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

CRIMINAL APPEAL NO.AAU 102 of 2019
[High Court of Labasa in Criminal Case No. HAC 38 of 2018]

BETWEEN	:	**RAJESH PRASAD**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Prakash for the Appellant**
	:	**Ms. E. Rice for the Respondent**
Date of Hearing	:	**06 July 2020**
Date of Ruling	:	**07 July 2020**

RULING

[1] The appellant had been charged in the High Court of Labasa for having committed an offence of rape contrary to section 207(1) and (2)(a) of the Crimes Act No.44 of 2009 by penile penetration of the vagina of the victim who was 11 years old at the time the offence was committed.

[2] The information read as follows

'Statement of Offence

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

Particulars of Offence

Rajesh Prasad on the 30th day of December, 2017 at Labasa in the Northern Division, penetrated the vagina of SW, a child below the age of 13 years, with his penis.

[3] After full trial, the assessors had expressed a unanimous opinion of not guilty on the count of rape on 01 May 2019 and a lesser charge of sexual assault. The learned High Court judge in the judgment dated 03 May 2019 had agreed with the assessors and acquitted the appellant of the charge of rape but convicted him on sexual assault and sentenced him on 06 May 2019 to imprisonment of 04 years and 10 months with a non-parole period of 04 years.

[4] The appellant in person had filed a timely appeal only against the sentence 24 May 2019 and the registry had received another petition of appeal with more grounds against sentence on 29 July 2019. The Legal Aid Commission had filed an application for enlargement of time to appeal out of time against conviction on 09 December 2019 and tendered written submissions on 27 May 2020. The delay is about 06 months. An application to abandon the appeal against sentence in Form 3 was tendered to court at the hearing on 06 July 2020. The State had tendered its written submissions on 03 July 2020.

[5] The brief facts of the case are as follows. The prosecution had called three witnesses, the complainant, her mother Manjula Wati (PW2) and her grandmother Sam Raji (PW3). However, the prosecution case was substantially based on the evidence of the complainant. Defense had called the appellant and four other witnesses.

[6] The complainant had testified that on 26th December 2017, during December holidays, her mother sent her to her maternal aunt's place (the mother's sister - DW2) at Korotari because her mother had no option but to look after the victim's sister who was hospitalized at Labasa Hospital. However, her mother appears to have said in evidence that the victim was sent to DW2's place on 29th or 30th December and stayed there for 03 days. According to the victim, she had travelled to Korotari by bus by herself when she was made to sit in the bus by her mother at the bus stand and upon reaching Korotari, DW2 had received her from the bus and, upon her arrival, she had seen the aunt calling her mother to confirm her arrival at Korotari as confirmed by PW2. The victim had further stated that she spent three days at her aunt's place before returning home.

[7] On 30th December, 2017, whilst the complainant was still at her aunt's place, she was sleeping with her aunt and uncle. Her aunt was sleeping next to her and her uncle was next to her aunt in the same bed. It was a Saturday and early in the morning at around 5-6 a.m., the aunt had gone to the market to sell vegetables. When her aunt went to the market, uncle (the appellant) had done something bad to her. Uncle had done R.A.P.E. The victim had learned about rape at her healthy living class in Year 7 and according to her RAPE was sec or sex.

[8] When asked to clarify, the victim had said that her uncle touched her breast and took out his hand from the breast and then put her pants down. Then, he took out his 'wee' and put his 'wee' on her wee and she had described 'wee' as the place boys 'wee' from. She said she was feeling bad and felt the itch. The appellant had put the blanket down and wiped her 'wee'. When a diagram of body parts of a man was shown to the victim, and asked to point out where the 'wee' is, she had pointed out the penis. When she was shown a diagram of female body parts, and asked to point out the wee, she had pointed out the vagina. She said that after doing the bad thing, uncle told her not to tell aunty what he did to her. When the aunt returned, she had told her what the uncle had done to her but her complaint had been neglected. Her aunt, DW2 had denied having received any compliant. When she returned home, the victim had told the grandmother that uncle did a 'bad thing' to her without any description of the 'bad thing' but her complaint had not been taken seriously. However, according the grandmother (PW3) when the victim complained to her for the second time, she had heard more details of the incident. Yet, it appears from the evidence of PW3 that the details as to how the incident happened given by the victim on the second occasion had been somewhat different to the victim's own version of the incident.

[9] The position taken up by the appellant, his wife and son had been that the victim never came or stayed at their place during the period in question as stated by the victim, her mother and grandmother. It appears that a suggestion had been made to the victim that she was not at the appellant's place from 27th December 2017 to 02nd January 2018 which she had denied. It had been part of the defense case that the appellant and his wife left home to go to Labasa Saturday market carrying vegetables at about 6.00 a.m. and returned around 3.15 p.m. on 30 December. However, the

appellant had admitted that he did not take up the position that he accompanied his wife to the market on the day in question at the stage the investigation was in progress. His wife also had admitted that she had not informed the appellant's lawyer that her husband came with her to the market on the day in question. The appellant had not filed an *alibi* notice either before the trial. It is not clear whether the appellant had taken up the position that the victim never came to and stayed at his house during the relevant period prior to the trial or he had come out of it for the first time at the trial. It is apparent, however, that he or his wife had not attributed any motive for the victim to have made a serious allegation against the appellant with whom the victim claims to have stayed just for 03 days. Nor had it been suggested that it was a fabrication or a mere fiction by a child.

[10] DW4 had not seen a little girl at the appellant's house on 31 December while celebrating the New Year. According to DW5 (brother of PW2 - against whom the victim had made a complaint of sexual abuse and was facing criminal proceedings), the victim and her sister Geeta had been with him at his house on 30 December and they had not gone out. Both the victim and her mother had also admitted in their evidence that mother, the victim and Geeta had celebrated the New Year at DW5's residence.

[11] Therefore, there is lack of clarity or some sort of uncertainty as far as the summing-up and the judgment are concerned as to when the victim reached and left the appellant's house. If one accepts PW2's evidence the victim had been back at DW5's place by the dawn of New Year. However, her evidence that the victim had initially left home on 29th or 30th December to go to the appellant's place and she was there for 03 days cannot be reconciled with the victim having come back to DW5's place by 30th or 31st December. Three day stay at the appellant's place by the victim including 30 December is also not possible if she had reached the appellant's home on 26th December as claimed by the victim.

[12] 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

[13] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
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> *(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?*

[14] ***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.'*

[15] 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.....'*

[16] I would rather consider the third and fourth factors in ***Kumar*** first before looking at the other factors which will be considered, if necessary, in the end.

Grounds of appeal

01st ground of appeal

> *'The learned trial judge did not provide cogent reasons when overturning the unanimous opinions of the assessors that the appellant is of guilty for the charge of sexual'*

[17] I said in **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020) and **Valevesi v State** [2020] FJCA 88: AAU039.2016 (22 June 2020) that:

> *'A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing, 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).'*

[18] The appellant relies on **Lautabui v State** [2009] FJSC 7: CAV0024.2008 (6 February 2009) where it was held

> *'[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have "cogent reasons" for differing from their opinion. The reasons must be founded* ***on the weight of the evidence*** *and must reflect the judge's views as to* ***the credibility of witnesses****: **Ram Bali** v **Regina** [1960] 7 FLR 80 at 83 (Fiji CA), affirmed **Ram Bali** v **The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962); **Shiu Prasad** v **Reginam** [1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in **Setevano** v **The State** [1991] FJA 3 at 5, the reasons of a trial judge:*
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> *'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.*

[19] I find from the judgment that the learned trial judge had analyzed the prosecution evidence in paragraphs 15–24 including its weight and credibility. The learned judge had analyzed and concluded in paragraphs 30-32 that there was no concreate evidence of penetration and therefore agreed with the assessors and acquitted the appellant of the rape count in the information. However, he had accepted the prosecution evidence and been satisfied that the appellant had touched the victim's breast and her vagina with his penis and therefore, found him guilty of sexual assault.

[20] The learned trial judge had also examined the defense evidence in paragraphs 25-29 and rejected the defense evidence for reasons given therein.

[21] Therefore, The learned trial judge had dealt with the weight of the evidence and his view of credibility of the victim and the appellant.

[22] At the same time the appellant argues that that the assessors may have opined that the appellant was not only not guilty of rape but also not guilty of sexual assault because they had not accepted that the appellant was there at the appellant's house on 30th December. In my view, it would not be material whether the incident of sexual abuse happened exactly on the 30th December if it had in fact happened on any day during her stay of three days at the appellant's house. If the assessors had doubted on the act of penetration only they could still have found him guilty of sexual assault which had been clearly put to them by the trial judge. Obviously, on the other hand, the trial judge had thought that the victim had been at the appellant's house at the relevant time as could be gathered from paragraph 15 and 16 of the judgment. The issue is who the ultimate judge of facts is in a trial in Fiji.

[23] In this context, one must not forget the judicial pronouncements on the role played by the assessors in Fiji. In **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006) the Court of Appeal held that

> *"...In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only, to offer their opinions, based on their views of the facts..."*

[24] **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016) the Supreme Court reiterated:

> *"....in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".*

[25] The appellant is also critical of paragraph 17 of the judgment where the trial judge had stated that the learned trial judge had held the victim's complaint to be consistent considering her complaints to the appellant's wife and her grandmother. The appellant's wife had denied having received such a complaint (their position was that the appellant was not at their house) and there is some inconsistency of the victim's complaint to the grandmother and her own version as to how the incident happened. Therefore, whether the learned trial judge's conclusion in paragraph 17 is flawed and what effect it can have on the conviction of the appellant of sexual assault is a matter the full court could examine with the help of the full appeal record. I am not in a position to comment any further on this at this stage.

[26] The appellant also argues that the learned trial judge had unreasonably rejected the evidence of DW5, the brother of victim's mother that his sister, the victim and the victim's sister were at his place on 30th December 2017 and never left home. The trial judge in paragraph 26 seems to have rejected his evidence as DW5 was facing a charge of sexual abuse of the victim. PW2 and the victim had both admitted having celebrated the New Year at DW5's place. It is possible that they admit having been at DW5's place on 31 December whereas the incident relating to this case had happened on 30th December. Once again I cannot probe this complaint any further without the full appeal record and it could be done only by the full court.

[27] Finally, another grievance of the appellant is that the learned trial judge had not assessed his *alibi* properly. The trial judge had dealt with it in paragraph 27-29 of the judgment. He had addressed the assessors on *alibi* defense in paragraphs 35-37 and 77-80 of the summing-up. The appellant's position was that the victim was never at his house not only on the day of the alleged incident but also that she never came there. In that context his defense of *alibi* carries not much weight. In any event he or his wife had not instructed their attorneys of the *alibi* defense in the first instance. Nor had the appellant given the legally required notice of *alibi* preventing the prosecution from inquiring into the veracity of it before the trial. I see no merit in his complaint on the so called *alibi* defense.

[28] However, while dealing with a complaint relating the *alibi* defence in **Pauliasi Raisele v State** AAU 088 of 2018 (01 May 2020) and **Leone v State** [2020] FJCA 85; AAU141.2019 (19 June 2020), I raised a slightly different question as to whether in addition to what **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020) have prescribed as the proper direction on an *alibi*, the assessors should or should not be directed on the 'intermediate position' namely if *alibi* evidence is neither accepted nor rejected, the resulting position is that a reasonable doubt exists as to the truth of the prosecution evidence, as a question of law to be looked into by the full court. The full court may also consider whether a trial judge when disagreeing with the majority opinion of the assessors, should or should not direct himself on this 'intermediate position' regarding an *alibi* and the impact of such failure on the conviction. However, in this instance the trial judge had completely rejected the appellant's *alibi* and therefore the 'intermediate position' would not have had any effect on the decision of the trial judge.

[29] In **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) the Supreme Court said

> *'[23] In the course of its judgment in Ram v The State this Court succinctly described the role of the trial judge as well as the supervisory function of the appellate court in the following words-*
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> *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case." (emphasis added)*

[30] I cannot say at this stage that the matters urged under the sole ground of appeal have a real prospect of success in appeal. However, I feel that the appellant may canvass his appeal before the full court (which will have the benefit of the complete appeal record) against conviction on the question as to whether the learned trail judge had complied with the legal requirements in his judgment dissenting with the assessors as set out in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) on the one hand and whether the overall verdict of guilty of sexual assault is supported by the totality of evidence **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) on the other, as a mixed matter of law and fact.

[31] In my view the delay is substantial and the reason for the delay is not acceptable as no one can be presumed to be ignorant of the law. The appellant could not have thought that he could not appeal against conviction when he had already filed a timely appeal against sentence. The delay in not appealing against conviction is not due to any insurmountable difficulties faced by the appellant as an incarcerated person to be exempted from the requirements of the CA Act and CA Rules on appealing against High Court decisions (see also the observations in **Fisher v State** [2016] FJCA 57; AAU132 of 2014 (28 April 2016). However, I agree that no prejudice would be caused to the respondent at this stage by the enlargement of time.

[32] Accordingly, enlargement of time against conviction is allowed for the reasons stated above.

Order

1. Enlargement of time against conviction is allowed.

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL