

IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 011 OF 2021

BETWEEN : PITA BALEI

AND : STATE

Counsel : Appellant in Person
Ms J Fatiaki for the State

Date of Hearing : 16 November 2021

Date of Sentence : 3 December 2021

JUDGMENT

[1] The Appellant was convicted of two counts of sexual assault after trial in the Magistrates' Court and sentenced to a total term of 5 years, 5 months and 3 weeks imprisonment. He seeks an enlargement of time to appeal against both conviction and sentence.

[2] Factors to be considered are as follows:

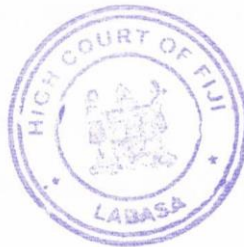
- (i) The reason for the failure to file within time.
- (ii) The length of the delay.
- (iii) Whether there is a ground of merit justifying the appellate court's consideration.
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

- (v) If time is enlarged, will the Respondent be unfairly prejudiced?*(Kamalesh Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012), per Gates CJ).*
- [3] The list is not exhaustive and the ultimate question is whether grave injustice will be caused if an enlargement of time is not granted (*Rasaku v State [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013)*).
- [4] The sentence was pronounced in open court on 31 July 2020 in the presence of the Appellant and his counsel. The written remarks also informed the Appellant of his right of appeal within 28 days provided by the Criminal Procedure Act.
- [5] The application for an enlargement of time is dated 21 April 2021. The High Court registered the application on 23 April 2021. By the time the Appellant gave notice, his appeal was late by about 8 months. The Appellant's contention is that his counsel did not provide him with a copy of the judgment and sentence for him to file a timely appeal.
- [6] At the trial, the complainant gave a detailed account of the two incidents of sexual assault on her by the Appellant. Both incidents occurred in 2017. She was a child at the time. The Appellant was her uncle. On both occasions the Appellant undressed the complainant and rubbed his genitals on her private parts. The Appellant in his evidence denied the allegations.
- [7] The grounds of appeal against conviction challenges the veracity of the complainant's evidence. The learned trial magistrate considered the veracity of the complainant's evidence and believed her account. The inconsistencies in her evidence were peripheral and did not affect her credibility.
- [8] The Appellant contends that his sentence is manifestly excessive. The complainant was 7 years old when she was sexually assaulted by the Appellant on two separate occasions. The nature of the assault (rubbing of genitals on the

private parts to ejaculate) was grave. The Appellant was an adult male. He was the complainant's uncle. Her trust was breached. The total sentence of 5 years, 5 months and 3 weeks imprisonment is within the permissible range of sentence for sexual assault on a child by an adult offender.

[9] The length of the delay is significant. The reason advanced for the delay is not compelling. There is no specific prejudice to the respondent but the appeal is very unlikely to succeed.

[10] I grant an enlargement of time but dismiss the appeal.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Appellant in Person