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

CRIMINAL APPEAL NO.AAU 181 of 2016
[High Court of Suva in Criminal Case No. HAC 159 of 2015]

BETWEEN	:	**ALAFI JONE**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Ms. S. Kiran for the Respondent**
Date of Hearing	:	**14 July 2020**
Date of Ruling	:	**16 July 2020**

RULING

[1] The appellant had been charged in the High Court of Suva for having committed an offence of rape and assault causing actual bodily harm contrary to section 207(1) and (2)(a) and 275 respectively of the Crimes Decree No.44 of 2009.

[2] The information read as follows.

FIRST COUNT

RAPE*: Contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

ALAFI JONE *on the 24th August 2014 at Nasinu in the Central Division had carnal knowledge of* ***OLIVIA MAILULU*** *without her consent.*

SECOND COUNT

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM*: Contrary to section 275 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

ALAFI JONE *on the 24th August 2014 at Nasinu in the Central Division assaulted* ***OLIVIA MAILULU*** *causing her actual bodily harm.*

[3] After trial, the assessors had expressed a unanimous opinion of guilty on both counts on 01 June 2016. The learned High Court judge in the judgment dated 02 June 2016 had agreed with the assessors, convicted the appellant and sentenced him on 07 June 2016 to imprisonment of 09 years and 10 months on the first count and 10 months imprisonment on the second count; both to run concurrently with a non-parole period of 08 years and 10 months.

[4] The appellant in person had signed an application for enlargement of time on 12 December 2016 containing grounds of appeal against conviction and sentence (received by the Court of Appeal registry on 15 December 2016). The delay is a little over 04 months. The appellant's amended grounds of appeal and written submissions had been tendered on two occasions (same document); first on 11 September 2019 and then once again on 26 May 2020 where he has stated that he would rely only on those submissions to be considered by court. An undated and unsigned affidavit also has come into the record at some stage. The appellant had made an application to abandon his appeal against sentence in Form 3 on 08 June 2020. The state had filed its written submissions on 14 July 2020.

[5] The brief facts of the prosecution case could be ascertained from the learned High Court judge's judgment as follows.

> *4. The complainant Olivia's evidence was that she went to Friends Night Club with a friend where she met her childhood friend Kelera, and her boyfriend Alafi the accused. They had been drinking alcohol in the night and in the early hours she had continued to drink with the accused after the other friends left.*

5. She had passed out at the club and she had been at one Leilani's house at Newtown when she woke up. She could not remember how she came there.

6. When she woke up the accused had been on top of her removing her pants. She had struggled and had called for help. Then the accused had punched her and had strangled her neck to shut her up. She said that she was out again due to the amount of punches he gave and also as she was weak.

7. When she regained consciousness she had been half naked. She had been underneath the house in a place like a storage place on a tarpaulin. Her vagina had been paining and she could not see properly as her face was swollen, she said.

8. When she went to the house she had got to know from Leilani that it was her house. Leilani was very unfair because she did not call the police or anybody, she said.

9. She had gone straight to the police station and had made the complaint. Investigating police officer confirmed that the complaint was made by the complainant the same morning.

[6] The learned trial judge had summarised the evidence of the doctor who had examined the complaint as given below.

10. The doctor who examined the complainant the same day testified that there were lacerations in the perenal area and contusions on the neck. Her face had been swollen.

11. The doctor opined that the injuries were possibly consistent with rape and the history. He also said that the injuries in the perenal region would have caused by a penis. Swelling on the face may have caused by blunt force trauma and it may be by punching or using a piece of wood, he said. The injuries had happened within 24 hours. Injuries on the neck may have caused by choking or strangulation, he said.

[7] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State**; **Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[8] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
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> *(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 substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[9] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[10] Under the third and fourth factors in ***Kumar***, **test for enlargement of time now is 'real prospect of success'**. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

> *'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal……'*

[11] I would rather consider the third and fourth factors in ***Kumar*** first before looking at the other factors which will be considered, if necessary, in the end.

Grounds of appeal

> *'Ground 1 - The Learned Trial Judge erred in law and in fact in not analyzing the evidence against the appellant separately causing a miscarriage of justice."*
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> *Ground 2 – The Learned trial Judge erred in law and in fact in finding the appellant guilty of rape and assault causing bodily harm the appellant is charged with.*

<u>Ground 3</u> - The Learned trial Judge erred in law in finding the appellant guilty on the elements of rape and this was an inconsistent verdict and as such there was a substantial miscarriage of justice.

<u>Ground 4</u> - The Learned Trial Judge summing up lacked fairness, objectivity and balance and favoured prosecution causing a miscarriage of justice.

<u>Ground 5</u> - The Learned Trial Judge erred in law in considering the principles of probability and improbability for the case.

<u>Ground 6</u> - The Learned Trial Judge erred in law as the conviction is unsafe and unsatisfactory resulting in a miscarriage of justice.

<u>Ground 7</u> - The Learned Trial Judge erred in law when failing to direct the assessors on the use of circumstantial evidence.

<u>Ground 8</u> - The Learned Trial Judge erred in law as prosecution failed to prove beyond reasonable doubt the 4th element of the charge of rape causing substantial miscarriage of justice.

<u>Ground 9</u> - The Learned Trial Judge erred in law in regards to the lack of consideration given to the Sentencing and Penalties Decree.

<u>Ground 10</u> - The Learned Trial Judge erred in law as he did not consider Section 4 (2) (e) and Section 4(2) (i) of the Sentencing and Penalties Decree.

<u>Ground 11</u> - The Learned Trial Judge erred in law in selection of assessors thus causing a substantial miscarriage of justice.

<u>Ground 12</u> - The Learned Trial Judge erred in law in not considering the conduct and incompetency of the defence counsel causing a miscarriage of justice.

01st ground of appeal

[12] The gist of the complaint under the first ground of appeal is that the learned trial judge had failed to analyze the two counts separately in the summing-up confusing the assessors.

[13] Upon an examination of the summing-up, it is clear that the trial judge in paragraphs 11-15 had addressed the assessors on the elements of rape and in paragraphs 16-19 on the offence of assault causing actual bodily harm. No confusion could have arisen in the mind of the assessors of the two counts. In addition the trial judge had given his

mind to these separate counts in paragraphs 16 and 17 of the judgment and decided that both had been proved beyond reasonable doubt.

[14] This ground of appeal has no prospect of success.

02nd and 04th grounds of appeal

[15] Vaguely drafted as it is, these grounds of appeal seems to contain a complaint that the summing-up is not objective, slanted towards the prosecution, structured in a manner biased towards the defense and the trial judge had guided the assessors to find the appellant guilty. However, the appellant has failed to highlight what statements in the summing-up are caught up within the appellant's above allegations.

[16] On an examination of the summing-up, I cannot see any merits in this contention. The learned trial judge had reminded the assessors of the prosecution evidence from paragraphs 20-42 and engaged in an analysis of it particularly regarding inconsistencies of the complainant's evidence, recent complaint evidence and the defense the appellant put forward in cross-examination in paragraphs 45-49. Since the appellant remained silent and called no witnesses there was no evidence on behalf of the appellant to be placed before the assessors. The trial judge had also said in paragraphs 43, 44 and 50 as follows.

> *'[43] Lady and Gentlemen assessors,*
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> *At the end of the prosecution case you heard me explain several options to the accused. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains on the prosecution at all times. The accused opted to remain silent. You must not draw any adverse inference from his choice to remain silent.'*
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> *'[44] Lady and gentlemen assessors,*
>
> *You heard the evidence of many witnesses. If I did not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision.'*
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> *'[50] I have told you the elements of the offence of Rape and Assault Causing Actual Bodily Harm you have to consider. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You may use your common sense when deciding on the facts. Assess the evidence of all witnesses and their demeanour in arriving at your opinions.*

[17] Therefore, I do not see how the appellant's complaint that the summing-up lacks the essential quality of objectivity and not presented in a fair and balanced manner as stated *inter alia* in the following decision, could be sustained.

[18] In **Tamaibeka v State** [1999] FJCA 1; AAU0015u.97s (8 January 1999) it was held

> *'A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced. If all the issues are put in a manner favourable to one party and unfavourable to the other, the assessors may feel bound to follow the view expressed by the Judge.'*

[19] The Court of Appeal in ***Tamaibeka*** has cited the following judgments in the course of the judgment but the appellant has not demonstrated with examples from the summing-up how the trial judge had offended the legal principles in any of those decisions.

> 'In ***R v. Fotu*** [1995] 3 NZLR 129 the Court of Appeal in New Zealand was concerned with a challenge to a summing up on the grounds of lack of impartiality. At 138 Cooke P, delivering the judgment of the court, referred to the speech of Lord Hailsham of St. Marylebone L C in ***R v Lawrence*** [1982] AC 510, 519:
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> > ***'A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.'***
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> Cooke P went on to observe that in ***Fotu's*** case "..... the summing up contrasts in some respects with the orderly, objective, and balanced analysis there recommended."
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> Later he added:
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> > ***"Considered as a whole the summing up leaves not the slightest doubt about what the judge was putting forward as the only just, proper and correct verdict, although he was careful to say frequently that it was a matter for the jury. A Judge is entitled to indicate his own views of the evidence, provided that as a whole the summing up is a fairly balanced***

and fair presentation of the case to the jury (Broadhurst v. R [1964] AC 441; R v Ryan [1973] 2 NZLR 611).

With great regret we are driven to conclude that this summing up clearly crossed the line into imbalance"

The requirement fairly to put the defence to the jury, or here the assessors, has long been recognised. In ***re Dinnick*** (1909) 3 Cr App R 77, 79, Lord Alverstone LCJ referred to what he described as a paramount principle of the criminal law "that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury."

In ***R v Clayton*** (1948) 33 Cr App R 22 Lord Goddard CJ had this to say about that duty:

"The duty of a judge in any criminal trial .... is adequately and properly performed .... if he puts before the jury, clearly and fairly, the contentions on either side, omitting nothing from this charge, so far as the defence is concerned, of the real matters upon which the defence is based. He must give to the jury a fair picture of the defence, but that does not mean to say he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence ...."

In ***R v Wilkes and Briant*** [1965] VR 475, 479, Smith J in the Full Court of the Supreme Court of Victoria referred to the risk of an erroneous conviction unless extremely strict precautions are taken. He said:

"Important amongst the necessary safeguards is the established rule that it is the judge's duty to put the defence fairly to the jury. That rule cannot, save in quite special circumstances, be departed from, without serious risk of a miscarriage of justice."

Finally, we refer to the comments of Richmond J in the Court of Appeal of New Zealand in ***R v Ryan*** [1973] 2 NZLR 611:

"There are cases where, in the particular circumstances, it has been held sufficient for a judge to leave the matter to the jury simply on the basis of the evidence they have heard and the addresses of counsel.... On the other hand there have been cases in which the summing up was held inadequate because it emphasised matters adverse to the accused but failed adequately to convey to the jury the answers made by the accused..... In some cases it may be sufficient for the judge to refer in the most general terms to the issue raised by the defence, but in others it may be necessary for him not merely to point out in broad terms what the defence is but to refer to the salient facts and especially those upon which the accused based his defence."

[20] In **Ali Ali** [1981] 6 A Crim R161, 165 it was held

> *"It is frequently said that a summing up must present a balanced account of the conflicting cases. But when one case is strong and the other is weak it does not follow that a* ***balanced summing up*** *will be achieved by under-weighting the strong case and over-weighting the weak case. If one case is strong and the other is weak, then a balanced account inevitably will reflect the strength of the one and the weakness of the other."*

[21] This ground of appeal has no real prospect of success.

03rd ground of appeal

[22] The appellant complains that the two verdicts were inconsistent. On the evidence led I cannot see why the two verdicts cannot co-exist. Both were based substantially on the evidence of the complainant complemented by medical evidence. The charge of rape except with regard to the element of lack of consent was further galvanised by the admission made as part of additional admitted fact to the effect *'On 24th of August, 2014 the accused Alafi Jone and the complainant Olivia Mailulu had carnal knowledge whereby the accused penetrated the complainant's vagina with his penis.'*

[23] The two verdicts can stand side by side and it cannot be said that no reasonable assessors or a judge properly directed could have arrived at the guilty verdict or that the verdicts cannot be reconciled on any rational or logical basis. These verdicts are not obnoxious to the principles relating to inconsistent verdicts set out in **Balemaira v State** [2013] FJSC 17; CAV0008 of 2013 (06 November 2013) and **Vulaca v State** [2013] FJSC 16; CAV0005.2011 (21 November 2013)].

[24] This ground of appeal has no real prospect of success.

05th ground of appeal

[25] The appellant submits that the learned trial judge had not considered the principles of probability and improbability of the prosecution case. He alleges that the trial judge had not placed before the assessors the complainant's evidence that she had got drunk and passed out and cannot remember most of the things that happened from being at the night club to the place of the alleged rape at Newtown. In particular, the appellant raises

the questions whether both of them were drunk and had consensual sex and she could have been involved in a brawl in the night club resulting in her bodily injuries.

[26] As I pointed out earlier the trial judge had addressed the assessors on these aspects in the summing-up and more particularly in paragraphs 21, 22, 26, 29, 48 and 49. The trial judge had given his mind to them in paragraphs 5 and 12 of the judgment as well.

[27] The appellant also argues that there was no independent evidence to demonstrate that the complainant could be trusted in her evidence to convict him. The only issue in the case was that of consent or lack of it. In terms of section 129 of the Criminal Procedure Act, 2009 the complainant's evidence required no corroboration. The assessors and the trial judge had believed her evidence on lack of consent (see paragraph 17 of the judgment) and all the appellant's suggestions to the contrary had been rejected by the complainant. There was no evidence contradicting the evidence of lack of consent by the complainant. The doctor had opined that the complainant's injuries were consistent with rape thus lending more credibility to the complainant's version.

[28] This ground of appeal has no real prospect of success.

06th ground of appeal

[29] The appellant argues that the opinion of the assessors and the judgment are unsafe and unsatisfactory. He cites lack of eye-witness evidence, expert evidence or documentary evidence to buttress his argument. None of these is essentially required for a conviction in a rape case. Such evidence would be hardly available in the matter of consent anyway in a rape case. In any event, the real question is not whether the verdict or conviction is unsafe and unsatisfactory but whether it could stand the scrutiny against the grounds set out in section 23 of the Court of Appeal Act.

[30] In **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) it was held

> *[52] Section 23 (1) of the Court of Appeal Act provides that the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there*

was a miscarriage of justice. In any other case the appeal must be dismissed. The proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the Appellant if the Court considers that no substantial miscarriage of justice has occurred.

*[54] In attempting to obtain guidance on the application of section 23(1) of the Court of Appeal Act from the English decisions, reliance can only be placed on those decisions prior to 1968. Section 23(1) is in virtually identical terms to section 4(1) of the Criminal Appeal Act 1907 (UK) which remained in force until 1966. From 1968 the bases upon which the English Court of Appeal must allow an appeal have changed in substance to the point where since 1995 the only test to be applied is whether the conviction is unsafe. This is not the law in Fiji. In addition since 1995 in England there is no longer any provision for the application of the proviso. As a court created by statute the powers of the Court of Appeal in criminal appeals are derived from and are confined to those given in Part IV of the Court of Appeal Act Cap 12. The Court of Appeal does not have an inherent jurisdiction in relation to criminal appeals since the appeal itself is a creation of statute: (See **R –v- Jeffries** [1969] 1 QB 120 and **R –v- Collins** [1970] 1 QB 710).*

[31] This ground of appeal has no real prospect of success.

07th ground of appeal

[32] The appellant complains that the learned trial judge had failed to analyse and direct the assessors on the use of circumstantial evidence. However, the prosecution case did not depend on circumstantial evidence. The only issue was that of consent and the only evidence of that came from the complainant which was direct evidence. There was no need at all to analyse or address the assessors on circumstantial evidence in relation to the issue of consent.

08th ground of appeal

[33] The appellant's argument here appears to be based on the mental element of the offence of rape. He contends that the learned trial judge had not adequately and correctly explained to the assessors the fault element of rape and picked the sentence in paragraph 15 of the summing-up *'You must be satisfied beyond doubt that the accused knew or believed that she was not consenting and was determined to have sexual intercourse with her anyway'* for criticism.

[34] The Court of Appeal in **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) exhaustively analysed the fault element of rape and stated

> *'[34] ……. Therefore, in a case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one of the three fault elements would be sufficient to prove the fault element of the offence of rape*
>
> *[42] ……. I have already held that it is recklessness that is the fault element of the offence of rape. However, as stated above the prosecution could prove the fault element of recklessness by proving intention, knowledge or recklessness'.*

[35] It is true that the trial judge had not referred to recklessness but only to knowledge. This had only worked in favour of the appellant, for the facts suggest that he had clearly been reckless in deciding to penetrate the vagina of the complainant with his penis in the teeth of her struggle against him in addition to his knowledge of lack of consent on her part.

[36] This ground of appeal has no real prospect of success.

[37] Appeal grounds 09 and 10 are on the sentence and the appellant is seeking to abandon his appeal against sentence and therefore, they are not considered here.

11th ground of appeal

[38] The appellant criticises the conduct of the learned trial judge in the selection of assessors. The appellant has not demonstrated that anything contrary to section 204 of the Criminal Procedure Act had happened in the process of selecting assessors. Neither has the counsel for the appellant raised any objection in that process or make representations to court on the ethnic representation of assessors as said in **Nand v Reginam** [1980] 26 FLR 137 at any stage in the trial court. However, I must point out that the observations in ***Nand*** must now be considered subject to the Constitution of the Republic of Fiji and more particularly to section 5 thereof which treats all citizens of Fiji as Fijians and not by any ethnic identities.

[39] This ground of appeal has no real prospect of success.

12th ground of appeal

[40] The appellant complains of alleged incompetency of his trial counsel. Firstly, the Court of Appeal will not entertain a ground of appeal based on criticism of former trial counsel in appeal when it is done without complying with the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of grounds of appeal, as set down in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019). The appellant has not taken those steps.

[41] Secondly, ***Chand*** also cited the following decisions which go to show that the appellant's complaint cannot succeed even otherwise.

> *[51] In **Ensor** [1989] 1 WLR 497 the Court of Appeal held that a conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial later appears to have been mistaken or unwise. This would be the case even if the decision or action was contrary to the accused's wishes. Taylor J said in **Gautam** [1988] Crim LR 109*
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> > *' ... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground of appeal.'*
>
> *[52] I am certain that in this case it cannot be said that no reasonably competent counsel would sensibly have adopted the course taken by the appellant's trial counsel. It was held in **Clinton** (1993) 97 Cr.App.R.320, [1993] 1 W.L.R.1181 that the circumstances in which the verdict of a jury could be set aside on the basis of criticisms of defense counsel's conduct would "of necessity be extremely rare". I am sure that this is not one of those rare cases.*

[42] From the summing-up and the judgment it is clear that the appellant's counsel has put forward his defence of consent clearly before court and there is absolutely no trace of flagrantly incompetent advocacy causing any miscarriage of justice.

[43] This ground of appeal has no real prospect of success.

[44] There is much truth in the statement, as has been said before, that a trial is not an inquiry into the truth of an issue but is concerned simply with the narrower question whether the prosecution has proved its case against the accused beyond reasonable doubt.

[45] I am of the view that the delay is not within reasonable limits (see **Julian Miller v State** AAU0076 of 2007), the reasons for the delay cannot be considered as the appellant's affidavit is unsigned and undated. However, no prejudice to the respondent could be foreseen at this stage by an extension of time. Nevertheless, the appellant fails in the most important test of 'real prospect pf success' to deserve enlargement of time.

Order

1. Enlargement of time against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL