

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

**CRIMINAL APPEAL NO. AAU 104 OF 2019**  
**[Lautoka Criminal Action No: HAC 95 of 2015]**

**BETWEEN** : **BIU CABEBULA**

**Appellant**

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

**Respondent**

**Coram** : **Mataitoga, RJA**  
**Andrews, JA**  
**Clark, JA**

**Counsel** : **Appellant in person**  
**Mr L.J. Burney for the Respondent**

**Date of Hearing** : **10 November, 2023**

**Date of Judgment** : **29 November, 2023**

**JUDGMENT**

**Mataitoga, RJA**

I. I support the reasons and the conclusion of this judgment.

**Andrews, JA**

2. I agree with the judgment of the Honourable Justice Clark.

**Clark, JA**

**Background**

3. On 15 March 2018, following trial in the High Court at Lautoka, the appellant was convicted on one representative charge of rape<sup>1</sup> and one charge of indecent assault<sup>2</sup>. He was sentenced to imprisonment for 13 years and 11 months with a non-parole period of 10 years.
4. On 26 June 2019, some 14 months beyond the statutory timeframe for appealing,<sup>3</sup> the appellant applied for an enlargement of time in which to appeal his convictions and sentence.
5. The appellant filed a further application for an extension of time and supporting affidavit on 10 June 2020.
6. On 21 January 2021 the Legal Aid Commission filed an amended application for an extension of time. There are two fundamental differences between this and the first application filed on 26 June 2019:
- 6.1 Where the 26 June application advanced 10 grounds for the conviction appeal, the amended application advanced only two: and
- 6.2 Where the 26 June application advanced 12 grounds in support of the sentence appeal, the amended application did not address the sentence appeal and sought only leave to appeal out of time against conviction. That said, the document was headed “Appellant’s Amended Notice of Appeal out of Time against Conviction & Sentence”.

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1 Crimes Act 2009, s 207(1) and (2).

2 Crimes Act 2009, s 212(1).

3 Court of Appeal Act, s 26(1).

7. On 2 July 2021 the appellant filed additional grounds of appeal against conviction and grounds of appeal against sentence.
8. The application for enlargement of time was considered by a single Judge of appeal pursuant to s 35(1) of the Court of Appeal Act. In a comprehensive ruling delivered on 3 September the Judge dismissed the application.
9. On 9 November 2021, pursuant to s 35(3) of the Court of Appeal Act, the appellant filed a renewal notice for enlargement of time of time in which to appeal. The grounds in support of the proposed appeal against conviction were identical to the two grounds advanced in the application filed by the Legal Aid Commission.
10. The courts may look with some leniency upon procedural lapses by incarcerated appellants when they are not legally represented. In this case the delay in filing the appeal is substantial. Nevertheless, this Court is obliged to consider the application for enlargement of time and exercise its discretion in light of the applicable principles.

#### **Enlargement of time - applicable principles**

11. The relevant principles may be summarised:

- 11.1 When an application for enlargement of time has been refused by a single Justice of Appeal acting pursuant to s 35(1) of the Court of Appeal Act, this Court will not automatically grant a renewal application under s 35(3).<sup>4</sup> Consideration of a renewal application requires the full Court of Appeal to scrutinise closely the appellant's application against the reasonably strict criteria to be met before a defaulting litigant is permitted to proceed out of time.<sup>5</sup>

The enlargement of time for filing a belated application for leave to appeal ... involves the exercise of the discretion of the court for the specific purpose of excusing a litigant for ... non-compliance with a rule of court that has a fixed period for lodging [the] application.

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4 *Vakocegu v State* [2023] FJSC 13 at [9].

5 *Vakocegu v State* at [12] citing *Rasaku v State* [2013] FJSC 4.

11.2 Enlargement is permitted only exceptionally and “only in an endeavor to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court”.<sup>6</sup>

11.3 In exercising their discretion appellate courts consider five factors:<sup>7</sup>

- (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 a substantial delay, whether there is nonetheless a ground of appeal that will probably succeed; and
- (v) whether, if time is enlarged, the respondent will be unfairly prejudiced.

11.4 These factors “may not be necessarily exhaustive” but they may be a convenient yardstick by which to assess the merits of an application for enlargement of time.<sup>8</sup>

11.5 The threshold for a successful application to appeal is (logically) higher when the appellant has filed out of time. The appellant must satisfy the Court that the appeal has a real prospect of success (rather than a reasonable prospect of success).<sup>9</sup>

12. I turn now to each of the five factors for this Court’s consideration.

### **The five factors**

#### *The reason for the failure to file within time*

13. The appellant has offered varying explanations for the delay in filing his appeal. He deposed in his affidavit sworn 31 December 2020 that the delay in filing “is on the Naboro

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6 *Rasaku v State* [2013] FJSC 4; CAV0009, 0013,2009 (24 April 2013) at [19].

7 *Vakacegu v State* at [11] citing *Kimur v State; Sinu v State* [2012] FJSC 17.

8 *Rokotuiwailavu v State* [2022] FJSC 21 at [14].

9 *Usa v State* [2020] FJCA 52 at [12].

Maximum Correction Office" because he did hand his notice of appeal to the Office to file on his behalf within time, but the Office did not file and serve his notice. The appellant further said that when he received no response from the Court of Appeal, he inquired with the Office who advised him that the Office had in fact received an acknowledgment from the Court of Appeal but had misplaced the appellant's copy.

14. In his Ruling refusing enlargement of time, the single Judge regarded the appellant's explanation as "incredible, if not completely false".<sup>10</sup> The acknowledgment available on the Court of Appeal file concerned the appeal papers filed (late) on 26 June 2019. Furthermore, the appellant himself in an earlier affidavit sworn 3 June 2020, deposed to having no knowledge of the law, being unfamiliar with the court system and that "this was a major contribution to the late appeal".
15. In light of the appellant's first sworn explanation of the delay I share the learned Judge's concern about the credibility of the explanation offered. Appellant's counsel confirmed the reason for the delay was lack of legal knowledge and that once the appellant was assisted he filed a notice of appeal. As to lack of legal knowledge being a major contribution to the delayed filing, I note that on 2 July 2021, without legal assistance, the appellant filed "in person" additional grounds of appeal against conviction.

*The length of the delay*

16. As I have already observed, the length is substantial. Without any satisfactory explanation the delay must be regarded as inordinate and unjustified.

*Grounds of appeal*

17. The appellant advances two grounds of appeal against conviction.<sup>11</sup> I deal with each in turn.
18. The first ground of appeal states:

... the conviction was unreasonable and cannot be supported by the totality of the evidence at trial when the Learned Trial Judge found that Appellant had

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<sup>10</sup> *Cabebula v State* [2021] FJCA 137; AAU104.2019 (3 September 2021).

<sup>11</sup> As with *Prematilaka ARJA* I do not consider the amended grounds of appeal which I refer to in [7] above. Although the appellant was represented by the Legal Aid Commission at the time, he chose to file his document "in person", without leave, without informing his counsel and without serving them on the State. Consequently the Judge regarded the Court as being "totally unassisted". He criticised the appellant's approach as amounting to an abuse of process and subverting the orderly processes of the Court.

penetrated the vagina of the complainant with his penis without her consent when State had not proven beyond reasonable doubt the lack of consent.

19. The issue of consent is to be considered against three key facts that were admitted at trial. First, the appellant and accused were known to each other before the offending. Secondly, at the material time the appellant was 31 years old and residing at Sigatoka village. His father was posted to Sigatoka village in 2012 as Pastor. Thirdly, the complainant was a student also residing at Sigatoka Village. Although not an "admitted" fact as such, that she was 15 at the material time was uncontested.
20. The complainant's account was that on 6 July 2012 at 7.30 pm she and her sisters attended a church service for the clan at the Pastor's house.<sup>12</sup>
  - After church I accompanied my youngest sister we came outside. Cabe was standing outside and he offered to drop us at home
  - We then said we can go by ourselves he insisted on taking us and we left together. On our way home Cabe was telling me he wanted to have sex with me. I said I can't since he was much older than me and I was very young. He kept on telling me that when he would see me he would admire me I kept saying I can't.
  - When we reached home he told my younger sister to go and watch movies at my uncle's home. Then my younger sister went to my uncle's home to watch movie and I wanted to go with her but then he pulled my arm.
  - He forcefully pulled my arm I just kept telling him I can't. Then he let go of my hand and I entered our house through the front door.
  - Then I locked the door and then I went to the back door to see my other siblings. I went to get my other siblings, when we were coming back home I could still see him waiting outside our house. He was standing outside the kitchen where the firewood was.
  - I was shocked to see him still standing outside the house, then I told my other siblings to go inside the house, while I was telling them to go inside the house he pulled my hand and took me inside the kitchen outside.
  - Then he forced me to sit on the floor and was touching my breasts while my clothes still on (demonstrated by hands). Then I escaped from him and went inside the house to see that my other siblings were off to bed.
  - But before I had gone into the house he told me not to tell anyone of this.

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12 Transcript of Proceedings, pp 8-9.

21. The complainant's evidence was that her father, "the elder of our Mataqali or clan" would, "when he came up with anything" go to share it with the Pastor. On this particular night her father was at the Pastor's house and her mother was on night shift.<sup>13</sup>

- My mother knocks off at 11 pm and boards the bus at 11.30pm, reaches home at 1 am.
- When he was touching my breasts I was afraid because this was the first time someone had done this to me.
- I didn't want to tell my mother and father because my father told me if anything happens to you I will beat you up. Because he doesn't want me to follow what my mother had done in her young days because when my mother was still schooling she got pregnant.
- I am the older of the 3 siblings.
- I can recall 9/07 to 31/07, 2012 only on the 9<sup>th</sup> he came home. I was at home with my siblings and my cousin from Suva. My cousin wanted to drink grog when she was still arranging the grog stuff Cabe came. Not long after we sat with Cabe my cousin asked me to buy some chaser. When I took the money and when I was about to go out, Cabe said he was also leaving for home.
- I went to the shop to go and buy when I was coming back he was trying to call me while standing in a dark place. I did not bother about him I just went home in the house and not long after that he came inside the house.
- My cousin and I thought when he had gone out in the first place he had gone home. I was shocked when he came back inside the house.
- My cousin's name is Ana my mother's namesake.
- When we were having grog my other siblings were inside the room. There was 3 rooms in the house.
- When Cabe came back into the house they were drinking grog I was just sitting there not drinking. After sometime my mother came from work. Not long after that grog had finished. Then we tidied the grog stuff and Cabe said he is leaving for home. We were in the kitchen. It was 1am in the morning next day.
- After that we locked up the house and went to sleep with my mother in her room, me and my other siblings slept with my mother in her room. Ana went to sleep in another room.
- Whilst sleeping I could feel someone tapping my leg and also pulling it. When I woke up I saw Cabe standing beside the bed and I was shocked to see him standing in the room beside the bed.
- I looked I saw it was Cabe, when I looked I saw him it was Cabe. I recognized him I saw his height, his built and looking at him I could tell it was Cabe. There was sufficient light inside the room.

- He was pulling my leg and I woke up and told him to go inside the house because my mum was sleeping. When we went inside the living room I asked him how did you come inside the house.
- Then he was telling me that he wanted to eat pawpaw and I did not understand that I told him to go in the kitchen and look for pawpaw to eat. Then he kept saying that he wanted to eat pawpaw and I thought he was only joking because he is my "tauvu."
- He pulled my hand and took me inside the sitting room there was a bed there he lay me on the bed and took off my pants then he also took off his pants then he took his penis and put inside my vagina.
- After 3 minutes he stood up got dressed and went out before he went out he told me not to tell this to anyone.
- I did not shout or raise alarm because I was frightened my mother would think that I was consenting to what Cabe was doing to me. I did not consent to what Cabe was doing to me.
- At that time I was a small girl when he pulled my hand I was really frightened because he was a big man and I was a small girl.
- When he did this I felt pain all over my body and especially on my thighs. In the 3 minutes he was lying on top of me and having sex, performing sex on me.
- When he was doing this to me I was very frightened at that time. After Cabe had gone outside I went to the bathroom to have my shower and blood was coming out of me.

22. Later in her evidence the complainant described another occasion when her father was attending a church meeting and she was with her siblings inside their home with all the doors locked.<sup>14</sup>

- This was about 9 o'clock in the evening we were all sleeping inside the room and I could feel someone tapping my leg and when I looked I got a shock to see him standing beside the bed. He pulled my hand and took me to the last room and inside the room he forcefully took off my clothes and put his penis inside my vagina. It was Cabe.
- He did this for about 10 minutes. At that time I wanted to shout I tried to get away from him because this was not the first time he has done this to me and I was really scared.
- I wanted to shout but he blocked my mouth with his hand and told me not to shout.
- I tried to get away from him I was pushing him away and also kicking him away but he was holding on to me so tight.
- While he was holding on to me so tight he performed sex on me after that he put on his clothes and told me not to tell anyone of this and he went outside.
- He was on top of me and he put his penis inside my vagina.

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<sup>14</sup> Transcript of Proceedings, p 12.



23. When cross-examined it was put to the complainant that she never shouted or raised any alarm because she wanted the appellant to come with her into the kitchen.<sup>15</sup>

A: I did not want to shout because he is the pastor's son and if I did shout stories would have gone around the village of what he did.

Q: If you are alleging that you weren't in a position to shout because he was the pastor's son you would agree that there was nothing stopping you from kicking him, biting his arms to let yourself go free.

A: I did that.

24. In the hearing before the single Judge appellant's counsel argued it was incumbent on the prosecution to ask the complainant why she did not resist or raise the alarm on any of the occasions when the appellants raped and assaulted her.

25. It is not necessary to discuss the authority counsel relied on for that argument. The learned Judge properly regarded the authority as being confined to its particular facts. For immediate purposes the two salient points are that:

25.1 it is for the accused, not the prosecution, to challenge a complainant's evidence of non-consensual sex; and in any event

26.1 as counsel for the respondent submitted, the complainant had explained that she did not shout or raise the alarm because she was frightened her mother would wake up and think she was consenting. Her evidence was that —

I did not consent to what Cabe was doing to me. At that time I was a small girl when he pulled my hand I was really frightened because he was a big man and I was a small girl.

26. During the second rape the appellant had blocked her mouth and she tried to get away from him by pushing and kicking.

27. In his summing up the trial Judge directed the assessors that in sexual offending cases such as the one before them the evidence of the complainant does not have to be corroborated. The Judge continued:

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<sup>15</sup> Transcript of Proceedings, p 16-17.

This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.

28. The three assessors returned a unanimous opinion of guilty on the rape charge. The Judge considered it was open to them on the evidence to reach that opinion. He accepted the complainant as truthful and reliable. He did not accept the appellant told the truth when he stated that the complainant was his girlfriend and they were in a relationship. It was obvious from the evidence that the accused visited the house regularly and was “very much trusted by the complainant and her family”.
29. The role of an appellate judge confronting challenges to credibility findings was recently discussed by the Supreme Court in *Wang v State*.<sup>16</sup> Young J, delivering the judgment of the Supreme Court cited *Sena v Police*, a decision of the Supreme Court of New Zealand in which the following passage appears:<sup>17</sup>

Since it is an appeal, it is for the appellant to show that an error has been made. Further, in assessing whether there has been an error, an appellate court must take into account any advantages a trial judge may have had. Because of this, where the challenge is to credibility findings based on contested oral evidence, an appellate court will exercise “‘customary’ caution”. There are two main, overlapping, reasons for this. The first is that a slow-paced trial, at which the evidence emerges gradually, provides a good opportunity for evaluating the strengths and weaknesses of a case. *In assessing the plausibility of what is said by the witnesses, the judge has the advantage of being also able to form a view as to what sort of people they are. This is an appreciable consideration despite the now well-recognised difficulties with demeanour based credibility assessments.*

The second consideration, in effect the other side of the coin to the first, is that appellate judges dealing with a case on the basis of a written record of what happened at trial and the submissions of counsel are unlikely to be as well-placed as a trial judge to determine contested questions of fact based on contested oral evidence. For instance, what a witness means may be conveyed, at least in part, by gesture or intonation, something which will not be apparent on the written record. *More generally, the appellate process in which appellate judges are taken, sometimes rather selectively, to the aspects of the evidence on which counsel rely does not replicate the advantages of a trial judge which we have just described.* (emphasis added)

30. I have not been persuaded that there is any proper basis for disturbing the credibility findings reached by the trial Judge.

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16 *Wang v State* [2023] FJSC 39; CAV0013.2021 (26 October 2023).

17 *Sena v Police* [2019] NZSC 59; [2022] 1 NZLR 575 at [38] – [40].

31. I turn now to the second ground of appeal which states:

The learned trial Judge may have fallen into error in fact and law by convicting the Appellant without any regard to the belatedness of the complaint of rape thus raising a reasonable doubt on the credibility and reliability of the complainant's allegation of rape.

32. Before the single Judge the appellant submitted that the trial Judge "did not direct the assessors or caution himself of the belatedness of the complaints". The submission is wrong. In summing up the Judge reminded the assessors that in re-examination the complainant had been asked to explain why it took seven months to tell anybody about the rapes and assault. The complainant answered:

I was really ashamed of myself and this had affected me in my school work even my teachers were asking me what had happened. I could not say anything because I was really ashamed.

33. At [71] – [72] of his summing up the Judge gave the following direction on the issue of delayed complaint:

71. Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for a child of 15 years not to complain to anyone about what she had gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

72. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant in this case did not inform anyone about the incidents until she came to know that she was pregnant on 27 February, 2013.

34. In light of the Court of Appeal's discussion of the issue of delayed complaint in *Bati v State* and the directions it is appropriate for a Judge to give, I consider the trial Judge's directions were unimpeachable.<sup>18</sup>

35. Appellant's counsel submitted the Judge did not expressly caution himself in his Judgment. But I note the authority counsel relied upon for advancing this criticism

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18 *Bati v State* [2023] FJCA 160; AAU002.2021 (23 August 2023) at [8]-[11].

related only to the requirement that a trial judge should specifically address the assessors on belated complaints. That is what the trial Judge did in this case. Where a judgment is delivered proximate to a considered direction to assessors on an issue, an appeal court may regard that direction as constituting a caution to the Judge him or herself where such cautions are required.

### **Sentence appeal**

36. When he first filed his appeal papers in June 2019, the appellant sought to appeal his sentence. He did not however pursue his sentence appeal before the single Judge nor had he maintained his appeal against sentence in the amended grounds filed subsequently by himself and on his behalf by the Legal Aid Commission. Consequently, it appeared to the respondent and to this Court that the sentence appeal had been abandoned.
37. At the hearing on 10 November the appellant seemed to equivocate on the possibility of appealing sentence. He was represented by counsel before the single Judge but was not represented in the hearing of the renewal application before us on 10 November. The appellant said he was unsure what to do.
38. Mr Burney submitted that it was important to get clarity on the point to avoid the significant possibility of wasted judicial time. The appellant had the opportunity to maintain his appeal against sentence but had not done so. Instead it was being resurrected in a sequential way when all issues could have been dealt with at the one hearing.
39. Ultimately the appellant confirmed that he abandoned his appeal against sentence, but pursued his appeal against conviction and relied on the submissions that had been filed.
40. Mataitoga, RJA emphasised to the appellants that abandonment meant the appellant could not, at any future time, resurrect an appeal against sentence. He was asked the questions that the Supreme Court considers prudent to ask in order for the court to be satisfied the decision to abandon an appeal against sentence was made deliberately, intentionally and without mistake.

## Result

41. I do not regard the appeal as having any reasonable prospect of success much less meeting the higher threshold of a real prospect of success which the appellant must meet in this, an application for enlargement of time in which to appeal.
42. Having reached my conclusions after a full consideration of the merits I would dismiss the appeal.


## Orders:

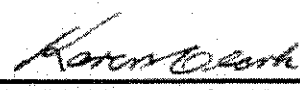
The following orders are made:

- a. The application to enlarge time is refused.
- b. The appeal against conviction is dismissed.
- c. The sentence appeal is formally abandoned.



  
Hon Mr Justice Isikeli Maitaitoga  
RESIDENT JUSTICE OF APPEAL

  
Hon Madam Justice Pamela Andrews  
JUSTICE OF APPEAL

  
Hon Madam Justice Karen Clark  
JUSTICE OF APPEAL