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

CRIMINAL APPEAL NO.AAU 116 of 2019
[In the High Court at Labasa Case No. HAC 30 of 2017]

BETWEEN : **TAITUSI MANUCA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

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

Date of Hearing : **11 October 2021**

Date of Ruling : **12 October 2021**

RULING

[1] The appellant had been indicted [with another - 2nd accused and appellant in AAU 139 of 2019] in the High Court at Labasa with one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act, 2009 committed at Taveuni in the Northern Division on 8 July 2017.

[2] The information read as follows:

*'**FIRST COUNT***
Statement of Offence

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

Particulars of Offence

TAITUSI MANUCA, *on 8 July 2017, at Taveuni, in the Northern Division, penetrated the vagina of* ***S.B.****, with his penis, without her consent.*

SECOND COUNT
Statement of Offence

SEXUAL ASSAULT*: Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

TAITUSI MANUCA, *on 8 July 2017, at Taveuni, in the Northern Division, unlawfully and indecently assaulted* ***S.B.****, by masturbating her genitalia.*

THIRD COUNT
Statement of Offence

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

Particulars of Offence

JONE COLATA*, on 8 July 2017, at Taveuni, in the Northern Division, penetrated the vagina of* ***S.B.****, with his finger, without her consent.*

FOURTH COUNT
Statement of Offence

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

Particulars of Offence

JONE COLATA*, on 8 July 2017, at Taveuni, in the Northern Division, penetrated the vagina of* ***S.B.****, with his penis, without her consent.'*

[3] At the end of the summing-up the assessors had unanimously opined that the appellant was guilty as charged. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 03 August 2018 to an imprisonment of 14 years (after the remand period was deducted the sentence is 13 years and 08 months) for rape and 07 years of imprisonment for sexual assault; both sentences to run concurrently with a non-parole period of 10 years.

[4] The appellant had in person appealed against conviction belatedly (30 July 2019) and filed submissions (27 February 2020) and additional grounds of appeal (15 September 2020) subsequently including a challenge to the sentence. Thereafter, the Legal Aid Commission had tendered a notice of motion seeking an extension of time to appeal against conviction and sentence, the appellant's affidavit and written submissions on 22 February 2021. The respondent's written submissions had been filed on 06 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 conviction appeal (being nearly 11 months) and sentence appeal (being 02 years and 10 days) is very substantial. The appellant had stated that his trial lawyers had not explained to him the appeal process with the 30 days' prescribed time and as he was not knowledgeable in the preparation of the appeal papers, he had to obtain the assistance of a fellow inmate to lodge the appeal. However, this cannot be accepted as an acceptable reason for the delay of 11 months for the conviction appeal and over 2 years delay in the sentence appeal. 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 grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows:

Conviction

Ground 1

THAT the Learned Trial Judge had erred in law and in facts having not directed the assessors and himself on the Turnbull directions to assess and/or evaluate the correctness of identification as the appellant had denied the allegations of rape.

Ground 2

THAT the Learned Trial Judge had erred in law and in facts having not directed the assessors and himself on how to approach the evidence of recent complaint.

Supplementary grounds *(raised in person)*

Ground 3

THAT the Learned Trial Judge had erred in law and in facts when in his summing up erroneously assumed that the complainant had suffered injuries on her vagina not supported by the medical report, a misdirection that had caused a miscarriage of justice to the appellant (refer section D [12]) pf the medical report which noted as follows; on vaginal examination – [1] Hymen not intact [2] no obvious laceration/bruising noted [3] no evidence of seminal fluid noted.

Ground 4

THAT the Learned Trial Judge had erred in law and in facts in not informing the appellant of his Legal Counsel the rights under section 224 (2) (a) or (3) (a) (d) of the Criminal Procedure Act 2009 which has caused a grave miscarriage of justice.

Sentence

Ground 1

THAT the Learned Trial Judge had erred in principle in enhancing the appellant's sentence with aggravating factors that; i) contributed to an element of the offence; and factors that is already reflected in the starting point.

