

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

CRIMINAL APPEAL NO: AAU0155 of 2015
[High Court Case No: HAC246 of 2014]

BETWEEN : THE STATE
Appellant

AND : ORISI LUTUNAIVALU
Respondent

Before : Hon. Mr. Justice Daniel Goundar

Counsel : Mr. L. J. Burney for the Appellant
Mr. G. O'Driscoll for the Respondent

Date of Hearing : 9 December 2016

Date of Ruling : 13 December 2016

RULING

[1] Following a trial in the High Court at Suva, the appellant was acquitted of three representative counts of rape at the no case to answer stage. The State seeks an enlargement of time leave to appeal against the acquittal pursuant to section 22(2) (a) of the Court of Appeal Act, Cap.12. The appeal is out of time by 7 days. The sole ground of appeal is:

That the learned trial judge erred in law when he failed to find a case to answer on the lesser offence of sexual assault.

[2] Section 35(1) of the Court of Appeal Act, Cap 12 gives a single judge power to grant an enlargement of time to appeal. The factors to be considered are:

- (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 courts consideration?
- (iv) Where there has been substantial delay, nonetheless is there a ground that will probably succeed?
- (v) If time is enlarged, will the respondent be unfairly prejudiced? (*Kumar v State* unreported Cr App No CAV0001 of 2009; 21 August 2012).

[3] The State filed comprehensive submissions addressing each of above factors. The written submissions were filed Ms Puamau. However, at the hearing, Mr Burney appeared for the State and fairly conceded that the State's appeal cannot possibly succeed. I agree.

[4] The respondent was charged with three representative counts of rape contrary to section 207(1) and (2)(a) of the Crimes Decree No.44 of 2009. The complainant was the respondent's step-daughter. At trial, the prosecution led evidence from the complainant and the doctor who had examined her. After the close of the case for the prosecution, counsel for the accused (the respondent) made an application under section 231(1) of the Criminal Procedure Decree 2009 for an acquittal on the ground that there was no evidence of an essential element of the alleged rape, namely, 'penile penetration of vagina of the complainant by the accused'. The learned trial judge agreed with this submission. The complainant's evidence was that the respondent had sex with her. The prosecution led no evidence what the complainant meant when she said the accused had sex with her. In his ruling, the learned trial judge said that the word 'sex' was not a synonym for penile penetration and that the prosecution had led no evidence of penile penetration as alleged in the charges. Accordingly, the respondent was acquitted of all three counts.

[5] Whether or not there was a case to answer is a question of law alone. Leave is not required on a ground of appeal that involves a question of law alone. However, if the question of law is frivolous in a sense that it cannot possibly succeed, then a single justice of appeal has power to dismiss the appeal under section 35(2) of the Court of Appeal Act, Cap. 12. The primary contention of the State is that the learned trial judge should have found a case to answer on the lesser offence of sexual assault. The difficulty with this argument is that the prosecution never argued before the learned trial judge that the respondent could be convicted of sexual assault if there was no evidence of rape. Also, the respondent had no notice that the prosecution was seeking a conviction on a lesser charge. For these reasons, the State's appeal cannot possibly succeed.

[6] **Result**

Appeal dismissed under section 35(2) of the Court of Appeal Act, Cap. 12.



A handwritten signature in blue ink, appearing to be "Daniel Goundar", written over a horizontal line.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Director of Public Prosecutions for the State.
O'Driscoll & Co for the Respondent.