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

CRIMINAL APPEAL NO.AAU 0027 of 2019
[In the High Court at Suva Case No. HAC 153 of 2017]

BETWEEN	:	**MOSESE BOKIA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**21 January 2021**
Date of Ruling	:	**22 January 2021**

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of sexual assault contrary to section 210(1)(a) of the Crimes Act, 2009, one count of attempt to commit rape contrary to section 208 of the Crimes Act, 2009 and one count of rape contrary to section 207(1) and (2) (c) of the Crimes Act, 2009 committed at Navua in the Central Division.

[2] The information read as follows.

COUNT ONE

Statement of Offence

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

Particulars of Offence

***MOSESE BOKIA** on the 16th day of March 2017, at Navua in the Central Division, unlawfully and indecently assaulted MV by kissing her lips.*

COUNT TWO

Statement of Offence

***ATTEMPT TO COMMIT RAPE**: Contrary to Section 208 of the Crimes Act 2009.*

Particulars of Offence

***MOSESE BOKIA** on the 16th day of March 2017, at Navua in the Central Division, attempted to have carnal knowledge of MV without her consent.*

COUNT THREE

Statement of Offence

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

Particulars of Offence

***MOSESE BOKIA** on the 16th day of March 2017, at Navua in the Central Division, penetrated the mouth of MV with his penis without her consent.*

[3] The complainant's father and mother had separated from each other and she had been living with the father and with the step mother with whom she did not get on well. She returned to her mother who also by that time was living with the appellant in her police quarters in the afternoon of 15 March 2017 and on the following day *i.e.* 16 March after the mother had left for duty at 11.00 p.m. only the appellant and the complainant had been at home. While the complainant had been sleeping on a mattress the appellant had come and kissed on her lips. He had then come on top of her, sat on her thighs and held her legs tightly with his legs. He had opened the zip of his pants and the complainant had seen his penis. Though she tried to scream the appellant had covered her mouth with the blanket, making her feel short of breath and triggering an attack of asthma. The appellant had called the mother and the appellant was taken to Navua hospital. After getting medicine she had come home and slept till morning. She had spent the day in the house with the mother. After dinner the mother had left for duty at 11.00 p.m. and the complainant went to sleep on the bed but awakened by the appellant who asked her to go and sleep on the mattress. While she was lying on the mattress the appellant had come from behind and hugged her and asked her not to tell what he was doing to the mother. He had come on top of her and

sat on her thighs locking her legs with his legs. Thereafter, the appellant had moved up, taken his penis out and forced her to suck his penis. When she tried to shake her head in resistance he had held her face by the sides of the mouth and forced his penis into her mouth. She had been forced to suck his penis until he ejaculated. She had not consented to any of those acts by the appellant and had felt ashamed and scared too.

[4] The next day, the complainant had left the mother's house and gone to stay with her uncle and aunt at Khalsa. She had come to PW4's house at Navua next morning; gone back to pack her bags to the mothers place with PW4 and both had then proceeded to a friend's house at Nakasi. She had called PW4 to Nakasi after a week and told everything that had happened to her. The complaint with the police had been lodged in May 2017.

[5] In addition to the complainant, her cousin (PW4) and her mother (PW3) also had given evidence at the trail.

[6] The appellant had remained silent but had cross-examined the complainant. It had been suggested to her that in the night on 16 March after the mother went to work the complainant had tried to awaken the appellant by touching his hands and that she laid her body beside him prompting him to kiss her. The appellant had been questioned that once she started to have sex the appellant's elbow accidently hit her chest which caused the asthmatic attack. Finally, it had been suggested that on both days she had had consensual sexual intercourse with him. She had rejected all those suggestions on consent on her part. Thus, the appellant's defense had been one of consent.

[7] At the end of the summing-up on 16 November 2018 the assessors had unanimously opined that the appellant was guilty of all counts. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on 21 November 2018, convicted the appellant on all counts and sentenced him on 11 December 2018 to 07 years, 09 months and 15 days of imprisonment with a non-parole period of 05 years, 09 months and 15 days.

[8] The appellant's untimely notice of appeal against conviction had been preferred by the Legal Aid Commission on 16 April 2019 along with summons seeking enlargement of time and the appellant's affidavit. LAC had filed written submissions on 23 September 2020. The state had tendered its written submissions on 05 November 2020.

[9] 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

[10] 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?*

[11] ***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.'*

[12] 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.'

[13] 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.'