[9] The trial judge had summarized the evidence in the case as follows:

> *'3. The evidence adduced by the State came from the complainant (referred to herein as "Mrs. B.") and her husband ("Mr. B"). They are a New Zealand couple who moved to Taveuni in May 2017 to start a business.*
>
> *4. On the 7th June 2017 they went to a local beach in the evening to relax and drink some beer they had taken with them. They were joined by the two accused and their girlfriends and beer and cigarettes were shared until about midnight. Eventually the NZ couple and the two accused ended their drinking "session" at another popular drinking spot known locally as the Korean wharf. The girlfriends had long before gone home. A bottle of rum was purchased and consumed by all four at the Korean wharf.*
>
> *5. At about 4am Mrs. B. had had enough and went to recline on the front passenger seat of their twin cab vehicle. She fell asleep but woke to find the first accused on top of her kissing her and penetrating her. She knew that it was not her husband and could recognize the body type and voice of the first accused. Apart from raping her he also sexually assaulted her with his hand and tongue. The second accused was standing outside by the open passenger door talking to the first accused whilst he was assaulting Mrs. B.*
>
> *6. When the first accused was finished the two men changed places and the second accused proceeded to rape Mrs. B with both his finger and his penis while biting her face and neck.*
>
> *7. While these assaults were occurring Mr. B. was nowhere to be seen or heard, but later when he returned he was suffering from memory loss and confusion.*
>
> *8. At dawn Mr. B (not knowing what had occurred) drove the two accused to town and dropped them both off. It was only at this stage that Mrs. B. was able to tell her husband of the ordeal she had just been through. The Police were immediately informed and medical examinations conducted at the Taveuni District hospital. A lady medical officer told the Court that Mr. B was found to have a head wound on his scalp with fresh blood; a wound consistent with blunt force trauma within the previous 12 hours.*
>
> *9. Both accused persons gave evidence in their defence, and both claimed to know nothing about assaults; each was asleep after so much beer and rum and if anything had happened to Mrs. B. it could not have been either of them because they were sleeping.*
>
> *10. Each accused called a witness to support the defence neither of whom were any assistance to the accused calling that evidence.*

01st ground of appeal

[10] The appellant submits that the trial judge had failed to direct the assessors and himself on Turnbull directions regarding the identification of the appellant.

[11] The evidence of the complainant makes it clear that there was no facial identification of the appellant. According to the complainant, the appellant was identified by his voice and distinct body type or shape (see paragraphs 19-24 of the summing-up) as the person who first sexually assaulted and had sexual intercourse with her. There had not been a subsequent voice identification parade either.

[12] The trial judge does not appear to have directed the assessors (or himself) as to how they should approach the identification evidence based on voice and body shape of the appellant using Turnbull directions or otherwise.

[13] In **Tbuduadua v State** [2018] FJCA 196; AAU120.2016 (29 November 2018) the then President of the Court of Appeal siting as a single judge had to deal with voice recognition evidence and in granting leave to appeal (the appeal is yet to be heard by the full court) stated as follows:

> *'[6] The first ground of appeal against conviction relates to the adequacy of the directions on the voice recognition evidence given by the complainant. As the judge noted in his summing up at paragraph 86 "It is clear that the prosecution has only evidence of identification by voice to connect the accused to the offending act." The directions on voice recognition are set out in paragraphs 86 and 87 of the summing up.*
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> *[7] In **Davis –v- R** [2004] EWCA Crim. 2521 the Court of Appeal noted at paragraph 29:*
>
> > *"_ _ _ we accept that voice identification (or here more precisely recognition) evidence needs to be approached with even greater care that usual identification or recognition evidence. But the general principles governing identification stated in Turnbull (emphasis added) apply to both cf e.g. Hersey [1997] EWCA Crim. 3106 (1 December 1997) (1998) Crim. L.R. 281."*

[14] Gage LJ in **Flynn and St John** [2008] EWCA Crim 970 said:

> *'In all cases in which the prosecution rely on voice recognition evidence, whether by listener, or expert, or both, the Judge must give a very careful direction to the jury warning it of the danger of mistakes in such cases".*

[15] In **R v Clarence Osbourne** [1992] JLR 452 (the Court of Appeal of Jamaica) the evidence of voice identification had been challenged. The learned trial judge had reminded the jury of the basis on which the recognition was made. He had pointed to the period both men were acquainted, the nature of their relationship, and the particular speech pattern of the applicant and the opportunities for such knowledge. Carey P (Ag), said:

> *…Common sense suggests that the possibility of mistakes and errors exists in the adduction of any direct evidence, in the sense of evidence of what a witness can perceive with one of his five senses. But that can hardly be a warrant for laying down that a Turnbull type warning is mandatory in every sort of situation where identification of some object capable of linking an accused to the crime or perhaps some attributable or feature of his speech capable of identifying him as a participant, forms part of the prosecution case.*

[16] **R v Rohan Taylor et al**, (1993) 30 JLR 100 Gordon JA said:

> *'We would add that the directions given must depend on the, particular circumstances of the case……*
>
> *In order for the evidence of a witness that he recognised an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for more spoken words to render recognition possible and therefore safe on which to act'*

[17] In the circumstances, though I cannot assess the degree of success of this ground of appeal at this stage as the final outcome will depend on the assessment of the totality of evidence by the full court, upon reading the compete trial proceedings, I think the aspect of identification or recognition by voice and by other means such as body shape etc. would need closer attention by full court for future guidance.

[18] Therefore, I am inclined to grant enlargement of time to appeal against conviction on this ground. The respondent too has conceded that this ground of appeal may be considered by the full court in more detail.

02nd ground of appeal

[19] The appellant submits that the learned trial judge had erred in law and in fact having not directed the assessors and himself on how to approach the evidence of recent complaint.

[20] In addition to the evidence of the complainant the other item of evidence led by the prosecution was the recent complaint made by her to her husband. It appears as conceded by the respondent that the trial judge had not provided any assistance to the assessors how to approach this piece of evidence. From the judgment it appears that the trial judge had not stated what weight he was attaching to the recent complaint evidence though he had referred to it.

[21] In **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017) the Court of Appeal dealt with the law relating to recent complaint evidence**.**

> *'[28] As a general rule, a prior consistent statement of a witness is inadmissible evidence. However, there are many exceptions to this rule. One of the exceptions to the rule is in sexual cases. In sexual cases, the evidence a recent complaint of the sexual assault made to another person by the complainant is allowed to show the consistency of the conduct of the complainant and to negative consent (Peniasi Senikarawa v The State unreported Cr App No AAU0005 of 2004S; 24 march 2006). The relevance of the evidence was explained by the Supreme Court in Anand Abhay Raj v The State unreported Cr App No CAV0003 of 2014; 20 August 2014 at [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.

[29] At trial, the complainant gave evidence that she told her boyfriend that the appellant had raped her shortly after the alleged incident. The complainant's boyfriend gave evidence and confirmed that the complainant made a complaint to him that the appellant had raped her. In paragraph 38 of the summing up, the learned trial judge told the assessors that the evidence of the boyfriend cannot be used to prove the truth of the alleged rape but as evidence of the consistency of the complainant's conduct with the story she told in the witness box. The direction is correct in law. This ground fails.

[22] The Supreme Court in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) had earlier 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.'

[23] Therefore, a trial judge dealing with evidence of recent complaint should direct the assessors that recent complaint is not evidence of facts complained of and cannot be

used to prove the truth of the allegation; nor is it corroboration of the allegation. It only 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.

[24] Unfortunately, the trial judge had failed to assist the assessors on the above lines in the summing-up. Nor had he directed himself accordingly in the judgment.

[25] Though, the case against the appellant depended on the evidence of the complainant, I am inclined to grant enlargement of time to appeal against conviction on this ground as well as it involves a question of law.

Supplementary grounds of appeal

Ground 03

[26] The appellant in person had alleged that the trial judge had erroneously assumed that the complainant had suffered injuries on her vagina which was not supported by evidence.

[27] Paragraph 28 of the summing-up reveals that the doctor had testified to laceration/bruise noted on the complainant's vagina. In any event, medical evidence is not a *sina quo non* to prove a charge of rape.

[28] There is no merit in this ground of appeal.

Ground 04

[29] The appellant claims that he had unknowingly sold a stolen chain saw to the assessors (which one is not specified) and he was not given the right to object to the two assessors.

[30] There is nothing to indicate that the appellant had any bar to instruct his trial counsel to object to any assessors on any legitimate basis had he entertained any reservations

of the impartiality of any of the assessors. This is purely an afterthought and the complaint has no merit at all.

01st ground of appeal (sentence)

[31] The appellant argues that the trial judge had used factors that formed part of the elements of the offence and those already reflected in the starting point in enhancing the sentence.

[32] The trial judge had taken 08 years as the starting point. On a reading of paragraphs 14 -17 of the sentencing order it is clear that the trial judge had considered vulnerability of the drunken complainant, breach of trust of hospitality extended by the victim family, night time attack on the complainant and long lasting trauma as aggravating factors to enhance the sentence by 06 years. These are not clearly elements of the offence of rape.

[33] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting'.

[34] The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features.

[35] The Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) stated that the difficulty is that the appellate courts do not know whether all or

any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[36] However, this concern is not real in this instance, for the trial judge had taken 08 years as the starting point when the tariff for adult rape had been taken to be between 07 and 15 years of imprisonment by Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338. Thus, the starting point is almost at the lower end of the tariff. The 06 years' increase is clearly for the aggravating factors above enumerated. In the circumstances, there is no reasonable danger of double counting seen in the sentencing process.

[37] On the other hand, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015). The appellant's final sentence is within the stipulated tariff. He had offended while on a suspended sentence and re-offended while on bail.

Orders

1. Enlargement of time to appeal against conviction is allowed.
2. Enlargement of time to appeal against sentence is refused.

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