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

CRIMINAL APPEAL NO.AAU 59 of 2020
[In the High Court at Suva Case No. HAC 310 of 2018]

BETWEEN	:	**KELEPI VANAVANA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Mr. M. Fesaitu and Ms. L. Taukei for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**13 October 2021**
Date of Ruling	:	**15 October 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva with one count of rape contrary to section 207(1) and (2) (a) of the Crimes Act 2009 committed at Suva in the Eastern Division on 17 May 2018.

[2] The information read as follows:

*'**Statement of Offence***

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

Particulars of Offence

***Kelepi Vanavana**, on the 17th day of May, 2018, at Suva, in the Eastern Division, penetrated the vagina of Sereana Tukana, with his penis without her consent.'*

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was not guilty of rape. The learned trial judge had disagreed with the assessors' 'not guilty' opinion, convicted the appellant of rape and sentenced him on 16 July 2019 to 09 years of imprisonment with a non- parole period of 07 years (after the remand period was deducted the sentence was 08 years and 06 months with a non-parole period of 06 years and 06 months.

[4] The appellant had appealed in person against conviction out of time and filed submissions (12 February 2020) and tendered amended grounds of appeal (20 July 2020) and affidavit explaining the delay (12 March 2021). Thereafter, the Legal Aid Commission had sought enlargement of time to appeal accompanied by an affidavit, amended grounds of appeal and written submission on 22 June 2021. The state had tendered its written submissions on 08 October 2021.

[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 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, the factors to be considered in the matter of enlargement of time 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?

[6] 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 [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[7] The delay of the appeal (being nearly 06 months) is substantial. The appellant had stated that he was expecting his LAC lawyer to visit him to attend to filing of an

appeal but it did not happen. Then he filed papers with the help of an inmate of the prison. However, the appellant's explanation in his affidavit (12 March 2021) is that the relevant papers were with his trial counsel and the same reached him on 28 August 2019 for him to prepare the appeal papers. There is no mention of his waiting for his trial counsel and no explanation for the delay from 28 August 2019 to 12 February 2020. Thus, his explanation for the delay is not consistent and unacceptable. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] The sole ground of appeal urged on behalf of the appellant against conviction is as follows:

> ***Conviction***
>
> *'THAT the Learned Trial Judge did not provide cogent reasons when overturning the unanimous opinions of the assessors.'*

[9] The trial judge in the sentencing order had summarized the evidence against the appellant as follows:

> 3. *It was proved during the trial that, on the 17th day of May 2018, at Suva, you penetrated the vagina of Sereana Tukana, a person whom you call "Grandmother", with your penis, without her consent.*
>
> 4. *You are a neighbor of the complainant and also a close relation. The complainant was looking at you as a grandchild.*
>
> 6. *The complainant clearly testified as to how, you pushed her to the floor and raped her. When she held her thighs tight in protest, you punched her on the thighs and forced her to open them up.*

[10] The complainant (PW1), the appellant's mother (PW2) and the complainant's neighbour (PW3) had given evidence for the prosecution. The appellant had given evidence and called the doctor who had examined the complainant as his witness.

01st ground of appeal

[11] The trial judge had overturned the opinion of not guilty by the assessors which he was entitled to do. The judge is the sole judge of fact (and law) in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **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).

[12] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) and **Fraser v State** [2021]; AAU 128.2014 (5 May 2021)].

[13] A ground based on lack of cogent reasons alone would not help an appellant to succeed in appeal as the ultimate test is whether the verdict recorded by the trial judge is unreasonable or cannot be supported having regard to the evidence.

Test of 'unreasonable or cannot be supported having regard to the evidence'

[14] At a trial by the judge assisted by assessors the test has been formulated as follows. Where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the

appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. *"Must have had a doubt"* is another way of saying that it was *"not reasonably open"* to the jury to be satisfied beyond reasonable doubt of the commission of the offence. (see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493).

[15] When the above test is recalibrated to a situation where the trial judge disagrees with the assessors or the trail is by the judge alone it may be restated as follows. The question for an appellate court would be whether or not upon the whole of the evidence acting rationally it was open to the trial judge to be satisfied of guilt beyond reasonable doubt against the assessors' opinion; whether or not the trial judge must, as distinct from might, have entertained a reasonable doubt about the accused's guilt; whether or not it was 'not reasonably open' to the trial judge to be satisfied beyond reasonable doubt of the commission of the offence.

[16] However, in this case the appellant's complaint is the lack of cogent reasons. Even there what is more important is whether the trial judge had embarked on an independent assessment and evaluation of the evidence and in the process come up with clear, logical and convincing reasons why not only was he differing from the opinion of the assessors thereby disagreeing with the assessors' opinion but also why he was convicting the appellant.

[17] The underlying argument of the appellant's counsel appears to be that the act of sexual intercourse was consensual and the trial judge was wrong to have decided that

the sexual intercourse was not consensual. He also suggests that the assessors in all probability may have found the appellant not guilty because they thought that the sexual intercourse may have been consensual. Thus, consent was the central issue in the case.

[18] Having directed himself according to the summing-up and traversed the evidence at length, the trial judge had directed his mind to this very question at paragraph 29 of the judgment and determined that he had no doubts that the complainant had not consented to sexual intercourse.

[19] From the summing-up and the judgment the following facts emerge. The trial judge had observed the complainant (46 years old) to be about 05 feet in height, small made and feeble whereas the appellant was seen to be 06 footed young man of 28. The appellant used to call her 'Bu' or 'grandmother' as she was related to him. She had seen him with read eyes and drunk when he knocked on her kitchen door calling her 'Bu Sere, Bu Sera, open the door'. She was in the house only with her 11 years old daughter sleeping in the sitting room. She had asked him to go away and told him that she was not opening the door. She had got scared and called out for her neighbour Waisake but she had not responded. Then, when she turned back, she had seen the appellant in front of the bed room door.

[20] The appellant had then removed his cloths and her cloths, covered her mouth with his hand, pushed her to the ground and inserted his penis into her vagina. When she resisted by closing her thighs he had punched on her thighs and forced her to open them. The appellant had bit her jaw while raping her leaving a bruise on her right jaw. She had cried in pain and her neighbour Asenaca (PW3) had called back 'Na Levu, Na Levu' ('Aunty, Aunty'). The appellant had ejaculated inside her vagina. He had tried to turn her around and put his penis into her anus but she had pushed him making his head hit against the door which knocked him out.

[21] The complainant had then wrapped herself with a blanket and hurried to the appellant's house and complained to his mother Litia Laca (PW2). PW2 had accompanied the complainant to her house to find the appellant still sitting inside the

bedroom naked. When PW2 asked him to go out he had walked out. Still, the appellant had come back and called 'Bu Sere, Bu Sera, open the door' but his mother had chased him away.

[22] PW2 had spent the rest of the night with the complainant and even in the morning she and PW2 had heard the appellant knocking at the door but PW2 had taken him to her house. PW3 Asenaca had asked the complainant in the morning why she had cried in the previous night.

[23] The complainant had informed the incident to her husband in the morning and lodged a complaint with the police. She had been medically examined within 20 hours of the incident.

[24] It had been suggested by the appellant's counsel that the complainant had invited him and opened the door for him to come inside her house and they had consensual sex that night. It had also been suggested that the bruise on her right jaw was a love bite and she had not suffered any injuries on her thigh as the medical report had recorded no such injury.

[25] The appellant's mother (PW2) by and large had corroborated the complainant's version of events. PW3 Asenaca too had heard the complainant crying around 9.00 p.m. but thought that the complainant and her husband were having a disagreement. However, when PW3 asked the complainant in the morning what had happened, she had told that the appellant had raped her in the night.

[26] The appellant in his examination-in-chief had taken up the position of consensual sex at the invitation of the complainant and said that he entered her house through the bed room door as requested by the complainant though he first knocked on the kitchen door. However, under cross-examination the appellant had changed his stance and stated that he did not have sex with her but they only hugged and kissed each other. Under cross-examination, he had tried to explain this significant change of defence position on the basis that he had forgotten to give proper instructions to his counsel.

[27] DW2 (the doctor) had noted 02cm bruise on the complainant's right jaw but not observed any other injury but had stated that bruises do sometimes occur between 24-48 hours of an assault.

[28] The trial judge had not only narrated (paragraphs 06-16) but critically analysed the above evidence from paragraphs 17-30 on each of the elements of the offence of rape *vis-à-vis* the evidence before overturning the assessors' opinion at paragraph 31. He had specifically reflected as to the credibility of witnesses in the process of embarking on his independent assessment and evaluation of the evidence in which he had come up with clear, logical and convincing reasons why not only was he differing from the opinion of the assessors thereby disagreeing with the assessors but also why he was convicting the appellant.

[29] It is clear that the appellant's is a case where his the defence of consensual sex propagated by his counsel in cross-examination on his instructions had got discredited by the appellant's own evidence under oath thus eventually making him incredible.

[30] If the sexual intercourse had been consensual or no sexual intercourse happened there is no reason whatsoever for the complainant to go out of her own house in the night covering herself only with a blanket even leaving her own daughter at home to complain to none other than the appellant's own mother who on her arrival saw the appellant still sitting naked in the bedroom. No one even knew of the incident until the complainant herself disclosed it to PW2 in the night and PW3 in the morning. The evidence of PW2 and PW3 consists not of only recent complaint evidence but also of evidence corroborative of the complainant's version in general. Medical evidence is supportive of the complainants' evidence too. Why should the complainant give publicity to an act of consensual intercourse when there was no danger of anybody finding that out at all?

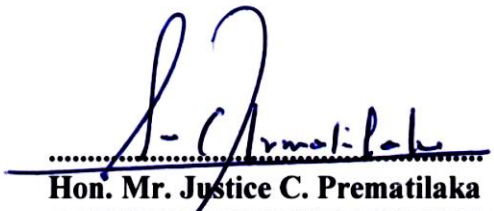
[31] Therefore, the trial judge had satisfactorily discharged his burden in disagreeing with the assessors and convicting the appellant of rape. He had embarked on an independent assessment and evaluation of the evidence and given 'cogent reasons' based on the weight of the evidence for differing from the opinion of the assessors

and the reasons are, in my view, capable of withstanding critical examination in the light of the whole of the evidence presented at the trial. The verdict of rape entered by the trial judge, in my opinion, cannot be said to be 'unreasonable' and the verdict of rape can be supported having regard to the evidence.

[32] Therefore, I do not see any real prospect of this ground of appeal succeeding.

Order

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



Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL