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

CRIMINAL APPEAL NO.AAU 0078 of 2017
[In the High Court at Labasa Case No. HAC 25 of 2015]

BETWEEN : **JONE SENIBIAU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Ratu for the Appellant**
: **Ms. A. V. Vavadakua for the Respondent**

Date of Hearing : **09 November 2020**

Date of Ruling : **10 November 2020**

RULING

[1] The appellant had been indicted in the High Court of Labasa on a single count of rape contrary to section 207 (1) and (2) (b) of the Crimes Act, 2009 committed on 19 March 2015 at Togo Village, Qamea in the Northern Division.

[2] The information read as follows.

'FIRST COUNT

Statement of offence

RAPE *– Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009.*

Particulars of the Offence

> ***JONE SENIBIAU*** *on the 19th day of March 2015, at Togo Village, Qamea, in the Northern Division, penetrated the vagina of* ***SERA KULA****, with his finger, without her consent.*

[3] After the summing-up on 05 October 2016 the assessors had unanimously opined that the appellant was guilty of the charge and in the judgment delivered on 06 October 2016 the learned trial judge had agreed with them and convicted the appellant of rape. On 07 October 2016 the appellant had been sentenced to 10 years and 06 months of imprisonment with a non-parole period of 08 years and 06 months.

[4] The appellant in person had signed an untimely notice of leave to appeal against conviction and sentence on 11 May 2017 (received by the CA registry on 24 May 2017). The delay is about six months. The Legal Aid Commission had subsequently filed papers seeking enlargement of time, amended grounds of appeal and written submissions on 17 July 2020. The state had responded by its written submission on 19 August 2020.

[5] 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

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

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors 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 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?*

[7] ***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.'

[8] The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

'*(a)……..*

(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.

(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.

(d) Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained.

(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'

[9] Sundaresh Menon JC also observed

'27……… It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.'

[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 **<u>'real prospect of success'</u>** (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal……'*

Length of delay

[11] The delay is about 06 months which is substantial. In **<u>Qarasaumaki v State</u>** [2013] FJCA 119; AAU0104.2011 (28 February 2013) even a delay of 3 ½ months had been considered significant.

[12] In **<u>Nawalu v State</u>** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 3 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

> *'In **<u>Julien Miller v The State</u>** AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave. <u>The appellant in that case was 11½ months late and leave was refused.'</u>*

[13] Faced with a delay of 03 years in **<u>Khan v State</u>** [2009] FJCA 17; AAU0046.2008 (13 October 2009) Pathik J observed that *'There are Rules governing time to appeal. The appellant thinks that he can appeal anything he likes. He has been ill-advised by inmate in the prison. <u>The court cannot entertain this kind of application</u>'*

[14] I also wish to reiterate the comments of Byrne J, in **<u>Julien Miller v The State</u>** AAU0076/07 (23 October 2007) that

> *'… that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'*

[15] Therefore, delay alone may be capable of defeating the appellant's appeal if that is the only consideration.

Reasons for the delay

[16] The appellant's excuse for the delay is that he was not aware that he could appeal after his incarceration in the prison. The state has pointed out that the sentence was read out to the appellant by the learned High Court judge in the presence of his counsel for the Legal Aid Commission and in paragraph 18 of the judgment the judge had clearly informed his right to appeal to the Court of Appeal within 30 days.

[17] In ***Qarasaumaki*** the Court of Appeal said

> *'[4] ..... The Notice is late by 3 ½ months and the reason for the delay is that the applicant was unaware of the statutory 30–day appeal period. The delay is significant and the applicant's ignorance of the law and its procedures is not a good excuse (**Rasaku's** case at [31]).*

[18] Therefore, I am not convinced at all of the reason for the delay given by the appellant and he has not satisfactorily explained the delay in lodging his appeal.

Merits of the appeal

[19] In the **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

> *"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."*

[20] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well in order to consider whether despite the substantial delay and want of an acceptable explanation, still the prospects of his appeal would warrant granting enlargement of time.

[21] Grounds of appeal against conviction urged on behalf of the appellant are as follows.

> *(i) 'THE verdict is unreasonable in that there is a reasonable doubt on the element of penetration.*

(ii) *THE Learned Trial Judge erred in law and in facts by not directing the assessors on how to approach inconsistencies arising from the evidence on oath and what is stated in a police statement.*

[22] The trial judge had summarised the evidence of the complainant and the appellant's position as follows in the judgment.

> *'[5] Prosecution case was based primarily on the evidence of the complainant. According to her, the accused is a person known to her. On the night of 19th March 2015 at about 2.45a.m. in her sleep the complainant felt someone first touching her vagina and then inserting a finger into it. She woke up and saw the face of the accused on the other side of the netting which separated them. There was a vertical cut in the netting through which the accused put his hand in to penetrate her. She later found a razor blade near the cut. She saw his face from the light coming from her solar lamp. He then ran away. She did not consent to the act of the accused.*
>
> *[6] The accused did not give evidence but relied on the position that he merely touched her vagina, as stated in his caution statement, marked by the prosecution as **P.E. No. 1A**. In this statement, he denied having inserted his finger into the vagina of the complainant.*

01st ground of appeal

[23] Therefore, it is common ground that what was in dispute at the trial was only the issue of penetration. According to the complainant the appellant had inserted his finger into her vagina and the appellant's position is that he had only touched her vagina.

[24] The appellant's complaint is that the trial judge should have independently assessed the evidence in its totality *i.e.* the evidence of the complainant and the appellant's cautioned statement in the judgment and in support of this proposition relies on **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) where Gounder J had said that when a verdict is challenged on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him and he also has cited **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020) to buttress his argument.

[25] I had the occasion to analyse several previous decisions dealing with the role of a trial judge in agreeing or disagreeing with the assessors in **Eroni Cevamaca v State** AAU 0060 of 2017 (22 September 2020). The judgments considered were **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC

12; CAV0001.2011 (9 May 2012), **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020).

[26] Having examined those decisions, I expressed the following views in **Eroni Cevamaca v State** (supra).

> *'[32] Therefore, there still appears to be some gray areas flowing from the above judicial pronouncements as to what exactly the trial judge's scope of duty is when he agrees as well as disagrees with the majority of assessors.*
>
> *[33] However, what could be identified as common ground is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trail judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter.*
>
> *[34] On the other hand when the trial judge disagrees with the majority of assessors the trial judge should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.*
>
> *[35] In my view, in both situations, a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.*

> *[36] This stance is consistent with the position of the trial judge at a trial with assessors in Fiji i.e. the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide* ***Rokonabete v State*** *[2006] FJCA 85; AAU0048.2005S (22 March 2006),* ***Noa Maya v. The State*** *[2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and* ***Rokopeta v State*** *[2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).'*

[27] Therefore, I do not agree that the trial judge was under a duty to independently assess the evidence in his judgment in this instance when agreeing with the assessors. Nevertheless, in his judgment the trial judge had firstly directed himself in accordance with the summing-up over which the appellant has no complaints and secondly, having focused his attention to the only issue at the trial namely 'penetration' the judge had concluded as follows

> *'[7] The assessors have found the evidence of prosecution as truthful and reliable, as they unanimously found the accused guilty to the count of Rape. They were directed in the summing up to evaluate the probabilities of the version of events as presented by the parties. The inconsistencies of the prosecution were also highlighted with suitable directions. The three assessors have obviously rejected the position taken up by the accused in his statement. It was a question of believing whom.*
>
> *[8] In my view, the assessor's opinion was not perverse. It was open for them to reach such a conclusion on the available evidence. I concur with the opinion of the assessors.*
>
> *[9] Considering the nature of all the evidence before the Court, it is my considered opinion that the prosecution has proved it's the case beyond a reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offence of Rape.'*
>
> *[10] In the circumstances, I convict the accused, JONE SENIBIAU, to the count of Rape.*

[28] Therefore, I do not think that the appellant's argument has any real prospect of success before the full court.

[29] There were two versions before the assessors and the trial judge on the issue of consent. What is required of a trial judge when there is a 'word against word' conflict between the prosecution and defence had been dealt with in **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Prasad v State** [2017] FJCA 112; AAU105

of 2013 (14 September 2017) and in **Liberato v The Queen** [1985] HCA 66; 159 CLR 507.

[30] In **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 High Court of Australia held:

> '*……. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue….'*

[31] In **De Silva v The Queen** [2019] HCA 48 (decided 13 December 2019) the position taken up by the majority on the High Court was that a *"Liberato direction"* is used to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that *". . . the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt."*

[32] ***Prasad*** was a case where (of course, in different circumstances to the current appeal) the appellant took up the consistent position that his indulgence in the act of sexual intercourse with the victim was consensual whereas the complainant's evidence was that the appellant engaged in sexual intercourse with her without her consent and there was seemingly no other credible evidence (though some evidence led at the trial) to buttress the complainant's version the credibility which itself was called into question, the Court of Appeal said as follows.

> *'[44] In my opinion, trial judges dealing with evidence of a case should necessarily leave the assessors with the following directions:*
>
> > *(i) that the onus of proving each ingredient of a charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.*
> >
> > *(ii) that in assessing the evidence, the totality of evidence should be taken into account as a whole to determine where the truth lies.*
> >
> > *(iii) that in situations where there is evidence adduced on behalf of an accused, it is incumbent on the assessors to examine such evidence carefully to decide, not necessarily whether they believe that evidence*

or not, but whether such evidence is capable of creating a reasonable doubt in their minds.

(iv) that in other words, if they believe the evidence adduced on behalf of the defense, which means the prosecution has failed to prove the case beyond any reasonable doubt and hence the benefit of the doubt should enure in favor of the accused and he shall therefore be acquitted.

(v) that on the other hand in the scenario of the assessors neither believe the evidence adduced on behalf of the accused nor they disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution's case and the benefit of doubt should then enure in favor of the accused and he should then be acquitted.

(vi) that in a situation where the assessors totally disbelieve the evidence adduced on behalf of the accused, the assessors should still consider whether the prosecution's case can stand on its own merits. Which means whether the case has been proven beyond any reasonable doubt. In another word, the mere fact that the accused's version has been rejected for its veracity, it does not mean the case for the prosecution has been proven beyond any reasonable doubt.

[33] On a perusal of the summing-up, I find that the trial judge had addressed the assessors on the burden of proof and standard of proof as the burden of the prosecution in paragraphs 28 to 31. He had also addressed the assessors on how they should deal with the appellant's evidence in paragraphs 58-61 and 72 and no substantial complaint could be made regarding the trial judge's summing-up on the *'complainant's version'* against *'appellant's version'* scenario.

> *'**[58]** In examining the accused's position in his caution interview on the determination of the question of fact, whether there was penetration of finger into the vagina of the complainant, if you find that the claim of the accused raises a reasonable doubt in your minds, then you must find the accused not guilty of the charge of Rape since the prosecution has failed to prove its case. If you reject the claim of the accused that he merely touched her vagina and his denial of the fact that he inserted his finger into it; that does not mean the prosecution case is automatically proved. They have to prove their case independently of the accused and that too on the evidence they presented before you.*

> ***[59]** With this caution in mind, we could proceed to consider the claim of the accused for its probability of the version. The accused denies any penetration. He also denied touching inside of the complainant's vagina with his finger. He*

claims he only touched it. It is your duty to consider the relative probability of the accused's version of events.

[60] *I must caution you over one important matter. When I present the accused's version, alongside the version of the complainant, you might get an impression that the accused must prove that he only touched her vagina and did not penetrate her vagina. That is wrong. He is under no duty to disprove the case for the prosecution. He is not under a legal duty to offer evidence. He opted to remain silent.*

[61] *So far I have directed you on the assessment of credibility of the witnesses for the prosecution and the version of events as claimed by the accused in his caution interview. If you reject the claim of the accused, that he merely touched her vagina, and preferred to accept the prosecution evidence as truthful and reliable then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence of Rape, beyond a reasonable doubt.*

[72] *If you have any reasonable doubt about the prosecution case as a whole or an element of any of these offences, then you must find the accused not guilty.*

[34] I think there is substantial compliance with the directions recommended by the above decisions in the summing-up on the appellant's position.

[35] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it is complained that the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

> *'…………..Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*
>
> *It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
>
> *We are not able to usurp the functions of the lower Court and substitute our own opinion.*
>
> *The appeal is dismissed.'*

[36] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[37] In my view, it was open to the assessors to bring the verdict they brought against the appellant and for the trial judge to agree with them. Having considered the evidence against this appellant as a whole, one cannot say that the verdict was unreasonable. There was evidence, when believed, on which the verdict could be based. In the circumstances, I do not see any basis for this court to interfere with the verdict on the count of rape.

[38] Thus, there is no real prospect of success of the appeal as far as this ground of appeal is concerned.

02nd ground of appeal

[39] The appellant complains that the trial judge had not directed the assessors as to how they should approach inconsistencies arising from evidence. The trial judge had dealt with the alleged inconsistencies in the summing-up as follows.

> *'**[17]** Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing credibility of the testimony of a witness on consistency means to consider whether it differs from what has been said by the same witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question.*
>
> ***[18]** In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Credibility concerns honesty. Reliability may be different. A witness may be honest enough, but have a poor memory or otherwise be mistaken.*
>
> ***[49]** At the beginning of this summing up, I described some considerations you might want to apply to the evidence in order to satisfy yourselves as to the truthfulness and reliability of the evidence. One such consideration is the consistency of the evidence. I shall deal with the two inconsistencies highlighted in the prosecution's case by the accused.*
>
> ***[50]** The first inconsistency of the prosecution evidence as highlighted by the accused was in relation to penetration by his finger. The inconsistency is based*

on the admission by the complainant that she was not orderly in her thoughts as she had just woken up from deep sleep and therefore unable to say for how long the accused touched her vagina. When it was suggested to her, during the cross examination by the accused, that at no point of time the accused inserted his finger into her vagina, the complainant replied that he did insert his finger.

***[51]** The other inconsistency highlighted by the accused was in relation as to who unbuttoned her pants. In examination in chief, the complainant said that when she woke up she found her panties pulled down, her pants unbuttoned and unzipped. She admitted in cross examination that she told Police, when the incident is still fresh in her mind, that she herself unbuttoned her pants. She further admitted that it is the correct position.*

***[52]** It is for you to decide whether these are inconsistencies and to the extent to which it affects the credibility of the basic version of the complainant and what weight you attached to her evidence. It is also for you to consider whether these inconsistencies make her evidence false and unreliable.*

[40] Therefore, I cannot see anything materially wrong with the trial judge's directions on the alleged inconsistencies. The ultimate test in assessing the contradictions, inconsistencies and omissions was laid down in the case of **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) as follows.

*'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280)'*

[41] The real inconsistency is the complainant's evidence on as to who unbuttoned her pants as opposed to what she had stated to the police. This inconsistency would have had a material impact on the credibility of the complainant's evidence had the appellant's defence been one of consent. As to who unbuttoned is immaterial to the issue as to whether there was penetration or not. The other alleged inconsistency does not appear

to be a real inconsistency as the complainant had not admitted anywhere that the appellant had not inserted his finger into her vagina.

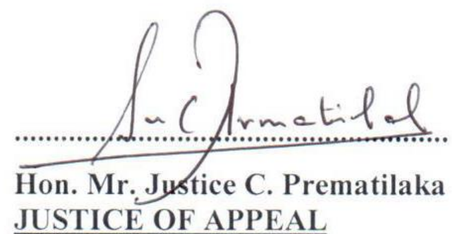
[42] Therefore, this ground of appeal too has no real prospect of success.

Prejudice to the respondent

[43] I do not see any real prejudice caused to the respondent as a result of an extension of time except the lapse of time since the commission of the offence. The delay itself is not very substantial. However, other factors and most importantly the merits of the appeal do not favour an enlargement of time.

<u>Order</u>

1. Enlargement of time to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL