. This issue was properly covered in the trial Judges judgement from paragraphs 38 to 42. This ground has no merit.
- [17] These grounds may not be considered for this leave application in the absence of the court granting leave to appeal out of time.
- [18] In conclusion, without the leave of the Court for the appellant to seek enlargement of time to appeal, the leave application by the appellant is dormant and is not considered. The Leave to appeal is refused.

ORDERS:

1. Application for Enlargement of time to appeal is refused.
2. Application for Leave to Appeal is refused.



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