

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

CRIMINAL APPEAL NO.AAU 0008 of 2020
[In the High Court at Suva Case No. HAC 229 of 2018]

BETWEEN : **SEMI RANATAWAKE**

AND : **STATE** *Appellant*
Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Appellant in person**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **07 December 2021**

Date of Ruling : **08 December 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva on one count of rape contrary to section 207(1) and (2) (b and (3) of the Crimes Act, 2009 committed on 11 May 2018 at Lau in the Southern Division.

[2] The information read as follows:

'Statement of Offence

Rape: *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.*

Particulars of Offence

SR, on the 11th day of May 2018 at Lau in the Southern Division penetrated the vulva of SV a child under age of 13 years with his tongue.'

- [3] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of rape. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 26 August 2019 to 12 years of imprisonment (after the remand period was deducted) with a non- parole period of 10 years.
- [4] The appellant in person had sought enlargement of time to appeal against conviction and sentence (30 January 2020). He had filed grounds of appeal and amended and/or additional grounds of appeal and submissions from time to time only against conviction. The state had tendered its written submissions on 11 January 2021 and 07 December 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 (about 04 months) is substantial. The appellant had stated that his trial counsel from Legal Aid Commission had undertaken to file his appeal but failed to do so. He had then written to the LAC, High Court registry and the Court of Appeal registry seeking to obtain documents necessary to file an appeal and then filed

appeal papers in person. I would now 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 are as follows:

Conviction

Ground 1

THAT the Trial Judge erred in law to consider and direct the assessors in allowing the dock identification therefore failed to direct the assessors in regards to “Turnbull Guidelines.”

Ground 2

THAT the Trial Judge erred in law when he failed to consider that the Police had failed to observe the Force Standing Orders which require the procedures and guidelines that are to be followed to ensure the fairness of arrest and searches to avoid fabrication of evidence by police officers.

Ground 3

THAT the Trial Judge erred in law to consider and direct the assessors in regards to accomplice evidence given by the victim in the trial.

Ground 4

THAT the Trial Judge erred in law when he failed to consider the inconsistency of the statements given by the witness under oath and the previous statement unsworn by the Prosecution witness.

Ground 5

THAT the Trial Judge erred in law when he failed to consider that the report was made one day late.

Ground 6

THAT the Learned Trial Judge erred in law and in fact when he did not put the case of the appellant to the assessors in a fair, balanced and objective manner.

Ground 7

THAT the Learned Trial Judge erred in law and in fact in not directing himself of the assessors to refer any summing up the possible defence and as such by his failure, there was a substantial miscarriage of justice.

Ground 8

THAT the Learned Trial Judge erred in law and in fact when he did not consider the evidence of the complainants mother (PW2) that she did not believe that the appellant would have done such a disgusting thing.

Ground 9

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the evidence of (PW3) that he is closely related to both the appellant and the complainant, thus he did not want to get involved in the matter by being the State witness in the case to tarnish his reputation.

Ground 10

THAT the Learned Trial Judge erred in law when he failed to fully investigate and consider the witness (PW3) evidence in records to the alleged crime scene.

Ground 11

THAT the Learned Trial Judge erred in law in his directions given in paragraph 14 of the summing up are defective in the sense that the Learned Judge has not identified which witness had given evidence that was inconsistent with prior out of court statements and the nature of inconsistencies.

Ground 12

THAT the Learned Trial Judge erred in law and in fact in his summing up to the assessors in reference to (PW3) evidence in paragraph 37 of the Summing Up.

- [9] The trial judge in the judgment had summarized the prosecution evidence and defense evidence in the summing-up as follows:

'PW 1 SV (The Complainant)

31. SV said that she is 6 years old. In 2018, she was in Class 1 and was living in Vaga settlement with her mother Lagilagi, her sister Leila and her brother Mei. When she was in Class 1, she could remember one incident. Tui Semi who was living up in the Vaga settlement called her into his house. Tui Semi licked her polo when she went inside his house. It happened during daytime while she was lying down on the bed inside Tui Semi's house. She described polo as her private part or balls. Her legs

were spread apart. Tui Semi was sitting down and his mouth was in the middle. His tongue went inside her polo. Her polo became wet when he licked it. With the aid of a teddy bear, she pointed out the private part where Tui Semi had licked. She said Tui Semi was dishonest. He did not give her an orange as promised. After Tui Semi had done that, she went down to her house. She told her grandfather and mother.

PW 2 Lagilagi Gucake

33. *Lagilagi, the mother of the complainant said that SR is her uncle from her father's side. Her daughter SV used to refer to SR as Tui Semi. SV had known SR since she was one year old. On 11 May 2018, she and SV were home. On that particular day her uncle, Lasarusa Waqa or Poi visited her and told her to question SV as to what had happened to her. She then questioned SV and was informed by SV that Tui Semi had done something disgusting to her, SR had licked her polo or balls. Lagilagi said that SV uses the word polo to describe her private part where she urinates from.*

PW 3 Lasarusa Waqa (Poi)

37. *Lasarusa said that his father and SR's father are brothers. There was no ill feeling between him and SR prior to 11 May 2018. On the 11 May 2018, at around 1.30pm he left home to attend a meeting at the school. On his way to the school, he stopped at SR's kitchen to see the newly born kittens. He looked through the window of SR's house. He saw what was happening to SV, his granddaughter. He saw SV lying down on the bed while her legs being raised. He could see SR's head in between SV's legs and saw what SR was doing. It appeared that SR was sitting on the bed and licking SV's private part or vagina, using his tongue. SV was wearing a short skirt and a t-shirt but not wearing anything to cover her private part. SR looked up and when SR saw him, SR even talked to him and asked where he was going. SR confirmed it was happening. He thought of going inside the house but later changed his mind thinking that he would be in trouble if he entered the house. Lasarusa said that he was standing just beside the window approximately 1 ½ meters away from where SV was lying down.*
38. *He then went to call SV's mother and saw SV running towards her house. He asked SV's mother to question SV as to what SR had done to her. He did not want to get involved and wanted SV's family to deal with the matter. He did not report the matter to police because he did not want his reputation to be affected by being a witness in a case. He said that SV's mother did not believe what had happened and that she complained to police a few days later.*

Case for Defence

42. *The accused SR said that, on the 11 May 2018 at around midday, SV and her sister Mela came up to his house when he was picking clothes from the cloth line. They informed him that the mother was sending them to get some oranges. He told them to get a stick from Nisa's house. When they went to get a stick, he went inside the house to fold the clothes. Two girls returned with some oranges and asked him to peel off them. He peeled off the good ones. While he was folding clothes on the bed, he saw Lasarusa through the window walking outside. He called up to Lasarusa and asked him where he was going. After he had folded the clothes, he went with the girls to pick oranges. He denied that Lasarusa was standing right beside the window when he was talking to him.*
43. *SR denied the allegation that he had licked SV's vulva. He said that Lasarusa who is a religious person had ill feelings towards him because he used to get drunk. He also said that Lasarusa was interested in the house built by his father and this allegation has been made up by Lasarusa to put him in trouble.*

01st ground of appeal

- [10] The appellant submits that the learned trial judge had failed to direct the assessors on Turnbull guidelines.
- [11] The appellant (37 years of age) had admitted in the agreed facts that he is the grandfather of the victim (06 years of age). He was living in Vaga Settlement and she called him as Tui Semi. Prosecution witness Lasarusa Waqa saw the appellant's head between the victim's legs and the appellant having seen the witness had even inquired where he was going.
- [12] There was no issue at all regarding the appellant's identity and Turnbull guidelines or directions were therefore not required.

02nd ground of appeal

- [13] The appellant submits that the police had not adhered to Standing Orders in that they had failed in the reconstruction of the crime scene and in obtaining material evidence

such as cloths worn by the victim and a medical report relating to the victim and in producing him within 48 hours.

- [14] Needless to state that all these matters are trial issues which should have been canvassed at the trial and cannot found appeal points. In any event, police sketch and photographs of the alleged crime scene had been marked as agreed facts. The victim's evidence does not reveal that there had been any injuries to her vulva and therefore her cloths and medical report would not have revealed anything more. In any event, Standing Orders were mere guidelines for investigation and do not have the force of statutory provisions. Even if the appellant had not been produced within 48 hours that *ipso facto* would not affect the conviction.

03rd ground of appeal

- [15] The appellant argues that the trial judge had failed to direct the assessors on accomplice evidence namely the evidence of the victim.
- [16] The 06 year old victim was not an accomplice and therefore, this argument has no merits.

04th ground of appeal

- [17] The appellant submits that the trial judge had failed to consider the inconsistency of the evidence of a witness with the police statement. He had however not highlighted what the inconsistency in the evidence of that witness was.
- [18] The only inconsistency considered by the trial judge was in the evidence of prosecution witness Lasarusa Waqa (PW3) as to why he did not immediately report what he saw happening between the appellant and the victim (see paragraph 12 of the judgment). The trial judge had correctly not seen any inconsistency in the evidence of this witness who had explained why he did not report immediately but told the police of what he witnessed later when questioned by the police.

05th ground of appeal

[19] The appellant complains about the delay of one day in reporting the matter to the police.

[20] The trial judge had given his mind to this aspect at paragraph 35 of the summing-up and the reason for the victim's mother to report the matter a day later was that she could not initially believe that the appellant, a close relative, could do the kind of thing he had allegedly done to the victim. The alleged delay would easily pass the totality of circumstances test (vide **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018)).

06th ground of appeal

[21] The appellant criticizes the trial judge for not having put his case before the assessors in a fair, balanced and objective manner.

[22] Upon a perusal of the summing-up as a whole and particularly paragraphs 32, 36, 39 and 42-45, I have no doubt that this complaint has no merits.

07th ground of appeal

[23] It is alleged that the trial judge had failed to direct the assessors on any possible defense.

[24] The appellant's only defense was an outright denial and there was no other possible defense arising from the evidence. The trial judge had fully addressed the assessors on the appellant's defense. The trial judge had also appraised the assessors of the motive attributed to the eye-witness and the victim's mother for the alleged fabricated complaint.

08th ground of appeal

- [25] The appellant alleges that the trial judge had not considered the victim's mother's evidence that she did not believe that the appellant could have done such a thing.
- [26] The trial judge had indeed considered this position at paragraph 11 of the judgment. The same had been canvassed earlier in the summing-up too.

09th ground of appeal

- [27] The appellant's complaint is that the trial judge had failed to consider the evidence of PW3 (Lasarusa Waqa) that he was closely related to both the appellant and the victim.
- [28] The appellant alleges that PW3 had lied on oath due to his ill-feeling towards him or interest in the appellant's property as a motive for the alleged false evidence. However, the appellant had admitted that he conversed normally with PW3 even on the day of the incident. The trial judge had at paragraph 14 of the judgment specifically dealt with this suggestion and dismissed the same.

10th ground of appeal

- [29] The appellant contends that the trial judge had failed to fully investigate and consider the evidence of PW3 on record. He questions whether PW3 could have seen what he claimed to have seen given the distance between him and the bed.
- [30] This is essentially a trial issue and should have been canvassed at the trial. According to PW3 the distance between him and the bed was about 1 ½ meters. There is nothing to show that PW3 had any impediment to witness what was going on between the appellant and the victim in broad daylight. The trial judge had considered the appellant's proposition at paragraph 13 of the judgment. The appellant had admittedly spoken to PW3 when he saw him through the window.

11th ground of appeal

[31] The appellant criticizes the directions at paragraph 14 of the summing-up on the basis that the trial judge had not identified as to which witness's evidence was inconsistent with his or her previous statement.

[32] At paragraph 14 the trial judge had given general directions to the assessors as to how consistency of a witness should be tested. Understandably, the trial judge had not referred to any particular witness in that paragraph.

12th ground of appeal

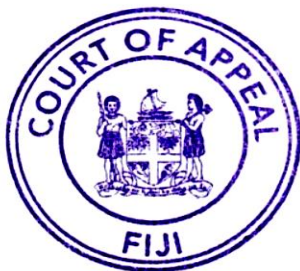
[33] The appellant joins issue with what the trial judge had stated at paragraph 37 regarding the evidence of PW3. He challenges the location of his kitchen. PW3 had stopped at the kitchen and seen through the window of the house to see the newly born kittens only to witness the appellant's head between the victim's legs.


[34] There is nothing objectionable in the directions at paragraph 37 and in any event these are matters that should have been ventilated at the trial.

[35] None of the grounds of appeal has any real prospect of success in appeal.

Order

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




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