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

CRIMINAL APPEAL NO.AAU 0063 of 2019
[In the High Court at Labasa Case No. HAC 39 of 2017]

BETWEEN : **ULIANO SAMUNAKA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Dr. A. Jack for the Respondent**

Date of Hearing : **12 November 2020**

Date of Ruling : **13 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 23 July 2017 at Navetau Village Saqani in the Northern Division.

[2] The information read as follows.

'Statement of Offence

RAPE: *Contrary to section 207(1) and (2)(b) of the Crimes Act 2009.*

Particulars of Offence

ULIANO SAMUNAKA *on 23 July 2017, at Navetau Village Saqani in the Northern Division, penetrated the vagina of (name suppressed) with his finger, without her consent.*

[3] After the summing-up on 17 August 2018 the assessors had unanimously opined that the appellant was guilty of the charge of rape. In the judgment delivered on the same day the learned trial judge had agreed with the assessors and convicted him as charged. On 20 August 2018 the appellant had been sentenced to 09 years and 06 months of imprisonment with a non-parole period of 08 years.

[4] The Legal Aid Commission had filed an application for enlargement of time to appeal against conviction on 10 June 2019 and written submissions on 26 August 2020. The delay in appealing is about 08 months and three weeks. The state had responded by its written submission on 04 September 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 **'real prospect of success'** (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal……'*

Length of delay

[11] As already pointed out the delay in filing the amended notice of appeal is 08 months and 03 weeks which is substantial.

[12] In **Nawalu v State** [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 **Julien Miller v The State** 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. The appellant in that case was 11½ months late and leave was refused.'*

[13] Faced with a delay of 03 years in **Khan v State** [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. The court cannot entertain this kind of application'*

[14] I also wish to reiterate the comments of Byrne J, in **Julien Miller v The State** 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 is sufficient to defeat the appellant's appeal if that is the only consideration.

Reasons for the delay

[16] The appellant has stated in his affidavit that he was undecided whether to appeal or not but finally decided to do so after discussions with his prison inmates and then attempted to communicate with Legal Aid Commission in December 2018 but his application to the LAC for reasons unexplained had reached LAC office in Labasa only in March 2019. Still the appeal had been filed in June 2020. The appellant had

been defended at the trial by lawyers from the LAC and there is no material submitted by the appellant to substantiate the reasons for delay even from December 2018. What is clear is that the appellant had no intention to appeal in the first instance.

[17] Therefore, the appellant has not satisfactorily explained the substantial delay in lodging his appeal against conviction.

Merits of the appeal

[18] 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."*

[19] 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.

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

> *1. **THAT** the conviction is not supported by the totality of the evidence, in that there is a serious doubt to the identification of the Appellant and that the Appellant had penetrated the complainant's virgin with his fingers.*
>
> *2. **THAT** the Learned Trial Judge erred in law and in facts, by not adequately directing the assessors on how to approach the alibi defence raised by the Appellant at trial.*
>
> *3. **THAT** the Learned Trial Judge had not fairly and objectively summed up the evidence of the Appellant's alibi witnesses.*
>
> *4. **THAT** the Learned trial Judge erred in law and in fact by allowing inadmissible evidence to be placed before the assessors, in that the complainant told her husband what had happened and the husband wanted to find the Appellant, when in fact the Husband was not called as a witness to*

give evidence, therefore such inadmissible evidence would have unduly strengthened the complainant's credibility.

*5. **THAT** the Learned Trial Judge erred in law, in failing to direct the assessors and himself on the fault element that the Appellant was reckless as to whether the complainant had consented.*

[21] The trial judge had summarised the evidence of the complainant and the doctor as follows in the judgment.

> *13. During the night leading to the 23 July 2017 she awoke from sleeping in pain. There was a heavy person lying on top of her. She opened her eyes and saw the accused. He was using his fingers to play with her and penetrate her. She asked him what he was doing, and telling him that it was very painful. He pressed his hand and mouth on to hers to keep her from shouting out. She tried to move around to evade him and shout. He punched her twice on her right thigh. He tried to force her legs apart but wasn't able to. He then stood up and went to stand in the kitchen, where she could see him by the light that was on there. She had known him for 14 years because they lived in the same village. When this happened it was sometime between 2am and 3am and he was in her room for about 15 minutes. At the time her husband was in another part of the village drinking yaqona. He didn't return until about 3pm that afternoon. She told him what had happened. He wanted to go to find Uliano but she said: "Enough already. I have already told the Turaga-ni-Koro and the Police."*
>
> *14. In cross-examination she added that after the accused had left her house she had shouted out and had asked her young uncle Sakeo to run after the fellow. She told Sakeo that he was the same build as Mokambo. She didn't want to tell Sakeo that it was Uliano because she was ashamed and her body was weak.*
>
> *15. **The young Doctor** told us about his medical examination of Koleta the next day, (the 24th) at the Korovesi Medical Centre. He noted two bruises on her right leg one on her lower thigh and one on her upper inner thigh. He said that these would be caused by violent blunt force trauma and were likely to be caused by a punch etc.*

[22] The trial judge had summarised the evidence of the appellant and his two witnesses as follows.

> *"18. **Uliano** told us that in the evening of the 23rd July 2017, he was drinking grog in the village with a group of his friends. They drank until about 11 pm. It was after that that Sakaraia invited him to drink home brew in a deserted house in Navutu, a neighbouring settlement. He went and drank there with*

some others. In the course of the night, he had an argument with Uraia which developed into a physical fight. They were very drunk. He left the house and went to the roadside where the home brew drinking had resumed. He joined his friends who had two buckets of home brew with them. After drinking one and a half buckets, he went home with Sakaraia. They were drunk but he says they knew what they were doing.

19. When they got to the village Sakaraia went to Alipate's house to get food and he went to the toilet. He then went to Kolinio's house with Sakaraia and they slept in the sitting room there. He woke up at about 10.30 in the morning and Sakaraia was still asleep.

20. He never went to Koleta's house that night and when he heard the allegations, he just laughed. He said that he had travelled a lot at both home and abroad and he had met lots of women. It is for you to decide what he meant by that statement.

*24. **Sakaraia** told us that he was drinking grog then a few of them went to drink home brew. He saw the accused and Uraia have the fight and he tried to stop the fight twice. He (Sakaraia) and Kolinio took one bucket to drink outside. They sat at the roadside. Both Uraia and Uliano came and joined them. They drank a lot and then Uraia ran away. Then he and Uliano walked back to the village. He went to his sister's house to get food and Uliano went to his own house. Sakaraia went to Mataiasi's house and slept. At some stage he "felt" that Uliano had come into the room to sleep.*

*26. The second alibi witness was **Mataiasi Kolonio**, another friend of the accused. He said that the accused and Sakaria slept in his house that night, but once again he was not able to help us account for the accused's movements and whereabouts for the whole night. You might think he was not a very helpful witness at all, but again it is a matter for you to decide, not me.*

*27. The final witness for the defence was **Sakeo Matakuru**. The young boy Sakeo told us that on the night of 23 July 2017 he was sleeping at Koleta's house when he heard Koleta shout out. She said that somebody had been in her room and had "done something" to her. It was somebody of a big build and she gave two names, Uliano and Makama. After the culprit had left her room and went outside, Koleta had heard a dog barking and she told Sakeo to go and look for the man. He couldn't see anybody.'*

01st ground of appeal

[23] The appellant argues that the identity of the appellant was in issue and the trial judge had failed to give Turnbull directions to the assessors. He further submits that though it was a case of recognition rather than an identification as the appellant was known to the complainant for 14 years, still Turnbull directions were called for because even an

honest witness could be mistaken. He relies on **Savu v State** [2014] FJCA 208; AAU 0090 of 2012 (05 December 2014) where it had been held

> *'[9] Clearly, the learned trial Magistrate misdirected herself when she said the **Turnbull** guidelines are not appropriate here as this was not fleeting glance case but was of recognition. The **Turnbull** guidelines equally apply to cases of disputed recognition as was the case here. In **R v Thomas** [1994] Crim. LR 120, the English Court of Appeal held that where there has been some form of recognition, the risk that needs to be assessed is whether the witness is mistaken in his or her purported recognition of the accused. That risk is assessed by taking into account the **Turnbull** guidelines against the circumstances in which the sighting occurred (**Wainiqolo**, supra at [18]). ...'*

[24] The trial judge at paragraph 10 of the summing-up had correctly directed the assessors that the sole issue for them to decide was, whether the perpetrator was the appellant or not. What is not clear from the evidence of the complainant is as to how she immediately recognised the appellant lying on top of her when she opened her eyes between 2.00 a.m. and 3.00 a.m. inside her room. There does not appear to have been any light inside the room. Then she claims to have recognised the appellant by the light that was there when he was in the kitchen while leaving the house. There had not been any voice recognition either. The complainant had not spoken to any other method of recognition of the appellant in that night.

[25] Though the complainant knew the appellant for 14 years, in my view, in the light of the above evidence and in the absence of any other evidence on recognition, whether or not the trial judge should have directed the assessors on Turnbull guidelines looms large. The trial judge having correctly identified the identity of the offender as the central issue in the case does not appear to have guided the assessors as to how to evaluate the evidence of recognition in terms of cautionary guidelines in Turnbull. Nor has the judge given his mind to that aspect in the judgment.

[26] The state has legitimately countered the appellant's argument by stating that his counsel should have sought redirections in this regard as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

[27] Whether the trial judge ought to have given Turnbull directions in the context of this case and if so, absent that, could the conviction be still upheld seem to be matters worthy of a closer examination by the full court as they are questions of law and questions of mixed facts and law. The above objection of the respondent also could be considered simultaneously by the full court.

[28] I am, however, unable to say at this stage and not suggesting without the full appeal record that the appellant has a real prospect of success in appeal on this ground of appeal. Nevertheless, on the question of law *i.e.* as to whether Turnbull directions ought to have been given, enlargement of time to appeal should be formally granted though technically no leave is required in terms of section 21(1)(a) of the Court of Appeal Act.

02nd ground of appeal

[29] The appellant argues that the trial judge had not adequately directed the assessors on how to approach the *alibi* defence but he had admitted that the trial judge had addressed the assessors in terms of the law set down in **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) in paragraphs 22 and 23 as follows.

> *'22. Uliano called Sakaraia as his first witness. He is what we call an alibi witness, who along with Mataiisi were called to say that he was not at the scene of the crime when it was committed. As the prosecution has to prove his guilt so that you are sure of it, he does not have to prove that he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi.*
>
> *23. Even if you conclude that the alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence.'*

[30] The appellant criticises the trial judge for not having addressed the assessors on the intermediate position on *alibi* defence reiterated in **Prasad v State** [2020] FJCA 98; AAU102.2019 (7 July 2020) where I expressed the view that

> *'[28] However, while dealing with a complaint relating the alibi defence in **Pauliasi Raisele v State** AAU 088 of 2018 (01 May 2020) and **Leone v State** [2020] FJCA 85; AAU141.2019 (19 June 2020), I raised a slightly different question as to whether in addition to what **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and **Mateni v State** [2020] FJCA 5;*

AAU061.2014 (27 February 2020) have prescribed as the proper direction on an alibi, the assessors should or should not be directed on the 'intermediate position' namely if alibi evidence is neither accepted nor rejected, the resulting position is that a reasonable doubt exists as to the truth of the prosecution evidence, as a question of law to be looked into by the full court. The full court may also consider whether a trial judge when disagreeing with the majority opinion of the assessors, should or should not direct himself on this 'intermediate position' regarding an alibi and the impact of such failure on the conviction. However, in this instance the trial judge had completely rejected the appellant's alibi and therefore the 'intermediate position' would not have had any effect on the decision of the trial judge.

[31] Thus, it is very clear that I had reserved the legal position of the 'intermediate position' for the full court to decide in the future as a matter of law. However, the trial judge cannot be faulted based on my provisional view as he had correctly and admittedly followed the law as it existed then.

[32] The respondent again challenges the appellant on the basis that he had not sought redirections on the 'intermediate position' on his *alibi* defence. However, in much as the appellant cannot impeach the summing-up based on that legal argument he could not have sought a redirection either because law as it was had not recognised such a third or intermediate position.

[33] More substantially, the respondent had submitted that there was no factual basis even to raise the defence of *alibi* in as much as the two witnesses called by the appellant to support his *alibi* defence could not affirmatively say that the appellant was with them throughout the duration the alleged offence had allegedly taken place. According to Sakaraia, he had gone to Mataiasi's house and slept and felt that at some stage that the appellant had come into the room to sleep. He could not say whether the appellant was sleeping with him during the night. Mataiasi Kolonio also could not shed much light as to the whereabouts of the appellant during the night because he had slept whole night except to say that the appellant and Sakaraia slept in his house. While I agree with the respondent regarding the inadequacy of the evidence of the appellant's two witnesses to establish an *alibi*, I think still *alibi* directions were called for on the basis of the appellant's own evidence that he was sleeping whole night at Kolonio's house and the trial judge was justified in doing so. One must also not forget that the appellant bore no burden to prove his *alibi*. The full court may consider the relevance of the 'intermediate position' of the *alibi* defence in this factual scenario.

[34] Therefore, there is no real prospect of success in this ground of appeal.

03rd ground of appeal

[35] The appellant has submitted that the trial judge had not fairly and objectively summed up the appellant's *alibi* evidence. He refers to paragraph 26 of the summing-up.

> *'26. The second alibi witness was* ***Mataiasi Kolonio****, another friend of the accused. He said that the accused and Sakaria slept in his house that night, but once again he was not able to help us account for the accused's movements and whereabouts for the whole night. You might think he was not a very helpful witness at all, but again it is a matter for you to decide, not me.*

[36] No more details could be gathered about the evidence of Mataiasi Kolonio except what the trial judge had indicated in the summing-up and the judgment. At paragraph 14 of the judgment the judge had referred to his evidence as follows.

> *'14. The second alibi witness (Kolinio) was totally unhelpful. He told the Court that although the accused stayed in his house, he (Kolinio) was asleep all night and would not have known if the accused was absent for some time in the night.*

[37] Therefore, it is clear that although Kolonio had come forward as an *alibi* witness he had not been able to speak to the whereabouts of the appellant the whole night or at least during the time relevant to the case namely from 2.00 a.m. to 3.00 a.m. This explains why the trial judge had called him unhelpful. But, importantly, the judge had left it to the assessors to decide it for themselves. He had not usurped the assessors' function. There is nothing in what the trial judge had told the assessors which can be regarded as being obnoxious to the pronouncements made in **Tamaibeka v State** [1999] FJCA 1; AAU0015u of 1997s (08 January 1999), as a trial judge is entitled to comment robustly on the evidence presented in court.

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

04th ground of appeal

[39] The appellant's complaint is that the trial judge had allowed inadmissible evidence in the form of the complaint's evidence at paragraph 13 of the summing-up.

> *'..... At the time her husband was in another part of the village drinking yaqona. He didn't return until about 3pm that afternoon. She told*

him what had happened. He wanted to go to find Uliano but she said: "Enough already. I have already told the Turaga-ni-Koro and the Police."

[40] It is true that the prosecution had not called the husband of the complainant to give evidence. The prosecution had not and could not have relied on recent complaint evidence in this case because the complainant's husband had not spoken to what his wife had told him. Thus, no recent complaint directions were required.

[41] It is not hearsay either because she had said what she did and what she told her husband. It is not something that she had heard from any other person.

[42] Even if an inference may have been drawn by the assessors that the complainant had implicated the appellant in what she told the husband, the fact is that she had already disclosed the appellant's involvement to the Turaga-ni-Koro (head of the village) and the Police. Thus, it would have come as no surprise to the assessors. In other words, the impugned portion of the complainant's evidence would have had a minimal prejudice or impact on the assessors.

[43] On the other hand, had the appellant's counsel entertained any misgivings of that portion of the complainant's evidence, they could have sought a redirection in the form of a caution or warning by the trial judge to the assessors to disregard that part of her evidence completely.

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

05th ground of appeal

[45] The appellant argues that the trial judge had failed to direct the assessors and himself on the fault element of rape that the appellant was reckless as to whether the complainant was consenting or not. He refers to paragraph 9 of the summing-up.

'[9]. Therefore before you can find Uliano guilty you must be sure that it was Uliano and that he had used a finger or fingers to penetrate Koleta's vagina that night and it was without her consent.'

[46] The appellant has cited the decision in **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) in support of his contention where the Court of Appeal described the fault elements of rape in paragraph 32.

'[32] Section 14 states inter alia that in order for a person to be found guilty of committing an offence the existence of the physical element and the required fault element in respect of that physical element must be proved (by the prosecution). Fault elements of an offence could be intention, knowledge, recklessness or negligence but the law creating the offence may specify any other fault element as well [vide section 18(1) and (2)]. Therefore, I conclude that the prosecution in a case of rape has to establish (a) carnal knowledge (i.e. penetration to any extent) (b) lack of consent on the part of the victim and (c) recklessness on the part of the accused as defined in section 21(1).'

[47] The Court of Appeal also said in ***Tukainiu***

'[34] If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [vide section 21(4)]. 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.'

[48] Therefore, ***Tukainiu*** did not prescribe that in every case the trail judge has to direct the assessors on all three fault elements with regard to an allegation of rape. Far from that, the trial judge has to address the assessors on the relevant fault element/s depending on the facts of the case. The direction on the fault element must be tailor-made to the case at hand. For example, one instance where recklessness may become relevant is when the accused takes up the position that he thought that the complainant was consenting to the sexual act. I do not think that this was a case where the trial judge should necessarily have directed the assessors on recklessness.

[49] The respondent is justified in criticising the appellant's stance on the basis of his failure to seek a redirection on this point of appeal at the trial. The respondent also argues that as far as the appellant was concerned the directions on consent or otherwise was a non-issue, for his defence was one of denial and an *alibi*.

[50] I do not see any merits in this ground of appeal.

Prejudice to the respondent

[51] The respondent had conceded that an enlargement of time to appeal against conviction would not prejudice the respondent.

Order

1. Enlargement of time to appeal against conviction is allowed only on the first ground of appeal.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL