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

CRIMINAL APPEAL NO.AAU 105 of 2019
[In the High Court at Suva Case No. HAC 176 of 2015]

BETWEEN	:	**AMIT KRISHNA GOUNDAR**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. J. Singh for the Appellant**
	:	**Ms. S. Kiran for the Respondent**
Date of Hearing	:	**23 December 2020**
Date of Ruling	:	**24 December 2020**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and one count of criminal intimidation contrary to section 375(2)(a) of the Crimes Act, 2009 committed on 14 June 2015 at Nadi in the Western Division.

[2] The information read as follows.

COUNT ONE

Statement of Offence

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

Particulars of Offence

AMIT KRISHNA GOUNDAR *on the 14th day of June, 2015 at Nadi in the Western Division, penetrated the vagina of "SK" with his penis without her consent.*

COUNT TWO

Statement of Offence

CRIMINAL INTIMIDATION*: Contrary to section 375 (2) (a) of the Crimes Act.*

Particulars of Offence

AMIT KRISHNA GOUNDAR *on the 14th day of June, 2015 at Nadi in the Western Division without lawful excuse and with intent to cause alarm to "SK" threatened the said "SK" with a cane knife.*

[3] After the summing-up on 17 May 2018 the assessors had unanimously opined that the appellant was guilty of both charges and in the judgment delivered on 18 May 2018 the learned trial judge had agreed with them and convicted the appellant as charged. On 28 May 2018 the appellant had been sentenced to an aggregate sentence of 14 years and 07 months of imprisonment with a non-parole period of 12 years.

[4] The appellant's notice of motion seeking an extension of time to appeal against conviction and his affidavit had been filed on 01 August 2019 by the Legal Aid Commission. The delay is about 01 year and 01 month. The written submissions on behalf of the appellant had been tendered on 08 September 2020. The state had responded on 14 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 about 01 year and 01 month 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 had handed over his appeal to Ba Correctional Centre in June 2018 but it had not lodged his appeal papers with the Court of Appeal. The veracity of this explanation cannot be tested at all and the explanation for the delay is not substantiated with any verifiable facts or material.

Merits of the appeal

[15] 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."*

[16] 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.

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

Conviction

1. ***THE*** *guilty verdict on the charge of Rape is unreasonable.*

2. ***THE*** *Learned Trial Judge erred in law and in fact by failing to warn the Assessors and Himself on the evidence of uncharged acts led at trial, thereby causing the Appellant to be prejudiced in his right to a fair trial.*

3. ***THE*** *Learned Trial Judge erred in law and in fact, in failing to adequately consider and/or assess the inconsistency in the Complainant's complaint relayed to the other two prosecution witnesses, which affects her credibility.*

[18] The facts of the case as summarised by the trial judge in the sentencing order are as follows.

> *2. The victim was a special needs child (intellectually impaired and a slow learner) who resided with her mother, her two brothers and* ***her step farther the accused*** *at Mulomulo, Nadi. At the time of the offending the victim was aged 14 years and 7 months.*
>
> *3. On 14 June, 2015 the victim's mother left home for work at 7am and the accused came home from work at 8am. After a while the accused gave some money to the victim's brothers to go to the shop to buy sweets.*
>
> *4. The victim was left in the house with the accused. After washing the dishes the victim went into the bedroom to fold clothes after a while the accused came into the bedroom. After locking the door of the bedroom the accused removed the clothes of the victim and forcefully inserted his penis into the vagina of the victim. The penetration was painful and blood had come out of the victim's vagina. The victim wanted to shout but the accused had puta piece of cloth inside her mouth so that she could not shout. The victim did not consent to what the accused had done to her.*
>
> *5. The victim also tried to go outside to tell someone about what the accused had done to her but the accused threatened her with a cane knife saying that he will chop her if she told anyone about what he had done to her. The victim was afraid when she saw the cane knife.*
>
> *6. Next day when the victim went to school she informed her teachers about the accused doing something wrong to her. The matter was reported to the Social Welfare Department and then to the police.*

[19] The appellant remained silent and not called any witnesses. His position had been that he was present in the house on the day relevant to the allegations but denied the allegations completely (see paragraph 87 of the summing-up).

01st and 03rd grounds of appeal

[20] It is convenient to consider both grounds of appeal together as the submissions that have been made on them overlap with each other. The appellant argues that the trial judge had not considered the fact that the complainant had kept changing her 'stories' when questioned by the school teacher. The alleged different 'stories' relate to what the complainant had told her teachers on the following day and are found in paragraph

56, 57, 58 and 63 of the summing-up. Upon being questioned, the complainant had first told PW2 (her class teacher) that she had had a fight with the mother because she did not do some household chores but later told that her mother had seen her with the appellant the previous night and that was the reason for the fight with the mother in the morning. The complainant had told another teacher (PW3), Pravin Reena Devi that the appellant would touch her private part when her mother was asleep and he would come to her and on Sunday the 14th June while she was having a shower the appellant had seen her naked and the mother also had seen her with him.

[21] The trial judge addressed the assessors on these varying accounts specifically at paragraph 70, 71 and 85 of the summing-up in addition to a detailed description of the evidence of PW2 and PW3. He had referred to the defence contention that the complainant should not be believed as she had changed her story a few times at paragraph 68. The judge had also brought to their attention that the complainant was intellectually impaired and a slow learner academically (see paragraph 54, 78 and 86). He had addressed the assessors as to how to evaluate inconsistent evidence at paragraphs 74-76 of the summing-up.

[22] In the judgment the trial judge had fully considered all the evidence including that of PW2 and PW3 along with the varying accounts given by the complainant to those witnesses. The judge had stated why he had believed the complainant's evidence but not the appellant's position at paragraph 19- 29 of the judgment as follows.

> *19. I accept the evidence of the complainant as truthful and reliable. The complainant was able to recall what had happened to her some three years ago. She was able to express herself clearly, was straight forward and forthright in her evidence.*
>
> *20. The complainant was able to withstand cross examination and was not discredited. She was referred to her police statement given to the police when facts were fresh in her mind, the inconsistency was not significant which did not adversely affect the credibility and reliability of the complainant's evidence.*
>
> *21. I have no doubt in my mind that the complainant told the truth in court, her demeanour was consistent with her honesty. I accept that the complainant was threatened by the accused that he will chop her with the cane knife he was holding if she told anyone about what he had done to her.*

22. The next day when the complainant went to school she told her teachers what the accused was doing to her at home. The teachers confirmed in their evidence that the complaint was an intellectually impaired child who was a slow learner she would take her time to answer questions, pause, wait for a while, give a blank look and then answer. Furthermore, the complainant was a quiet and a reserved child who hardly shared anything with the teachers.

23. Since the complainant was a special needs child it was normal to expect that she would express herself by giving different versions of what had happened to the teachers. The most important thing is that she was able torelay the message that the accused had done something unlawful to her. There is no requirement of the law that a complainant has to disclose all the ingredients of an offence but must disclose evidence of material and relevant unlawful conduct on the part of the accused. It is also not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence (see Anand Abhay Raj vs The State, CAV 0003 of 2014).

24. I accept that the complainant had told the School Teachers about the unlawful sexual conduct of the accused. The fact that she did not tell the School Teachers that the accused had raped her does not affect the credibility of the complainant's evidence.

25. I do not accept the defence suggestion that the complainant had a motivation to fabricate a story against the accused since he had scolded her on the day of the alleged offending and on one earlier occasion the accused had slapped the complainant because she had met her biological father without informing the accused or her mother.

26. I accept the evidence of all the prosecution witnesses as truthful and reliable. The defence has not been able to create a reasonable doubt in the prosecution case.

27. I am satisfied beyond reasonable doubt that the accused on 14 June, 2015 had penetrated the vagina of the complainant with his penis without her consent.

28. I also accept that the accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.

29. I am also satisfied beyond reasonable doubt that the accused on 14 June, 2015 without lawful excuse and with intent to cause alarm to the complainant threatened the said complainant with a cane knife.

30. I agree with the unanimous opinion of the assessors that the accused was guilty of one count of rape and one count of criminal intimidation.

[23] Therefore, there are no merits in the appellant's contention that the trial judge had failed to consider the varied accounts given to her teachers.

[24] 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), **Kaivum 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)]

[25] 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.

[26] Since the trial judge had directed himself in accordance with the summing-up in the judgment he should be deemed to have considered all his directions to the assessors in the judgment as well.

[27] 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.....'*

[28] 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).

[29] 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)].

[30] I have no doubt that considering the evidence against this appellant as a whole one cannot say that the verdict was unreasonable. There was clearly evidence on which the verdict could be based and the trial judge could have reasonably convicted the appellant on the evidence before him.

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

02nd ground of appeal

[32] The appellant's complaint is that the trial judge had wrongly treated as recent complaint evidence, the evidence of the two teachers (PW2 and PW3) when the same was actually evidence of an uncharged act in respect of which there was no warning given to the assessors.

[33] The piece of evidence complained of was given by PW3 (see paragraphs 63, 71 and 85 of the summing-up) where she had said that the complainant told her that the appellant would touch her private part when the mother was asleep.

[34] The trial judge appears to have treated the evidence of both teachers and not particularly the above evidence as recent complaint evidence and given complete directions on how to evaluate such evidence at paragraphs 67-69 of the summing-up.

> *67. This is commonly known as recent complaint evidence. The evidence given by Ranjini Kumar and Pravin Reena Devi is not evidence as to what actually happened between the complainant and the accused since both the Teachers were not present and did not see what had happened between the accused and the complainant.*
>
> *68. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant who was an intellectually impaired and a slow learner complained to her School Teachers about what the accused had done to her although she did not say that she had been raped by the accused she had complained the next day of the alleged incident and therefore is more likely to be truthful. On the other hand, the defence says that the complainant did not complain to her brothers when they came home from the shop or to her teachers that she had been raped by the accused and also when talking to her teachers the complainant was changing her story therefore she should not be believed.*
>
> *69. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.*

[35] The prosecution also had treated the evidence of PW2 and PW3 as recent complaint evidence.

[36] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court set down the law regarding recent complaint evidence as follows.

> *"[33] In any case evidence of recent complaint was never capable of corroborating the complainant's account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App. 12 of 1989; **Jones v. The Queen** [1997] HCA 12; (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S, 24th November 2006.*
>
> *[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of*

*the complaint: **Kory White v. The Queen** [1999] 1 AC 210 at p215H. This was done here.*

[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.'

[37] Unfortunately, I do not find in the summing-up a reference to any instance where the complainant had said in evidence at the trial that the appellant would touch her private part when the mother was asleep. If not, procedurally that evidence coming only from PW2 and PW3 could not have been admissible and treated as recent complaint evidence. Otherwise, the prosecution may have been able to lead that evidence as recent complaint evidence.

[38] If the complainant had not come out with such evidence at the trial but only PW3 had spoken to that evidence then it becomes evidence not only of an uncharged act namely sexual or indecent assault but also perhaps hearsay evidence. There are no directions or warnings given by the trial judge to the assessors or to himself on the said evidence of an uncharged act or possible hearsay evidence in the summing-up or the judgment.

[39] In **Senikarawa v State** [2006] FJCA 25; AAU0005.2004S (24 March 2006)

*'[8] The learned judge admitted evidence of uncharged acts by the appellant against the complainant. The question of admissibility of such evidence is tested by the broader principle of whether the probative value of the evidence outweighs the prejudice to the accused, **R v. Boardman** [1975] AC 421, **Pfennig v. R** [1995] HCA 7; (1994-95) 127 ALR 99.*

[9] The nature of the evidence here was relationship evidence. The evidence of the uncharged acts provided an insight into the relationship between the appellant and the complainant and also the mother. It had a probative value beyond its tendency to prove a relevant propensity. It demonstrated an ongoing sexual attraction towards the complainant.'

[40] Although the appellant had not been charged with the incident of him having touched the complainant's private part, in my view, that evidence may show a propensity on the part of the appellant to behave in a sexual way to his step-daughter. Applying the above test that evidence taken in conjunction with other evidence of the complainant had a probative value beyond its tendency to prove a relevant propensity and demonstrated an ongoing sexual attraction towards the complainant.

[41] In any event, excluding the impugned item of evidence even as hearsay there is sufficient evidence coming from the complainant alone to sustain the conviction.

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

Prejudice to the respondent.

[43] Though an extension of time would not prejudice the respondent directly, any fresh proceedings would cause a great deal of inconvenience to the complainant, particularly given her intellectually impaired status. The time that had lapsed too may have caused the complainant to forget the actual incident that happened in 2015.

Order

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

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL