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

CRIMINAL APPEAL NO.AAU 136 of 2018
[In the High Court at Suva Case No. HAC 113 of 2016]

BETWEEN	**:**	**JONE TUAGONE**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Ms. S. Ratu for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	**:**	**30 March 2021**
Date of Ruling	**:**	**31 March 2021**

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of rape contrary to section 207 (1) and 207 (2) (a) of the Crimes Act, 2009 committed on 08 November 2015 at Tagitagi, Tavua, in the Western Division.

[2] The information read as follows:

Statement of Offence

> ***RAPE****: Contrary to Section 207 (1) and Section 207 (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

> ***JONE TUAGONE*** *on the 08th day of November 2015, at Tagitagi, Tavua, in the Western Division, had carnal knowledge (penile sex) of* ***AKENETA NAILEVU*** *without the said AKENETA NAILEVU's consent.*

[3] After the summing-up on 11 June 2018 the assessors had unanimously opined that the appellant was guilty of rape and in the judgment delivered on 12 June 2018 the learned trial judge had agreed with them and convicted the appellant as charged. On 22 June 2018 the appellant had been sentenced to 10 years of imprisonment with a non-parole period of 08 years.

[4] The appellant had filed an untimely appeal only against conviction on 20 December 2018. The delay is almost 05 months. The Legal Aid Commission had subsequently filed an amended notice of appeal, the appellant's affidavit and written submissions on 12 November 2020 seeking an extension of time to appeal only against conviction. The state had responded by its written submission tendered on 22 January 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, **Kumar v State**; **Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[6] 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?*

[7] ***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.'

[8] 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.'*

[9] 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.'*

[10] 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

[11] As already stated, the delay is about 05 months and substantial.

[12] 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.'*

[13] 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

[14] The appellant's excuse for the delay in his affidavit is that he was awaiting his lawyer to prepare his appeal and lodge it but later got to know that no appeal had been filed. Then, he proceeded to file his appeal with the assistance of fellow inmates. However, the appellant had not made any reference to this position in his initial appeal filed belatedly. Therefore, there is not much credibility attached to the explanation.

Merits of the appeal

[15] 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 <u>despite the excessive and unexplained delay</u>, 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."*

[16] Therefore, I would proceed to consider the third and fourth factors in ***<u>Kumar</u>*** regarding the merits of the appeal as well in order to consider whether despite the delay and lack of a credible explanation, the prospects of his appeal would warrant granting enlargement of time.

[17] Grounds of appeal urged on behalf of the appellant against conviction are as follows.

> ***Ground 1:*** *That the Learned Trial Judge may have caused a miscarriage of justice in accepting evidence of a distressed complainant without any prior verification on the soundness of her mental capacity to adduce evidence.*
>
> ***Ground 2:*** *That the Learned Judge had erred in his analysis of evidence and in convicting the appellant when the evidence in totality does not support the charge of rape, particularly the fact of absence of injuries on the complainant's genitalia.*

[18] The trial judge had summarised the evidence in the sentencing order as follows.

> *'[3] At the time of offending, the Mr. Tuagone (the Accused) was aged 39 years and the complainant was 44 years old. Accused is a brother-in-law of the complainant. The complainant was living alone in a house owned by her uncle in an isolated place. <u>The Accused jumped through the window and entered the complainant's house in an early morning. He came to her bed and forced her to have sex with him and undressed her. The complainant ran outside without her panty, looking for help. The Accused chased her, and having tied her neck with a sulu, he dragged her inside the house. In the bedroom, the Accused forcefully penetrated complainant's vagina with his penis. The complainant received injuries when she was being dragged in to the house.</u> She reported the matter to police station. Police officers took her to Tavua Hospital for a medical examination.'*

[19] The prosecution relied on the complainant's direct evidence, recent complaint evidence of two witnesses, distress evidence and medical evidence to prove its case. The appellant had not given evidence but called one *alibi* witness. His defence had been one of denial. He had also disputed the identity of the perpetrator and attempted to show that he was elsewhere at the time of the alleged rape.

01st ground of appeal

[20] The criticism forming the first ground of appeal is based on paragraph 35 of the summing-up.

> *'[35] Evidence was led through WC Alanieta and Dr Lanieta that the complainant looked distressed shortly after the alleged incident. WC Alanieta said that the Complainant looked scared, talked to herself and most of the time she mumbled. Dr. Lanieta said that the patient looked a bit scared the way she was talking, she was a bit slow, she had to think of what to say and then talked and she was also in pain. This is how you should approach the evidence of distress. You must be satisfied beyond a reasonable doubt that the Complainant's distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged sexual offence. The distress evidence is only relevant in assessing whether the alleged sexual incident occurred. The distress evidence must not be used to connect the Accused to the alleged offence. Before you use the evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause. In deciding these matters, you must take into account all relevant circumstances. If you are so satisfied then you may give such weight to the evidence of distress as is appropriate. But if you are not so satisfied then you must disregard the evidence of distress.'*

[21] The trial judge had further directed the assessors on the aspect of distress evidence at paragraph 98.

> *'[98] Prosecution relies on distress evidence to prove Complainant's consistency in her conduct. I have directed you as to how you should deal with distress evidence. If you are satisfied that the Complainant was in a distressed condition after the alleged incident and that distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause, then you may give such weight to the evidence of distress as is appropriate, having taken into account all relevant circumstances.'*

[22] The appellant argues that it was unfair and erroneous for the learned trial judge to have directed on those lines given that his defence was a denial and it was also unfair to allow evidence of distress to be elicited without any confirmation whether the complainant was mentally fit to adduce evidence as she had been disoriented according to Dr. Lanieta and WC Alanieta both of whom had said that the complainant was talking herself and mumbled.

[23] The appellant argument seems to be that the condition of distress in the complainant may have been due to another mental disorder she was suffering from and not due to being subjected to a sexual assault. However, it does not appear from the summing-up or the judgment that the appellant's counsel had taken up this stance as a trial issue and at least suggested to the complainant, Dr. Lanieta or WC Alanieta that the complainant may have been suffering from any other mental illness. Thus, the appellant's argument has no factual basis at all. An appeal argument or a point of appeal must be based on a factual scenario and cannot exist in a mere hypothetical space.

[24] The trial judge had placed before the assessors the evidence of Dr. Lanieta that the complainant looked a bit scared, a bit slow and had to think of what to say and then talk and she was in pain. WC Alanieta's account was that the complainant looked scared, talked to herself and most of the time she mumbled and sometimes did not hear of what the witness talked (see paragraph 35 of the summing-up). The appellant now tries to use this evidence to elevate the complainant's behaviour to that of a mental disorder without confronting the complainant and eliciting from Dr. Lanieta or WC Alanieta even a hint of evidence to that effect. If questioned, both of them would have been in a position to explain what they thought of such behaviour on the part of the complainant, both scientifically and otherwise.

[25] In any event, when this evidence was clearly before the assessors and they were told by the trial judge that *'Before you use the evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause.'*, the assessors were well placed to consider any other reason as suggested by the appellant even hypothetically for the complainant's behaviour.

[26] In the circumstances the trial judge's directions at paragraph 35 and 98 of the summing-up on distress evidence are not in conflict with **Soqonaivi v State** (Majority Judgment) [1998] FJCA 64; AAU0008U.97S (13 November 1998). Unlike in ***Soqonaivi*** the trail judge had not told the assessors that distress evidence can be corroboration of lack of consent (though corroboration of the evidence of a complainant in sexual offence cases is no longer required in Fiji – vide section 129 of

the Criminal Procedure Act, 2009) but that it is only relevant in assessing whether the alleged sexual incident occurred.

[27] While accepting that evidence of distress was capable of amounting to corroboration, the appellant's counsel in ***Soqonaivi*** had submitted that the trial judge's warning to the assessors that that evidence should be treated with caution was inadequate in that it should have been pointed out to the assessors other possible explanations for the complainant's distress such as the consumption of a substantial amount of alcohol by the appellant and the complainant. It had been submitted that the complainant's distress may have been the result of that consumption, and the trial judge should have put this possibility to the assessors.

[28] However, the Court of Appeal in ***Soqonaivi*** did not find fault with the following direction by the trial judge on distress evidence.

> '*If you are satisfied that the complainant was genuinely distressed shortly after the alleged rape then that could be corroboration of her lack of consent. However, again you must exercise some caution in using the evidence for that purpose. You must first exclude the possibility that she was distressed for some other reason that is consistent with the accused's explanation. For instance, remorse because she had participated in sexual intercourse with the accused or because he had assaulted her causing a painful injury."*

[29] The Court of Appeal in ***Soqonaivi*** finally said

> '*We also note that there was no cross-examination of the complainant to support the possibility that her distress was caused as the result of the alcohol she had consumed.*
>
> *The Judge's direction on the distress evidence as corroboration was correct. That ground of appeal also cannot succeed.'*

[30] The distressed demeanour of a complainant immediately after an alleged sexual offence or at the time that he or she makes a complaint to, for instance, a family member or to a police officer was formerly considered in the context of a requirement for corroboration. The corroboration previously required was that the offence had been committed and that the accused committed it. If there was no corroboration then it was a requirement to warn the jury of the danger of convicting on the uncorroborated evidence of the complainant. That requirement was abolished by Section 32 of the Criminal Justice and Public Order Act 1994 in UK.

[31] However, distress can still amount to corroboration in Fiji. The evidence of bruising and of scratches, and of distress, was corroborative of the complainant's evidence of absence of consent though in the case of distress, consideration needed to be given to the possibility that the distress could be due to some other reason [vide **Balelala v State** [2004] FJCA 49; AAU0003 of 2004S (11 November 2004)]

[32] The current judicial thinking on distress evidence was expressed by Morgan LCJ, Weir LJ and Stephens J in the Court of Appeal in Northern Ireland in **The Queen v BZ** [2017] NICA 2 where having examined **R v Redpath** (1962) 46 Cr App Rep 319, 106 Sol Jo 412, **R v Chauhan** (1981) 73 Cr App Rep 232, **R v Venn** [2002] EWCA Crim 236, **R v Romeo** [2003] EWCA Crim 2844; [2004] 1 Cr. App. R. 30; [2004] Crim. L.R. 302; Times, October 2, 2003, **R v AH** [2005] EWCA Crim 3341 and **R v Zala** [2014] EWCA Crim 2181, the Court stated the law as follows.