[14] 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

[15] The delay is about 03 month and 01 week and not very substantial.

[16] 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.'*

[17] 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

[18] The appellant's excuse for appealing the conviction belatedly is that initially he was satisfied with his sentence but decided to appeal against conviction after the DPP had appealed against the sentence. According to this explanation it is very clear that the appellant had no serious reservations about his conviction on its merits and therefore, the delay in the appeal against conviction had been deliberate and an afterthought.

Merits of the appeal

[19] 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."*

[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 delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.

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

> *1. That the guilty verdicts are unreasonable.*
>
> *2. That the learned trial judge misdirected himself and/or the assessors at paragraphs 24 and 25 of the summing-up in that the two prosecution witnesses corroborated the evidence of the complainant in the subsequent incidents.*
>
> *3. That the learned trial judge at paragraph 29 of the summing-up failed to adequately address the assessors on the appellant's right to remain silent therefore causing a substantial miscarriage of justice.*

01st ground of appeal

[22] The appellant's written submissions have elaborated the first ground of appeal and stated that the trial judge had failed to indulge in an independent analysis of the evidence in agreeing with the assessors. He relies on **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014) and **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) in support of his argument.

[23] I undertook some analysis of past several decisions of the Supreme Court and the Court of Appeal to arrive at common principles regarding the duty of trial judges when they agree and disagree with the assessors in **Manan v State** [2020] FJCA 157; AAU0110.2017 (3 September 2020) and **Waininima v State** [2020] FJCA 159; AAU0142 of 2017 (10 September 2020). **State v Mow** [2020] FJCA 199; AAU0024.2018 (12 October 2020) and a few other rulings. I do not intend the repeat the same exercise here. However, my conclusions were subsequently summarized in **Raj v State** [2020] FJCA 254; AAU008.2018 (16 December 2020) as follows.

> *[12] There still appears to be some gray areas flowing from the past judicial pronouncements as to what exactly the trial judge's scope of duty is when he agrees as well as disagrees with the majority of assessors.*

*[13] What could be ascertained as common ground 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 a judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and preferably reasons for his agreement with the assessors in a concise written 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 a 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), **Kaiyum 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)].*

*[14] On the other hand when the trial judge disagrees with the majority of assessors the trial judge 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)]*

[15] In my view, in both situations, a judgment of a trial judge cannot not 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.

*[16] This stance is consistent with the position of the trial judge at a trial with assessors i.e. 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 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).*

[24] Upon an examination of the judgment, it appears that the trial judge had considered all the evidence available against the appellant and held that the assessors had accepted the evidence of the complainant as trustworthy and reliable including her explanation for the delay in reporting. He also had held that the assessors had rejected the appellant's version and that it was open for them to express the opinion they did. Accordingly, the trial judge had concurred with the assessors' verdict. Therefore, viewed in the light of the past decisions as highlighted above, I am of the view that the learned trial judge's consideration and reasons for agreeing with the assessors were sufficient.

[25] When an appellant complains that the verdict cannot be supported by the totality of evidence or unreasonable the test to be applied by the appellate court is to be found in the powers conferred on the appellate court under section 23 of the Court of Appeal Act. The question the appellate court should ask itself is whether there was evidence before the court on which reasonably minded assessors could have convicted. The test is whether having considered the admissible evidence against the appellant as a whole, the appellate court could say that the verdict was unreasonable; In other words whether there was admissible evidence on which the verdict could be based [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)].

[26] In other words, could the trial judge also have reasonably convicted the appellant on the admissible evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) and **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[27] I my view, the answer to above questions should be in the affirmative. Therefore, there is no real prospect of success of this ground of appeal.

02nd ground of appeal

[28] The appellant's complaint is based on what the trial judge had said about the evidence of PW4 and PW3 at paragraphs 24 and 25 of the summing-up where he had referred to their evidence as being corroborative of the complainant's evidence. It is clear that the prosecution had not relied on their evidence even as recent complaint evidence, leave aside as corroborative evidence. All what they had stated was based on what the complainant had told them of what happened between the appellant and her. Thus, the trial judge had erred in referring to their evidence as evidence of corroboration of the complainant's evidence. Corroborative evidence should originate from a source independent of the witness whose evidence is to be corroborated.

[29] I think both the state counsel and defense counsel are equally guilty of not having sought a re-direction from the trial judge to rectify this error of law. Rather than taking this up as a ground of appeal the defense counsel should have asked for redirections in respect of this error in the summing-up 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). The failure to do so would disentitle the appellant even to raise it in appeal with any credibility.

[30] On the other hand, the state counsel as an officer of court should not have allowed this patent error of law in the judge's directions to remain but should have got the judge to correct himself before the assessors retired for deliberations. As a result the same error had crept into the judgment too. It is sufficient at this stage to quote from THE PROSECUTOR'S HADBOOK published by the DPP in Fiji in this regard.

> *'**10.** The purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the Court what the State considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings (see Boucher v the Queen (1954) 110 CCC 263, 270).'*

[31] Coming back to the appellant's complaint, it appears that at paragraph 26 the trial judge had said that the only evidence which relates to the alleged incident is the evidence of the complainant. The judge had reminded himself of this position even in the judgment.

[32] It is clear from evidence that given the appellant's stand at the trial, the chance of this error having contributed significantly to the ultimate verdict is minimal, for the only matter before the assessors and the judge was the issue of consent. In that respect it is plainly clear that the appellant's version of the complainant having coaxed him into sexually engage with her falls into a realm totally beyond belief. It has no credibility, for the complainant did not even know that her mother was living with the appellant until she got to the mother's quarters the previous day and soon after the incidents of sexual abuse she left that place in disgust.

[33] I think the correct approach that should be taken by the appellate court in dealing with this kind of complaint regarding a misdirection in the summing-up is the same as that is adopted upon an allegation of a non-direction, which is to see whether the misdirection or omission had resulted in a miscarriage of justice and if so, whether it is a substantial miscarriage of justice.

[34] The proper test for the appellate court is laid down in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)

> *'[55] The approach that should be followed in deciding whether to apply the* ***proviso to section 23*** *(1) of the* Court of Appeal Act *was explained by the Court of Appeal in* ***R v. Haddy*** [1944] 1 KB 442. *The decision is authority for the proposition that* ***if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice****. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the* Court of Appeal Act.
>
> *[56] This test has been adopted and applied by the Court of Appeal in Fiji in* ***R –v- Ramswani Pillai*** *(unreported criminal appeal No. 11 of 1952; 25 August 1952);* ***R –v- Labalaba*** *(1946 – 1955) 4 FLR 28 and* ***Pillay –v- R*** *(1981) 27 FLR 202. In* ***Pillay –v- R*** *(supra) the Court considered the*

meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in ***R –v- Weir*** [1955] NZLR 711 *at page 713:*

> *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt.* ***If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred."***

[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

> *In* ***Vuki –v- The State*** *(unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*
>
> *"The application of the* ***proviso to section 23*** *(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."*

[35] I am satisfied that on the whole of the facts, reasonable assessors, after being properly directed, would without doubt have convicted the appellant and therefore, there is no substantial miscarriage of justice. Similarly, it can be safely stated that on the whole of the facts and with a correct direction the only reasonable and proper verdict would have been one of guilty and therefore, there is no substantial miscarriage of justice.

[36] Therefore, there is no real prospect of success of the second ground of appeal.

03rd ground of appeal

[37] The appellant refers to this court paragraph 29 of the summing-up where the trial judge had reminded the assessors that the appellant had elected to remain silent exercising his constitutional right to be silent but failed to tell them that no adverse inference should be drawn against the appellant for opting to remain silent.

[38] However, the appellant's counsel had not cited any authority to support the proposition that a trial judge is bound by law to always say that no adverse inference should be drawn against an accused because he had opted to remain silent. Many a

judge does direct the assessors on those lines whenever the accused elects to remain silent as a matter of good practice, out of abundance of caution and also to be absolutely fair by the accused. However, the appellant's counsel had not placed any material to show that such good practice should be elevated to a rule of law so that an omission to direct the assessors in those or similar words would constitute a miscarriage of justice.

[39] In any event, the appellant's trial counsel had not sought a re-direction from the trial judge on these lines. Rather than taking this up as a ground of appeal the defense counsel should have asked for redirections in respect of this alleged omission in the summing-up 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). The failure to do so would disentitle the appellant even to raise it in appeal with any credibility.

[40] Therefore, I do not think that there is a real prospect of success of this ground of appeal.

Prejudice to the respondent

[38] The respondent had not pleaded any specific prejudice in the event of enlargement of time. However, it would cause immense inconvenience to the complainant in the case of any fresh proceedings.

Order

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

COURT OF APPEAL FIJI

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL