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

**CRIMINAL APPEAL NO.AAU 60 of 2019**
**[In the High Court at Lautoka Case No. HAC 205 of 2013]**

**BETWEEN** : **SOHEB NASIR ALI**

***Appellant***

**AND** : **STATE**

***Respondent***

**Coram** : **Prematilaka, JA**

**Counsel** : **Mr. A J. Singh for the Appellant**
: **Mr. M. Vosawale for the Respondent**

**Date of Hearing** : **07 December 2020**

**Date of Ruling** : **08 December 2020**

# RULING

[1] The appellant, aged 19, had been indicted in the High Court of Lautoka on a single count of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009, committed at Nadi in the Western Division. The victim was aged 12 years and 11 months at the time of the offence.

[2] The information read as follows

***Statement of Offence***

***RAPE:*** *Contrary to section 207(1) and 2(a) and (3) of the Crimes Act 2009.*

***Particulars of Offence***

> ***SOHEB NASIR ALI*** *between the 1st day of October 2013 and 31st day of October 2013 at Nadi in the Western Division, penetrated the vagina of* ***CRYSTAL DIVASHNI GRACE,*** *aged 12 years and 11 months with his penis.*

[3] At the conclusion of the summing-up on 06 February 2019 the majority of assessors opinion that the appellant was guilty of the charge of rape. The learned trial judge had agreed with the assessors in his judgment delivered on 07 February 2019, convicted the appellant and on 08 February 2019 sentenced him to 03 years of imprisonment without fixing a non-parole period.

[4] The appellant's application for enlargement of time, affidavit and application for leave to appeal against conviction had been filed on 30 May 2019 by Messrs. Anil J Singh Lawyers. The delay is 81 days *i.e.* less than 03 months. The same lawyers had filed written submissions on behalf of the appellant on 02 August 2019. The state had responded by its written submissions on 18 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* ***'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 stated, the delay is less than 03 months which is not so substantial by itself as to defeat the appellant's application.

[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 03 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.'*

[13] However, 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.'*

***Reasons for the delay***

[14] The appellant's excuse for the delay is that he wanted to appeal but was unable to pay the fee quoted by the lawyers. Then, he had tried to get the assistance of the Legal Aid Commission but that process too had taken a long time. On 02 May 2019 the appellant had come to court in person regarding the sentence appeal filed by the state ready with appeal papers to be filed against conviction but the court staff had rejected them and advised him to seek legal assistance. The court too had advised him to obtain legal assistance. Thereafter, his sister had arranged the current lawyers to attend to his appeal against conviction. The appellant has not substantiated any of the above matters except that it appears that on 20 March 2019 the appellant had informed court when he

appeared as the respondent in connection with the sentence appeal that he needed to contact his trial lawyer for his appeal. Therefore, the explanation for the delay is not acceptable.

[15] In **Qarasaumaki v State** [2013] FJCA 119; AAU0104.2011 (28 February 2013) 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]).*

***Merits of the appeal***

[16] In **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."*

[17] 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 delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.

[18] The grounds of appeal urged on behalf of the appellant against conviction are as follows.

> *1. 'That the Learned Trial Judge erroneously and contrary to rules of Fair Trial introduced confessions into evidence when the prosecution was not relying on it and had not lead any evidence on it up to that stage thereby making the trial a nullity, he further refused to instruct assessors to ignore the answer extracted by him from the Police witness thereby allowing prejudicial evidence to be before the assessors.*
>
> *2. The Learned Trial Judge further after defence attempted to clarify the issue in ground 1 wrongly allowed prosecution to use the evidence stating it*

*was rebuttal evidence, he allowed assessors to hear objections and made rulings without proper considerations thereby causing a miscarriage of justice;*

*3. That the learned Trial Judge wrongly prejudiced the trial by unfairly accused defence counsel of staring at the Assessors and the judge repeatedly in presence of the assessors thereby causing a miscarriage of justice;*

*4. That the learned Trial Judge erroneously prevented cross examination on inconsistencies between evidence at trial with that of earlier trial stating he didn't care what was said before judge Sharma thereby preventing cross examination on a prior inconsistent statement;*

*5. That the Learned Trial Judge failed to allow cross-examination on the fact that the complainant had completely repudiated her Police statement not giving any further statement to police instead relied on a letter she wrote to DPP office which was not served on defence until 2018, the Learned Judge's conduct allowed a miscarriage of justice;*

*6. The manner in which the Learned Trial Judge conducted the trial breach rights of accused person enshrined in Constitution of the Republic of Fiji and as such the trial was a nullity and the conviction is unsafe and contrary to evidence;*

*7. The Prosecution erroneously refused to adduce medical evidence, as the same was more consistent with the accused version then that of the complainant, causing a miscarriage of justice;*

*8. The Prosecution unfairly adduced evidence from the Record of Interview when they had indicated that they were not relying on the same making the voire dire unnecessary, failing in their duty to be fair;*

*9. The Learned Trial Judge kept interrupting the trial stating that consent is no defence whilst that may be true it did not negate denial, altogether with no medical or forensic evidence;*

*10. The Prosecution attempted to change its case as in the brief of evidence to meet the contents of the undated letter from the complainant after the two civilian witnesses had opportunity to discuss their evidence;*

*11. The Learned Trial Judge hearing the first trial erroneously ordered a mistrial when the evidence of the complainant was thoroughly discredited before the Assessors thus allowing prosecution to change its case to meet the contents of an undated letter thereby a grave miscarriage of justice."*

[19] The learned trial judge had summarized the evidence led by the prosecution and the defense in the judgment as follows.

*(Prosecution)*

*'[7]. The thrust of the prosecution case came from the complainant, Crystal who was 12 years and 11 months at the time of the offence. She gave evidence of having met the accused, then aged 20, at a youth club that they both attended weekly. They appeared to have struck up a casual friendship although they each denied in their respective evidence that they were close.*

*[8.] Crystal said that on the 8th October, she was home alone when he came to her house wanting to use some computer device. She admitted him and after giving him refreshments he followed her into her bedroom and forced himself upon her penetrating her with his penis. She said that he forcibly held her hands, covered her mouth and undressed her before removing his own trousers.*

*[9.] This relationship (if it was indeed such) came to the notice of the girl's mother on the 23rd October 2013 when the mother came home from work early and found them both dressed but under a blanket on Crystal's bed. The mother, quite understandably, was furious that her 12 year old was in such a compromising position with the boy and she proceeded to beat them and berate them As a result of this discovery the mother reported a case of trespass to the Police. The Police enquiries led to a medical examination of the girl from which the mother learned that the girl was not a virgin. The daughter then relayed the rape complaint as detailed above to the mother and the boy was charged accordingly. He was interviewed under caution by the Police.*

*[10.] The mother gave evidence, as did the Investigating Officer.*

*This Police witness produced the girl's birth certificate proving that she was under 13 at the time and he told the Court that he had interviewed the boy under caution. As a "follow up" to that evidence the Court enquired as to the response of the boy in the interview to which the officer said that he confessed.*

*[11.] The inculpatory interview under caution was not led by the Prosecution.*

*(Defense)*

*[14.] The accused agreed the evidence that he had met the girl at the youth club and that they had become casual friends. He agreed that he went to her house when she was alone and had played computer games (he didn't say when). He also admitted that he had returned to visit on October 23 and was on the bed with Crystal when Mum came home and started "belting" him. When asked in chief by his Counsel whether he had told the Police he had raped or had sex with Crystal, he told the Court that he had told the Police no rape and no sex.*

*[15.] This unfortunate question by counsel of course opened the Record of interview in rebuttal and it was put to the accused. The answer to Question 54 clearly shows him to have answered: "we had sex on the bed" which belied his answer to counsel in chief, and called his credibility into question.*

*[16.] The accused called no witnesses in his defence.*

***01st, 02nd, 06th and 08th grounds of appeal***

[20] All the above grounds of appeal could be considered together. The circumstances that have given rise to the above complaints which have formed the basis for the appeal grounds are to be found in the following paragraphs of the summing-up.

> *'[27.] The third and final witness for the prosecution was a Police Officer who was in charge of the investigation at the time. It was he who obtained the original birth certificate of Crystal proving that she had been born on the 11th November 2000 and was therefore under 13 in October 2013. He said he was not present when Crystal made her statement, nor was he present when the mother made hers. He confirmed that the accused had never been in trouble with the law before.*
>
> *[28.] He talked about having interviewed the accused about the allegations and when asked by me what transpired in the interview* ***he told me that the accused had admitted to the offence of rape.***
>
> *[37.] Now I want to direct you on how you must approach the matter of the interview. Normally when a suspect is interviewed by the Police the record of that interview is used in the subsequent trial. It is evidence that may or may not assist the Prosecution. In this case, for reasons best known to themselves, both the Prosecution and the Defence agreed that it would not be placed before the Court in evidence. However when that interview becomes an issue in the evidence as it did in this trial when Counsel for the Defence asked the accused about it when he was giving evidence, then it can be "opened up" to a limited degree to show that the accused is not telling the truth. In this case the accused told the Court that he told the Police that he didn't rape or have sex with Crystal. The interview says otherwise so I allowed the Prosecution to show the interview to the accused, and in particular one answer he gave to the Police where he said ; "we had sex on the bed" . This showed that the accused was not telling the truth in his evidence in chief.*
>
> *[38.] I direct you that the only use you can make of this answer is to discredit the evidence of the accused; that is to say that you may not think his evidence is reliable if he is shown to have lied once. You may not use that evidence to find the accused guilty because the whole of the interview and the manner in which it was made has not been satisfactorily dealt with according to strict rules of evidence relating to interview evidence. If you are to find the accused guilty you must do so solely on the evidence of Crystal and her mother and on nothing else. Apart from using the interview to show that the accused was not telling us the truth in his evidence, you are then to put it out of your minds in your deliberations.*

[21] Therefore, it is clear that the prosecution had not intended to produce the appellant's cautioned interview as part of its case to prove the case against the appellant. However, the trial judge had asked pointedly from the police officer who happened to record the cautioned interview in the course of his other evidence as to what had transpired in the interview and the witness had said in the presence of the assessors that the appellant had admitted to the offence of rape.

[22] Subsequently, in order to mitigate the effect of the damage caused to his case by the above answer the defense counsel had asked the appellant when he gave evidence whether he had told the police that he had raped the victim and the appellant had answered in the negative. Then, 'in rebuttal' the prosecution had been allowed by the trial judge to confront the appellant with his cautioned interview where his answer to question 54 had been *'we had sex on the bed'*. Then in the summing-up the judge had directed the assessors to use that answer only to discredit the appellant.

[23] The trial judge had dealt with this scenario in the judgment as follows.

> *'[19.] The situation with the interview under caution was unfortunate in two respects. The State and the Defence had agreed before trial that the inculpatory interview would not be used at trial. The Court has no idea as to why the State would make this great concession to the Defence but in any event they had and quite fairly the prosecutrix did not attempt to allude to it.*
>
> *[20.] Unfortunately the Court was not made aware of this concession and was not constrained to have asked the Police witness who told the Court that he had interviewed the accused what the outcome of the interview was.*
>
> *[21.] This might have been overlooked and "lost" if the Defence Counsel had not "opened" the interview in his examination of the accused in chief. This allowed the prosecution to use the interview to rebut a lie told by the accused. However, as can be seen in the summing up, the assessors were directed not to use this to find guilt.*

[24] All in all, what is clear is that the trial judge had unfortunately attempted to lay the blame on the defense counsel for 'opening-up' the cautioned interview and justified allowing the prosecution to actually elicit the self-incriminatory answer to question 54 of the cautioned interview under cross-examination of the accused. In truth, it is the trial judge, unwittingly as it may have been, who had elicited the appellant's confession in the cautioned interview from the police witness. In **Babkobau v State** [2001] FJCA

23; AAU0005U of 2001S (22 November 2001) the Court of Appeal remarked *'... While of course Judges can properly ask questions for clarification, it is most unwise for a trial judge to intervene to the extent of taking over counsel's role.'*

[25] Further, the subsequent directions to the assessors and to himself have only touched upon the appellant's answer to his counsel that he told the police that he had not had sex with the victim and his alleged answer to the contrary in the answer to question 54 of the cautioned interview. However, neither in the summing-up nor in the judgment had the trial judge directed the assessors or himself of the prejudicial effect of the police officer's answer to the question by court that the appellant had confessed to the act of rape which triggered the subsequent questions and answers elicited from the appellant on what the appellant had told or not told the police.

[26] Needless to state, that this whole episode could have been prevented had the trial been declared a mistrial or aborted after the trial judge had even inadvertently elicited the incriminating contents of the cautioned statement from the police officer. The judge had failed to mitigate in any way the prejudice caused to the appellant either in his address to the assessors or in the judgment by this evidence. The appellant argues that this wrongfully admitted evidence on his guilt should vitiate the trial completely and render it a nullity. He also argues that he had been deprived of a fair trial in the process.

[27] It appears that the conduct of the trial by the trial judge, as he did, appears to have violated the right of the appellant to challenge his confessional statement before its contents were admitted in evidence. Section 288 of the Criminal Procedure Act provides statutory sanction for *voir dire* inquiries to Judges and Magistrates and at a trial before assessors a *voir dire* may be conducted prior to swearing in of the assessors but after the accused has pleaded to the information. **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005S (14 July 2006) had earlier laid down some guidelines as to when and how to conduct a *voir dire* inquiry.

> *'[24]* ***Whenever the court it advised that there is challenge to the confession****, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is not represented, a trial with a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its*

*exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led.*

*[25] It would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it. If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done.*

[28] Obviously, the counsel for the appellant had not sought a *voir dire* inquiry because the prosecution had agreed that it would not seek to lead the appellant's cautioned interview in evidence.

[29] This has clearly resulted in a miscarriage of justice to the appellant. The respondent argues that the evidence of the victim and her mother is sufficient to sustain the conviction despite the prejudice caused to the appellant by the wrongful admission of the contents of the appellant's confessional statement. What the state is suggesting is the application of the proviso to section 23(1) of the Court of Appeal Act. However, as to whether there was no substantial miscarriage of justice in terms of the proviso to section 23(1) is a matter to be decided by the full court upon the complete record of the proceedings being available.

[30] The Court of Appeal in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) set out the approach to be taken by the appellate court in the application of the proviso to section 23(1) of the Court of Appeal Act which is almost identical with section 256 (2) (f) of the Criminal Procedure Act, as follows.

*'[55] The approach that should be followed in deciding whether to apply the proviso to section 23(1) of the Court of Appeal Act was explained by the Court of Appeal in **R v. Haddy** [1944] 1 KB 442. The decision is authority for the proposition that **if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice**. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.*

*[56] This test has been adopted and applied by the Court of Appeal in Fiji in **R –v- Ramswani Pillai** (unreported criminal appeal No. 11 of 1952; 25 August*

*1952); **R –v- Labalaba** (1946 – 1955) 4 FLR 28 and **Pillay –v- R** (1981) 27 FLR 202. In **Pillay –v- R** (supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in **R –v- Weir** [1955] NZLR 711 at page 713:*

> *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt. **If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred.**"*

*[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.*

*In **Vuki –v- The State** (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*

> *"The application of the proviso to section 23(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."*

[31] The full court would consider the contention of the respondent that the evidence of the victim and her mother was sufficient to sustain the conviction, upon consideration of the evidence against this appellant as a whole excluding the impugned incriminating evidence and decide whether the verdict was unreasonable or cannot be supported by such evidence under section 23(1) of the Court of Appeal Act [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)]. It would also consider whether the trial judge could have reasonably convicted the appellant on the evidence excluding the impugned incriminating evidence before him (vide **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020) and **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013)].

[32] Therefore, enlargement of time to appeal against the conviction on the above grounds of appeal is granted to the appellant.

***Prejudice to the respondent***

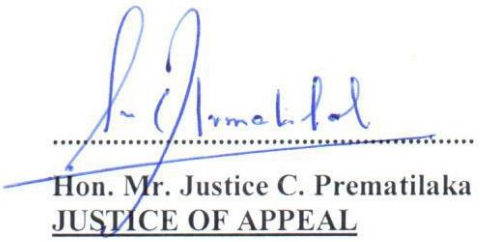
[33] I cannot foresee any substantial prejudice to the respondent by the extension of time except the lapse of time since the alleged incident.

***03rd, 04th, 05th, 07th, 09th 10th and 11th grounds of appeal***

[34] The appellant's contentions under the above grounds of appeal cannot be gone into at this stage without the trial proceedings and therefore I make no ruling on those grounds of appeal.

**Order**

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

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL