

**IN THE SUPREME COURT OF FIJI**  
**APPELLATE JURISDICTION**

**Criminal Petition No. CAV0007 of 2018**  
**[on appeal from Court of Appeal Cr. App.**  
**No: AAU0050/2012]**

**BETWEEN** : **PENIAME ROLIGALEVU** **Petitioner**

**AND** : **THE STATE** **Respondent**

**Coram** : The Hon. Chief Justice Anthony Gates  
President of the Supreme Court

The Hon. Mr. Justice Suresh Chandra  
Judge of the Supreme Court

The Hon. Mr. Justice Brian Keith  
Judge of the Supreme Court

**Counsel** : Ms S. Nasedra for the Petitioner  
Ms P. Madanavosa for the State

**Date of Hearing** : Wednesday 17<sup>th</sup> October 2018

**Date of Judgment** : Thursday 1<sup>st</sup> November 2018

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**JUDGMENT OF THE COURT**

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**Gates P**

[1] This is a Petition against conviction. An appeal against sentence was abandoned by Petitioner's counsel. In one of several appeal documents it was suggested the arguments were to be those brought before the single judge. The petition is brought against the decision of the single judge of the Court of Appeal delivered on 2<sup>nd</sup> December 2016. Procedurally there had been confusion over where the appeal should go thereafter and this resulted in the late filing of the petition before this court.

- [2] The Petitioner had been charged with a single count of rape contrary to section 207(1) and (2)(a) of the Crimes Act 2009 and one count of defilement contrary to section 215(1) [CA].
- [3] The Petitioner had pleaded not guilty to the charges. After trial in the High Court the learned Judge convicted him of both counts.
- [4] On 18<sup>th</sup> May 2012 the Petitioner was sentenced to 12 years imprisonment for the rape conviction and 4 years imprisonment for the defilement, which was to be served concurrently. The rape sentence had a non-parole term of 10 years.
- [5] There were various documents filed in the Court of Appeal but the single judge approached the matter on the basis that the Notice of Appeal with grounds was 8 months out of time. This was a substantial period. Before the single judge neither counsel had addressed on the issue of lateness of filing Notice and grounds which required an application for enlargement of time.
- [6] The judge allowed the informality of filed papers to be treated as an application for enlargement. However there was no material before the court to explain the delay. Accordingly, following established principle, **Rasaku and Anor. v The State** CAV 9 and 13 of 2012 24<sup>th</sup> April 2013 and **Sinu and Kumar v The State** [2012] FJSC 17; CAV 1 of 2009; 21<sup>st</sup> August 2012, the judge went on to consider whether there was any ground against conviction likely to succeed.
- [7] The single judge concluded that the grounds of appeal against conviction and sentence were unlikely to succeed. As a result his lordship refused enlargement of time. The grounds for both conviction and sentence he concluded were vexatious and therefore both appeals, conviction and sentence, were dismissed under section 35(2) of the Court of Appeal Act.
- [8] Our task is to decide whether the judgment of the Court of Appeal by the single judge was correct, bearing in mind the Supreme Court is not a Court of Criminal Appeal or general review nor a court to entertain the appeal as of right: **Aminiasi**

**Katonivualiku v The State** (2003) FJSC Crim. App. CAV0001/99 17<sup>th</sup> April 2003 at p.3.

**The facts**

- [9] The complainant was a 14 year old girl. She resided with her mother and stepfather at Narocake Village in Rewa. The Petitioner is the eldest brother of the girl's stepfather. In interview the Petitioner completely denied the incidents, the rape and the defilement. In his own defence the Petitioner exercised his right to silence and called 2 witnesses.
- [10] On 3<sup>rd</sup> September 2010 the complainant was sleeping in her room. At 2am she went outside to visit the toilet. On her way back someone grabbed her hand and pulled her to the back of her grandfather's house. She recognised her uncle, the Petitioner by the light of one of the kitchens close by.
- [11] He threw her to the ground, took off her pants and took off his clothes. He had full intercourse with her. She struggled to get away. She tried to scream. He blocked her mouth and held her down.
- [12] On the second occasion, after watching a movie she and her cousin slept in her room. The Petitioner came in and got the cousin to leave. The Petitioner said he wanted to have sex with her. She refused. She was scared. He removed her sulu and clothes. He put his penis into her vagina. He told her not to tell anyone. She did not inform anyone she said because she was scared.
- [13] In cross-examination of the complainant it was suggested she only made up the story because she was scared of her mother. She denied that. It was also suggested that there was some bad feelings about her parents being asked to move out of the step-grandfather's house. It was said they blamed the Petitioner and that was the reason why this story was made up.
- [14] The complainant accepted that her step-father wanted the house back, moving house had been a problem and that tension had been high before the allegation. She

admitted previous relationships with the Petitioner and his family had been good before. But on being confronted with the allegation that she had made up a false allegation of rape because she was scared of the mother she said "I did not make up false allegation."

- [15] She admitted her mother and herself sought a traditional apology and that she had made a statutory declaration. She said she did not know what a statutory declaration was. On being shown the document and her signature, she answered "Yes, I do not know anything about the contents. I was just told to sign." And later "I don't know what was written on the form. It was given to me folded for me to sign." It was not suggested the complainant had written the hand written words on the declaration.
- [16] It is likely that neither the assessors or the judge placed much weight on this document, and accepted that this 14 year old girl was telling the truth, though there had been attempts to get her to retract.

### **Grounds Argued**

- [17] Counsel for the Petitioner argued two grounds against conviction. They were:

#### **Ground 3**

That the learned trial Judge erred in law and in fact by failing to adequately put to the assessors all the necessary elements that must be proven for the count of rape by the prosecution.

#### **Ground 4**

That the learned trial Judge erred in law and in fact by failing to adequately put to the assessors all the necessary elements that must be proven for the count of defilement by the prosecution.

- [18] The ground alleging a failure to put the necessary elements to be proven to the assessors was not argued. This is not surprising since the trial judge did indeed place all three elements for rape to the assessors and did so fully and correctly. The judge said that "all three elements are in dispute in this case." His lordship also dealt fully with the legal elements for the offence of defilement.

[19] Several passages were brought to our attention suggesting inconsistency in the complainant's evidence or that of the supporting witness her cousin PW2.

[20] For instance:

Q: You are from Vanua Levu?

A: Yes.

Q: In your statement you say you originally from Narocake Rewa?

A: Yes.

Q: Which one is correct?

A: Vanua Levu.

[21] Without more delving we are not sure of the nature of the inconsistency, if there was one. She could have come from Vanua Levu from one side of the family or indeed lived there for a time. It has not been pursued to enable the court to say "here she is inconsistent, and therefore an unreliable witness."

[22] There were three houses close to each other for family members, and three kitchens.

Q: Three houses have electricity?

A: Yes.

Q: Kitchen doesn't have electricity?

A: Yes.

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Further down:

Q: You saw my client's face from the kitchen light?

A: Yes it is tube light.

Q: How many kitchens are there?

A: Three kitchens belonging to each house.

Q: All kitchens does not have electricity?

A: The light was coming from Semisi's inside kitchen.

Q: You identified my client using that light?

A: Yes.

Q: Refer to your statement. Light came from Semisi or Peniame's house?

A: Semisi.

Q: Only light that was on was Peniame's house?

A: Yes.

Q: You mistaken about the light coming from Semisi's house?

A: Yes.

[23] The trial judge pointed out the inconsistencies to the assessors in this way:

“[28] Lorima gave evidence that on one occasion when he was sleeping over at the complainant's house he confronted the Accused when he entered her bedroom when she was sleeping.

[29] Ms Savou cross-examined the complainant and Lorima regarding the inconsistencies in their evidence and the statements they made to the police. It was pointed that the complainant told the police that she was originally from Rewa, the identification was made under light from the Accused's house, the Accused was completely naked during the alleged rape and on 25 November 2010, she was wearing shorts and the Accused had sexual intercourse with her twice.

[30] The inconsistency pointed out in Lorima's evidence is that in his statement to the police, he said he saw the Accused entering the complainant's bedroom. In his evidence, Lorima said he saw the Accused when the complainant woke him up.

[31] As a matter of law, I must direct you that what a witness says on oath are evidence. What a witness says in his or her previous statement out of court is not evidence. However, previous statements are often used to challenge witnesses' credibility and reliability because a previous inconsistent statement may indicate that a witness has told a different story previously and are therefore not reliable. It is for you to judge the extent and importance of any inconsistency. If you conclude the complainant and Lorima have been inconsistent on an important matter, you should treat both accounts with considerable care. If, however, you are sure that the evidence of the complainant and Lorima are true in whole or in part, then it is evidence you are entitled to consider when deciding your opinions.

[32] If you accept the complainant's account of the alleged rape as true, then I must warn you of the special need for caution before relying on her evidence of identification alone as the basis for a conviction. A witness who is convinced in her

own mind may as a result be a convincing witness, but may nevertheless be mistaken. Bear in mind that we all make mistakes in thinking that we recognize people even those we know well. That is not to say that you cannot rely on identification evidence. Of course you may, but you need to be careful in deciding whether the evidence is good enough to be relied upon. You should therefore examine carefully the circumstances in which the identification of the Accused by the complainant was made. In assessing the evidence you must consider the following: For how long did she have the person she says was the Accused under observation? At what distance? In what light? Did anything interfere with the observation?

[33] If, after careful consideration of evidence and bearing in mind my direction on identification, you are convinced that the complainant positively identified the Accused on the night of 3 September 2010, then you may act upon the identification evidence of the complainant.”

[24] The judge cautioned the assessors further:

“[36] The prosecution’s case wholly rests on the complainant’s evidence. If you believe the complainant is telling you the truth about being forced by the Accused to have sexual intercourse with him on 3 September 2010, and that he had sexual intercourse with her on 25 November 2010, and accept her explanation for not complaining to anyone, you may express an opinion that the Accused is guilty of the charges. If you disbelieve the complainant, then you must find the Accused not guilty of the charges. Similarly if you have reasonable doubt you must find the Accused not guilty.”

[25] The judge dealt with the inconsistencies properly, and sufficiently cautioned the assessors on the reality that the case stood or fell on the complainant’s evidence. Grounds 3 and 4 must fail.

[26] There are no grounds to conclude the single judge was in error in his decision. There being no ground likely to succeed there is no basis for granting an enlargement of time for an appeal to this court, nor do the grounds meet the statutory criteria for leave.

[27] The proposed orders of the court therefore are:

- (i) Application for enlargement of time refused.
- (ii) Leave refused.
- (iii) Petition dismissed.

**Chandra J:**

[28] I agree with the reasons and conclusions in this judgment of Gates P.

**Keith J:**

[29] I agree that the Petitioner’s time for filing his petition for special leave should be refused for the reasons given by Gates P.

**Gates P:**

[30] The orders of the court are:

- (i) Application for enlargement of time refused.
- (ii) Leave refused.
- (iii) Petition dismissed.

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Mr. Justice Anthony Gates  
**The Hon. President of Supreme Court**



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Mr. Justice Suresh Chandra  
**The Hon. Judge of Supreme Court**

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Mr. Justice Brian Keith  
**The Hon. Judge of Supreme Court**

**Solicitors:**

Office of the Legal Aid Commission for the Petitioner  
Office of the Director of Public Prosecutions for State

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