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

CRIMINAL APPEAL NO.AAU 090 of 2019
[In the High Court at Suva Case No. HAC 319 of 2015]

BETWEEN : **ALIPATE TUWAI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **08 December 2020**

Date of Ruling : **09 December 2020**

RULING

[1] The appellant, aged 37, had been indicted in the High Court of Suva on a single count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed between 12 September 2015 and 19 September 2015 at Suva in the Central Division. The victim was just above 13 years of age at the time of the incident.

[2] The information read as follows.

COUNT ONE

Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

ALIPATE TUWAI *between the 12th day of September 2015 to the 19th day of September 2015, at Suva, in the Central Division, had carnal knowledge of* ***ST*** *without her consent.*

[3] After the summing-up on 13 August 2018 the assessors had unanimously opined that the appellant was guilty of the charge and in the judgment delivered on 14 August 2018 the learned trial judge had agreed with them and convicted the appellant as charged. On 17 August 2018 the appellant had been sentenced to 13 years and 09 months of imprisonment with a non-parole period of 10 years and 09 months.

[4] The appellant's application for enlargement of time had been filed by the Legal Aid Commission on 26 July 2020 seeking extension of time accompanied by his affidavit and a single ground of appeal. Therefore, the appellant's appeal is out of time by over 10 months. The Legal Aid Commission had also filed written submissions on 16 September 2020. The state had responded by its written submission on 23 October 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 over 10 months and very 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 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 did not have his court documents such as the summing-up, judgment and sentence and therefore could not settle his appeal. The state counsel summited that all accused are given those documents by the trial court and they should be in their possession. In any event, the appellant had been defended by a senior attorney and the appellant could have sought his assistance to appeal but the appellant had stated that he did not make contact with him after he was sentenced. Therefore, the delay was his own making and the explanation for it 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 sole ground of appeal against conviction urged on behalf of the appellant is as follows.

> *(i) 'THE conviction is unreasonable and not supported by evidence.'*

[19] The trial judge had summarised the evidence in the sentencing order as follows.

> *'**[4]** It was proved during the trial that, between the 12 September 2015 and the 19 September 2015, at Suva, you penetrated the vagina of ST, with your penis, without her consent.*
>
> ***[5]** You are an immediate neighbour of the complainant at Gaji Road in Samabula. The complainant was only 13 years of age, at the time you committed the above offence on her (her date of birth being 11 September 2002), and as such, she was a juvenile.*

> ***[6]*** *The complainant clearly testified as to how, you penetrated her vagina with your penis, without her consent. You were entrusted to take the complainant to her home on that fateful Saturday evening. Instead, on the way, you lured her to a grassy spot and raped her. By your shameful act you have robbed the innocence of a 13 year old child.*

[20] The appellant had remained silent at the trial. He had denied the incident completely in cross-examining the victim. However, he seems to have not suggested any sinister motive for the victim to have implicated him in the act of rape.

Sole ground of appeal

[21] The only submission that had been made on behalf of the appellant is that had the trial judge evaluated the evidence independently he would have entertained a reasonable doubt as to whether there is lack of consent and whether the appellant had known that the complainant was not consenting.

[22] The appellant relies on the decision in **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014) and **Chandra v State** [2015] FJSC 32;CAV21 of 2015 (10 December 2015) in support of his argument that the judge had failed in his duty as aforesaid.

[23] However, what could be identified as common ground arising from several past judicial pronouncements 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 [vide **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) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]

[24] On the other hand, the judgment of a trial judge cannot 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.

[25] On a perusal of the judgment it is clear that the trial judge had directed himself in accordance with the law and the evidence which the judge had discussed in the summing-up to the assessors. Thus, the trial judge had performed his task quite satisfactorily in agreeing with the assessors and in the process had considered all the evidence once again.

[26] I have considered the evidence of the victim relating to the issue of consent and the following among others can be quoted from paragraph 58 of the summing-up. Her evidence clearly demonstrates that the victim had not consented to sexual intercourse. The appellant should have known that she was not consenting.

Q. Then what happened?
A. He was in front and I was following him. He went right in front and waited for me. When I came near him, then he gave me a $10 (note). When he gave me the $10 then he pushed me on the grass. I tried to stand up. He pointed on my forehead forcefully and I fell down.
Q. Can you demonstrate?
A. He pointed and pushed me down. (Witness pointed at her forehead and demonstrated how this happened).
Q. Can you tell us what happened when you fell down?
A. He took off his t-shirt and used it to close my mouth. He took off his t-shirt and he held me and used it to close my mouth.
Q. What exactly did he do with his t-shirt?
A. Nothing.
Q. How did he close your mouth with his t-shirt?
A. He took his t-shirt and tied it on my mouth. (The witness demonstrated how this happened).
Q. What did you do when he tied the t-shirt on your mouth?

A. *After he tied the t-shirt on my mouth, he held both of my hands. I tried to move around so I can get up. But I could not.*
Q. *And what happened after this?*
A. *He took off my pants and my panty.*
Q. *At this time how were you positioned?*
A. *I was lying down facing upwards.*
Q. *How was he able to take off your pants and your panty?*
A. *His right hand was holding both of my hands. And with his left hand he took off both my pants and panty.*
Q. *Were the pants and panty removed from your body totally?*
A. *Yes.*
Q. *Was this done separately or together?*
A. *Was done together.*
Q. *At this time, what were your legs doing?*
A. *I was moving around, so that he cannot take off my pants and panty.*
Q. *After he took off your pants and panty, what happened then?*
A. *He then held my legs and put it up. Then he took off his pants.*
Q. *Do you recall how he took off his pants?*
A. *He took off his pants up to the knee……*

Q. *Earlier you said Alipate took off your pants and panty. Do you recall what hand he used to take off his pants and underwear?*
A. *His left hand.*
Q. *What was he doing with his right hand?*
A. *He was holding both of my hands.*
Q. *What happened after he removed his pants and underwear?*
A. *He pulled up my t-shirt and my bra. Both at the same time.*
Q. *At this point in time, how were you and Alipate positioned?*
A. *I was lying down facing upwards. He was kneeling down.*
Q. *Where was he kneeling down?*
A. *He took up one of my legs and pushed it up and he tried to separate both my thighs and he knelt between both of them.*
Q. *What happened after that?*
A. *He sucked my nipple and bit it.*
Q. *What happened after that?*
A. *Then he took his penis and put it to my vagina.*
Q. *Where did his penis go?*
A. *It went inside my vagina.*
Q. *What did you feel in your vagina?*
A. *I felt it was painful, and when his penis went inside, I felt that it was cracked.*
Q. *What did you mean by 'it was cracked'?*
A. *I heard, when he put his penis into my vagina – witness made a cracking sound.*
Q. *Was his penis inside your vagina for a long time or short time?*
A. *Short time.*
Q. *While Alipate was inserting his penis into your vagina, what was he doing with his hands?*
A. *His right hand was holding my hands and his left hand was touching the grass and he was moving around.*

Q. Do you know, why he was touching the grass, while he was moving around?
A. So that he can brace himself.
Q. You said before that he put his penis into your vagina, he took his penis. What hand did he use?
A. His left hand.
Q. What were you doing whilst he was inserting his penis into your vagina?
A. I tried to move around and get up, but I could not.
Q. Why couldn't you get up at that time?
A. Because I was really weak.
Q. And you said he inserted his penis into your vagina for a short time. What happened after that?
A. After he pulled out his penis, he wore his pants. Then I got up, I put on my pants and pushed down my bra and t-shirt.
Q. Did you and Alipate talk after that?
A. He then told me not to say it to anyone. If I say it to anyone, he will kill me.
Q. And how did you react when he said this to you?
A. I was scared.
Q. Why were you scared, when told this to you?
A. Because if I go and say it to my mother like that, he will kill me.

[27] The trial judge in paragraph 49 of the summing-up had directed the assessors on how to analyze the issue of consent:

> *'**[48]** You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:*
>
> *(a) by force; or*
>
> *(b) by threat or intimidation; or*
>
> *(c) by fear of bodily harm; or*
>
> *(d) by exercise of authority; or*
>
> *(e) by false and fraudulent representations about the nature or purpose of the act; or*
>
> *(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.*
>
> ***[49]** Apart from proving that the complainant did not consent for the accused to insert his penis, into her vagina, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if*

the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[50] *A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case had just turned 13 years of age at the time of the incident, and therefore, she had the mental capacity to consent.*

*'**[52]** If you are satisfied beyond any reasonable doubt that the accused, between the 12 September 2015 and the 19 September 2015, at Suva, penetrated the vagina of ST with his penis, without the consent of the complainant and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the count of Rape.'*

[28] The trial judge had summarized and once again considered the complainant's evidence including her evidence on lack of consent from in paragraphs 11-18 of the judgment. There is no doubt whatsoever of lack of consent on the part of the victim in this case. In any event lack of consent was not a trial issue at all. The appellant's position had been that there was no such incident of rape as alleged by the victim.

[29] The victim had explained how she came to report the incident in her evidence and the trial judge had summarized it in the judgment as follows.

*'**[19]** Thereafter, the complainant testified as to how she had returned to her home at Gaji Road. She said that she did not tell anyone at home about the incident because the accused had threatened her.*

[20] *The following Monday she had gone to school. After school, she did not return home. She had gone and stayed at a friend's house. She said "since we were neighbours with Alipate, I could not stand having to keep seeing him".*

[21] *On 28 September 2015, the complainant's step-father and her mother's brother had come to school looking for her, as she had been missing from home for a few days. On inquiring further, the complainant had told her class teacher Clare Fong about the incident. The matter had then been reported to the police.*

[30] According to the summing-up (paragraph 60) and the judgment (paragraphs 22) medical evidence had revealed healed, incomplete, hymenal lacerations at the 3.00 o'clock, 5.00 o' clock and 9.00 o' clock positions which may have occurred between 07 to 14 days prior to the medical examination that had taken place on 28 September 2015. The time duration is compatible with the happening of the incident as narrated by the victim.

[31] 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.....'*

[32] 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).

[33] In **Kaivum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal 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 (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[34] Having considered the evidence against the appellant as a whole, I cannot say the verdict was unreasonable or cannot be supported by evidence. There was clearly evidence on which the verdict could be based and the trial judge could have reasonably convicted on the evidence before him. Therefore, there is no real prospect of success of the appellant's appeal under section 23(1) of the Court of Appeal Act.

Prejudice to the respondent

[35] There is no prejudice to the respondent *per se* by an extension of time but certainly the victim would be prejudiced in case there is to be another trial given what had been revealed by the victim impact statement referred to in paragraph 07 of the sentencing order.

Order

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL