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

CRIMINAL APPEAL NO.AAU 126 of 2017
[In the High Court at Suva Case No. HAC 067 of 2013]

BETWEEN	:	**SASHI SALEN BAKAYA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Ratu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**27 November 2020**
Date of Ruling	:	**30 November 2020**

RULING

[1] The appellant 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 on 22 December 2012 at Corbett Avenue in Nausori, in the Central Division.

[2] The information read as follows.

'FIRST COUNT
Statement of offence

Rape *contrary to Section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009*

Particulars of the Offence

> ***Sashi Salen Bakaya*** *on the 22nd day of December 2012 at Corbett Avenue in Nausori, in the Central Division, had carnal knowledge of* ***M.R.****, without her consent.*

[3] After the summing-up on 28 October 2015, the assessors had unanimously opined that the appellant was guilty of the charge and in the judgment delivered on 29 October 2015 the learned trial judge had agreed with them and convicted the appellant of rape. On 30 October 2015 the appellant had been sentenced to 11 years, 11 months and two weeks of imprisonment with a non-parole period of 10 years.

[4] The appellant in person had signed an untimely application for leave to appeal against conviction and sentence on 05 June 2017 (received by the CA registry on 01 September 2017). The delay is about 01 year and 06 six months by June 2017. The appellant had filed an application to abandon his sentence appeal in Form 3 on 03 April 2019. Legal Aid Commission had subsequently filed papers seeking enlargement of time, amended grounds of appeal against conviction and written submissions on 07 August 2020. The state had responded by its written submission on 27 November 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] The delay is about 01 year and 06 months which is very substantial. In **Qarasaumaki v State** [2013] FJCA 119; AAU0104.2011 (28 February 2013) even a delay of 3 ½ months had been considered significant.

[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 may be capable of defeating the appellant's appeal if that is the only consideration.

Reasons for the delay

[16] The appellant's excuse for the delay is that he had expected his trial lawyers to lodge an appeal but later came to know that no appeal had been tendered. Thereafter, with the assistance of an inmate he had filed his appeal in person. There is no material to support that the appellant had ever instructed his trial lawyers from the Legal Aid Commission to appeal against his conviction and sentence. In fact there is no mention to that effect at all in the late appeal he had filed in person. Moreover, there is no explanation given why the appellant had to wait 1 ½ years to realize that no appeal had been filed.

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

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

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

Merits of the appeal

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

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

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

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

> *(i) 'THE Learned Trail Judge erred in law and in facts by not directing himself and the assessors on how to approach the alibi defence raised by the Appellant, thereby causing substantial miscarriage of justice.*
>
> *(ii) THE Learned Trial Judge erred in law and in facts by not directing the assessors and himself on recent complaint and its purpose when considering the credibility of the complainant.*

[22] The trial judge had summarised the evidence of the complainant, aged 13 and the appellant's position (who was the complainant's mother's sister's husband) as follows in the summing-up.

> *[35] Evidence of the complainant, M.R.*
>
> *(i) It is her evidence that she was born on 9th March 1998 and was residing at Corbett Avenue with her mother. She has studied up to class 8 and given up education due to lack of financial support. The Accused is married to her mother's sister.*
>
> *(ii) On 22nd December 2012 she slept on the mattress laid on the floor of the sitting area of her house. House itself is a small one with one bedroom. She had gone to sleep around 9.00 p.m. with her sisters two small children. Her mother and sister were drinking grog at the Accused's house. She was woken up when she felt the Accused on top of her inside the mosquito net. He had closed her mouth. Removed her panties and inserted his penis into her vagina. She had not consented.*
>
> *(iii) She identified the Accused from the light of the candle kept on a 2 feet high cupboard. It was located about two steps form the place she had slept. During cross examination she admitted no light came to the place where she slept.*
>
> *(iv) Then one of the small children started crying and the Accused wanted M.R. to go to the bed room. She refused. Then the Accused went away. She had thereafter she came out of the house and told what happened to a police officer Saula. Then she was taken to Nausori Police Station and statement was taken. She was also produced before a Doctor.*

(v) On 21st March 2013 she had signed letter prepared by the Accused and his family and the letter meant to "solve this case". Wife of the Accused had talked to her mother and she was not consulted. Some payment of money was also discussed. She had not complained to Police of this interference.

[36] Evidence of Boletawa Rakala

(i) This witness is also related to M.R. and on 22nd December 2012 at about 12.30 a.m., having attended his brother's birthday party he had come to accompany his uncle who lived close to M.R.'s house.

(ii) He had seen the Accused coming behind her house. Two or four minutes later M.R. too came out of front door of the house crying. She said the Accused had held her tightly and forcefully.

(iii) He and uncle had then alerted Saula, a police officer, who questioned and later arrested the Accused.

[37] Evidence of Dr. Salome Daunivalu

(i) This medical witness had examined the complainant on 23rd December 2012 at 9.00 a.m. and recorded the history as given by M.R. Her examination of the genitals of M.R. revealed that hymen not intact. There were no acute bleeding or semen and the vagina was dry. She opined there was sign of forced entry attributed to loss of hymen. During cross examination it was clarified that M.R. could have lost her hymen on an earlier occasion. Medical report was marked as Prosecution Exhibit No. 1.

[23] The trial judge had summarised the defence evidence too as follows.

'[39] Evidence of the Accused Sashi Salen Bakaya

(i) He says that on 22nd December 2012 he had gone to Vikash's house at about 8.00 p.m. to get a packet of grog. He had dropped him by the main road. He had not gone to the house of M.R. and did not come behind her house. Boletawa and his uncle never questioned him. Saula has arrested him and tore his T shirt. Only at the Police he was told of the allegation of rape. He denied the allegation and marked his statement to Police as Defence Exhibit No. 1.

(ii) He denied any knowledge of the letter signed by M.R. he is not aware even the family members have spoken about the letter.

[40] Evidence of Vikash Lal

(i) His evidence is that on 22nd December 2012 at about 8.00 p.m. the Accused came for a packet of grog. They talked for a while and the accused went away at about 9.00 p.m. His house and M.R.'s house are separated by

another house. The police did not record his statement and he told Accused he could tell him if he is needed.

(ii) During cross examination he said that he would close the front door at 10.00 p.m. and would go to sleep and would not know if the Accused had gone past his house after 11.00 p.m. when asked whether he would do anything on behalf of his friend the witness said he is not mad and would not die for him. He further said that if he has done something wrong he would not help.

01st ground of appeal

[24] The appellant complains that the trial judge had not given an *alibi* direction to the assessors causing a miscarriage of justice. He has cited **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020) in support of his contention. The law relating to directions on an *alibi* defence is well known in Fiji.

[25] In **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) the Court of Appeal said of the required direction in cases where there is a defense of *alibi* in the following words which were reiterated in **Mateni v State** (supra).

*'[29] When an accused relies on alibi as his defence, in addition to the general direction of the burden of proof, the jury (in Fiji the assessors) should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (**R v Anderson** [1991] Crim. LR 361, CA; **R v Baillie** [1995] 2 Cr App R 31; **R v Lesley** [1996] 1 Cr App R 39;'*

[26] In **Bese v State** [2013] FJCA 76; AAU0067.2011 (10 July 2013) Gounder J held

'[12] When an accused raises alibi as his defence, in addition to the general direction on the burden of proof, the jury should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (R v Anderson [1991] Crim. LR 361, CA; R v Baillie [1995] 2 Cr App R 31; R v Lesley [1996] 1 Cr App R 39; R v Harron [1996] 2 Cr App R 457). Not only these directions were not given, the number of rhetorical questions posed by the trial judge in relation to the applicants' alibi, arguably made the summing-up imbalance and unfair to the applicants. Whether the alleged errors caused miscarriage of justice is for the Full Court to determine. As far as this application is concerned, I am satisfied that leave should be given to both applicants to appeal against their convictions.'

[27] However, the respondent has submitted that there was no proper *alibi* evidence for the trial judge to have directed the assessors. Section 150(8) of the Criminal Procedure Act 1986 (NSW) is helpful to understand what *alibi* evidence means. It states:

> *"evidence in support of an alibi means evidence tending to show that, by reason of the presence of the accused person at a particular place or in a particular area at a particular time, the accused person was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission."*

[28] It appears from the evidence that according to Vikesh Lal the appellant had left his house around 9.00 p.m. and obviously Vikesh cannot account for the appellant's whereabouts thereafter. Most importantly, even the appellant does not seem to have explained or place any evidence as to where he was after 9.00 p.m. in his evidence to show that it would not have been possible for him to commit the offence. This evidence falls short of required evidence for an *alibi*. Otherwise, it would have alerted the trial judge to an *alibi* on the part of the appellant and enabled him to give directions to the assessors accordingly. If the appellant had gone home straightway after leaving Vikesh Lal, at least his wife or the complainant's mother who were drinking grog together at the appellant's house would have been in a position to speak to that fact. The complainant had gone to bed around 9.00 p.m. and woken up in the night to find the appellant on top of her. According to Vikesh, his house and the complainant's house is separated by only one house in between. Even the appellant's house is not far away from the complainant's house. At paragraph 65 of the summing-up the trial judge had specifically said that the case presented by the appellant was that he was in the vicinity of the house of the complainant in that night. Boletawa's evidence proves this.

[29] The plea of *alibi* postulates the physical impossibility of the presence of the accused at the scene of the offence by reason of his presence at another place. The plea can, therefore, succeed only if it is shown that the accused was so far away at the relevant time that he could not have been present at the place, where the crime was committed.

[30] This explains why neither the prosecution, nor the defence and not even the trial judge had understood the appellant as having set up an *alibi* defence and it also explains why the trial judge had not given an *alibi* direction to the assessors and why the

defence had not asked for redirections on *alibi* defence. Therefore, in any event technically the appellant is now barred from raising this ground of appeal as an appeal point 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).

[31] Therefore, there is no real prospect of success in appeal as far as this ground of appeal is concerned.

02nd ground of appeal

[32] The appellant argues that the trial judge had failed to direct the assessors on recent complaint evidence. His complaint is based on the evidence of the complainant's cousin Boletawa who in his evidence had said that the complainant had come out of the house from its front door crying within a couple of minutes of the appellant was seen behind her house and when asked she had told in the presence of an uncle that the appellant had held her tightly and forcefully.

[33] However, what the complainant had told in her evidence is that she had told everything to the police officer, Saula and she had not stated that she said anything to Boletawa or the uncle. Neither Saula, nor the said uncle was called by the prosecution to give evidence.

[34] Therefore, the question is whether the prosecution had led any recent complaint evidence at all. 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.'

[35] Thus, it appears that in the absence of the complainant's evidence that she had told Boletawa of material and relevant unlawful sexual conduct *(i.e.* rape) on the part of the appellant, the evidence of Boletawa that she had told him and the uncle that the appellant had held her tightly and forcefully could not constitute 'recent complaint' evidence of rape. In any event, what she is alleged to have told Boletawa could not amount to material and relevant unlawful sexual conduct *(i.e.* rape) on the part of the appellant, for holding the appellant tightly and forcefully by the appellant would not be necessarily suggestive of an act of rape.

[36] Therefore, the trial judge was not required to direct the assessors on assumed recent complaint evidence in terms of **Raj v State** (supra).

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

Prejudice to the respondent

[38] I do not see any real prejudice caused to the respondent as a result of an extension of time except the lapse of time since the commission of the offence. The delay itself is very substantial and reasons for the delay are totally unacceptable. The merits of the appeal do not favour an enlargement of time.

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