

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

CRIMINAL APPEAL AAU 77 OF 2016
(High Court HAC 196 of 2013)

BETWEEN : SERUVI RALIVANAWA

Appellant

AND : THE STATE

Respondent

Coram : Calanchini P

Counsel : Mr T Lee for the Appellant
Mr R Kumar for the Respondent

Date of Hearing : 3 December 2018

Date of Ruling : 18 December 2018

RULING

- [1] Following a trial in the High Court at Suva the appellant was convicted on one count of rape contrary to section 207(1) and (2)(a) of the Crimes Act 2009. On 13 June 2016 he was sentenced to 10 years 10 months imprisonment with a non-parole term of 8 years.

[2] This is his timely application for leave to appeal against conviction pursuant to section 21(1)(b) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable before the Court of Appeal. (Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013, 20 November 2013).

[3] On 29 May 2018 the appellant filed an amended notice of appeal against conviction. The ground of appeal against conviction set out in that notice was further amended in court during the course of the leave hearing to read as:

“That the conviction was unreasonable and cannot be supported having regard to the evidence at trial, in particular, to the following:

- (a) Failure of the complainant to make a prompt complaint was necessarily consistent with consensual sexual intercourse; and*
- (b) appellant’s knowledge of complainant’s pregnancy before anyone else disproved the reasonable belief that complainant did suffer trauma and subtle fear psychoses thus preventing her from complaining in the ensuing (sic) months; and*
- (c) contradictory stances taken by Defence Counsel and the appellant regarding the first sexual encounter was not necessary an indication that appellant’s conduct and demeanour were not consistent with his honesty.”*

[4] In the same amended notice of appeal the appellant added an application for leave to appeal sentence and at the same time filed an application for an enlargement of time to apply for leave to appeal sentence. That application was supported by an affidavit sworn on 29 May 2018 by the appellant. The application is made under section 26(1) of the Act. Section 35(1) of the Act gives power to a single judge of the Court of Appeal to enlarge time.

[5] 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.

- [6] The first ground of appeal against conviction is concerned with the evidence concerning the complaint of rape made by the complainant. At the trial the issue in dispute was consent. It was not disputed that sexual intercourse had taken place nor was it disputed that the parties had known each other for many years. Under section 129 of the Criminal Procedure Act 2009 corroboration of the complainant's evidence is not required in order to sustain a conviction. It would appear that the complainant became pregnant as a result of the sexual intercourse the subject of the charge. The complainant informed her mother when four months pregnant that she had been raped by the accused. The complainant had informed the appellant after three months that she was pregnant. It was argued by the appellant that it was only on account of the pregnancy that the complainant claimed to have been raped.
- [7] Although the majority of the assessors returned opinions of not guilty, the learned Judge in a reasoned judgment considered all the relevant evidence and for the reasons stated in the judgment concluded that the complainant's evidence was truthful and reliable. Having accepted the complainant's evidence he was satisfied that the evidence established guilt beyond reasonable doubt. For any one of a number of reasons it does not necessarily follow that a delayed complaint by the complainant indicates that sexual intercourse must have been consensual. The trial judge accepted the explanation given by the complainant. In my judgment this ground is not arguable.
- [8] The second ground concerns the fact that the complainant after 3 months had told the appellant before any other person that she was pregnant. However it does not follow that at the time of the incident and as a result of having been raped the complainant did not experience trauma and subtle fear psychosis. This ground is not arguable.

- [9] The third ground concerns an inconsistency in the evidence given by the appellant at the trial concerning an earlier act of sexual intercourse with the complainant. The inconsistency arose as a result of questions put to the complainant in cross-examination on instructions by the appellant's counsel. That issue was considered by the judge who noted that there was an inconsistency and concluded that his conduct and demeanour when giving his evidence "*were not consistent with his honesty.*" This ground is not arguable.
- [10] In relation to the appeal against sentence in order to be granted an enlargement of time the appellant must show that the appeal is likely to succeed. The application for leave to appeal against sentence is just under two years out of time. Under section 26(1) of the Act the appellant has 30 days to apply for leave to appeal. Sentence was imposed on 13 June 2016 and the application for an enlargement of time was filed on 29 May 2018. The affidavit in support does not disclose any compelling explanation for the delay. The issue is whether the appeal against sentence is likely to succeed.
- [11] The first ground claims that the learned Judge failed to properly discount for the appellant's good character prior to the offence. This matter is referred to in paragraph 23 of the sentencing decision. In paragraph 24 the judge gave a discount of three years for mitigating factors. In my judgment the only genuine mitigating factor was the appellant's good character up to that point in time. This ground is unlikely to succeed as an error in the exercise of the sentencing discretion.
- [12] The second ground relates to the sentencing judge regarding the appellant's plea of not guilty as an aggravating factor. The appellant is entitled as of right to be tried and to require the prosecution to prove guilt beyond reasonable doubt. This ground is likely to succeed as an error in the exercise of the sentencing discretion.

- [13] The third ground is unlikely to succeed as there does not appear to be evidence as to the extent to which the complainant and the appellant interacted with each other after the commission of the offence.

Orders:

- 1) Leave to appeal against conviction is refused.
- 2) Enlargement of time is granted to appeal sentence.
- 3) The appellant is to file and serve a notice of appeal against sentence within 30 days from the date of this Ruling.



W. Calanchini

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