

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 134 OF 2016  
(High Court HAC 87 of 2015)

BETWEEN : MARIKA TUBEINAVATU *Appellant*

AND : THE STATE *Respondent*

Coram : Calanchini P

Counsel : Mr T Lee for the Appellant  
Ms P Madanavosa for the Respondent

Date of Hearing : 20 September 2018

Date of Ruling : 29 November 2018

RULING

- [1] Following a trial in the High Court at Lautoka, the appellant was convicted on one count of rape and sentenced on 24 March 2016 to a term of imprisonment of 10 years with a non-parole term of 7 years. This is his application for an enlargement of time for leave to appeal against conviction and sentence. The application is made under section 26(1) of

the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives power to a single judge of the Court of Appeal to enlarge time.

- [2] The factors to be considered for an enlargement of time are (a) the length of the delay, (b) the reason for the failure to file within time, (c) whether there is a ground of merit justifying the appellate court's consideration and where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced (Kumar and Sinu –v- The State [2012] FJSC 17; CAV 1 of 2009, 21 August 2012).
- [3] The background facts may be stated briefly. In this case the complainant was a foreign national and still a teenager who had come to Fiji as a community worker for a church. On the day in question the complainant was not feeling well and remained at home. She was given some tablets by the appellant's mother. The medication made her feel drowsy and tired. The appellant's mother went into town leaving the appellant and the complainant alone in the home. Shortly afterwards the complainant fell asleep. The complainant suddenly woke up as she felt someone was on top of her. The appellant admitted that he lay on top of the complainant and then pulled her shorts and undergarments to one side. He also admitted that he had sexual intercourse with her by inserting his penis into her vagina. The complainant had tried to push him away and screamed at him to get off her. The appellant had given evidence that he had asked the complainant to have sex for which she replied "anytime." He then immediately proceeded to have sex with her.
- [4] The notice of appeal filed by the appellant in person was dated 19 September 2016 and as a result was about 5 months out of time. The reason for the delay is set out in the affidavit sworn on 27 June 2018 by the appellant in support of his application. The appellant accepts that the delay was caused by his mistaken belief that his trial counsel (from the LAC) would have filed his grounds of appeal against conviction and sentence within time. However there is no allegation by the appellant that the Legal Aid Commission had not complied with his instructions. I do not consider the explanation to

be sufficiently compelling to excuse the delay which must necessarily be regarded as substantial. As a result it is necessary for the appellant to establish that his appeal is likely to succeed.

- [5] The grounds of appeal set out in the Amended Notice of Appeal filed on 24 July 2018 are as follows:

*"1. THAT the learned Trial Judge erred in principle and fact by lacking to provide a fair and balance Summing Up when directing the assessors, in particular, to the following:*

- (a) Not adequately and properly directing the assessors on the law and facts regarding the inconsistency of evidence of the Prosecution witnesses; and*
- (b) Not adequately directing the assessors on the law regarding whether the State has proven beyond reasonable doubt the lack of consent.*

*2. THAT the conviction was unsatisfactory having regard to the totality of the evidence at trial, in particular, to the following:*

- (a) found that there was penetration but the State failed to prove beyond reasonable doubt the lack of consent.*

*3. THE Learned Trial Judge erred in principle when sentencing the Appellant, in particular, to the following:*

- (a) Not properly considering the mitigating factors to adequately decrease the sentence."*

- [6] The grounds of appeal against conviction raise two issues. The first relates to the directions in the summing up on what are described as inconsistencies in the evidence given by witnesses for the prosecution. The second issue concerns the directions given on lack of consent and whether the evidence established lack of consent beyond reasonable doubt.

- [7] The inconsistency that is relied upon in the submissions relates to the evidence concerning the location of the complainant after the incident. The complainant stated she waited outside under a tree. The witness Tuvuli stated that he saw the complainant on



her bed when he returned to the premises. It is claimed that the inconsistency goes to the credibility of the complainant and that the trial judge should have directed the assessors accordingly.

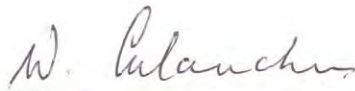
[8] The only issue in the trial was that of consent as the act of sexual intercourse had been admitted by the appellant. In his judgment dated 23 March 2016 the learned Judge has given cogent reasons for accepting the evidence of the complainant on the issue of consent. That evidence was sufficient to establish lack of consent beyond reasonable doubt. In my view neither of the grounds of appeal against conviction are likely to succeed. An enlargement of time to appeal conviction is refused.

[9] In relation to the sentence appeal, the appellant submits that the learned judge has not given sufficient discount for the appellant's hitherto good character. The total amount discounted by way of mitigation was one year. The two matters relied upon by the judge were that the appellant was a 32 year old farmer and that he had spent 5 months in remand. The reality is that the appellant received a 7 month discount for being a person aged 32 of good character up to the time of the commission of the offence. It must be acknowledged that the issue is arguable. However the test is whether the appeal against sentence is likely to succeed. As the respondent has submitted the sentence is in the middle of the tariff of 7 – 15 years for the rape of an adult. The enhancement for aggravating factors of 2 years may be regarded as modest. The sentence does not indicate an error in the discretion rendering the sentence either manifestly excessive or wrong in principle. An enlargement of time to appeal sentence is refused.

Order:

*Application for extension of time for leave to appeal against conviction and sentence is refused.*



  
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Hon Mr Justice W. D. Calanchini  
**PRESIDENT, COURT OF APPEAL**