> *'[43] Given that the weight of evidence as to distress will vary according to the circumstances of the case we consider that whether the evidence is admissible and if so whether a direction is needed and, if it is needed, then in what terms, depends much on the particular circumstances in any given case. In giving consideration to those questions a distinction can be drawn between the complainant's own evidence of distress and evidence from a witness, who may be independent, as to the distress 20 of the complainant. A distinction can also be drawn between evidence of distress at the time or shortly after the alleged offence and distress displayed years later when making a complaint. If the jury is sure that distress at the time is not feigned then the complainant's appearance or state of mind could be considered by the jury to be consistent with the incident.*
>
> *'[44] We consider that it is for the judge to look at the circumstances of each case and tailor the direction to the facts of the particular case emphasising to the jury the need, before they act on evidence of distress, to make sure that the distress is not feigned and drawing to their attention factors that may affect the weight to be given to the evidence.*

[33] The trial judge had firmly decided at paragraph 12 of the judgment that the complainant's distressed condition was not artificial but only referable to the alleged rape and not any other cause.

[34] Therefore, there is no real prospect of success in the first ground of appeal.

02nd ground of appeal

[35] The appellant contends that the trial judge had failed to analyse the evidence in its totality, particularly the absence of injuries on the complainant's genitalia in convicting the appellant. He relies on **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013). ***Kaiyum*** was a case where the central theme was the issue of consent in the context of lack of sufficient evidence of resistance to anal penetration on the part of the male complainant. Still ***Kaiyum*** accepted that submission without physical resistance alone cannot constitute consent while stating that there has to be evidence that the victim did not freely and voluntarily agree to the alleged sexual acts.

[36] In the instant case, the trial judge had discussed medical evidence at paragraphs 13 – 15 in the judgment which are clearly corroborative of the complainant's evidence as to how she was dragged into the house by the appellant while she was trying to flee.

> *13. Prosecution also relies on doctor's medical evidence and evidence of Rupeni to prove consistency of the Complainant's version. Doctor said that the patient had a lot of bruises on her back and also scratches on her joints especially on her elbows and her knees. The bruises were more on the back of the patient. Near the collar bone, doctor noticed a bruise, right underneath the chin. Rupeni also said that fresh bruises with blood were seen on both of her elbows and both shoulders.*
>
> *14. Doctor's professional opinion is that the bruises and the scratch marks on the patient most probably could have been caused when being dragged on a hard bumpy surface. She agreed that the bruise near the collar born region could have been caused when resisting the pressure if somebody wrapped a piece of cloth around her neck and pulled. Doctor's evidence is consistent with that of the Complainant that she was tied in her neck with a sulu and was being dragged inside the house.*
>
> *15. Defence argues that those injuries would have been received while working in cane fields. Doctor did not agree that the scratches could have been caused while going through cut cane fields because the marks she noted were of irregular shape and not linier. The fact that bruises were more on the back of the patient dismisses the possibility of them being caused while going through cut cane fields.*

[37] The trial judge had narrated the defence position that there were no injuries on the appellant's genitalia because no rape had occurred at paragraphs 16-18 of the judgment.

16. It was argued that the doctor had observed no injuries on genitalia of the Complainant because she was never raped.

17. Doctor found no bruising, scratches or bleeding in Complainant's vaginal examination. She explained instances where a forced or non-consensual sexual intercourse could take place without causing any injury to vagina. Those instances do match ideally with the Complainant's scenario. She had given birth to three children. She had surrendered herself to the Accused without much resistance. In my opinion, doctor's finding is not inconsistent with the evidence of the Complainant.

18. I find that scratches and bruises found on Complainant's body are consistent with Complainant's evidence that she was raped.

[38] Thus, the trial judge had considered the appellant's argument under the 02nd ground of appeal on lack of injuries on the appellant's genitalia and rejected it considering the explanation given by the doctor for such a possibility particularly given the fact that the complainant was a mother of three children and she had not offered much physical resistance in the course of the sexual intercourse. The trial judge had correctly accepted the other injuries present on the complainant as being consistent with sexual intercourse without her consent. Even if the complainant had merely submitted without offering physical resistance after being dragged into the house by the appellant causing several injuries to her other parts of the body that evidence was more than sufficient to prove lack of consent. Totally of the complainant's evidence clearly prove lack of consent.

[39] In any event, the appellant's defence was not that he had consensual sexual intercourse with the complainant.

[40] Therefore, there is no real prospect of success in the 02nd ground of appeal.

Prejudice to the respondent

[41] No prejudice to the respondent has been pleaded. However, given the fact that the incident had happened in the year 2015 there can be genuine difficulties in obtaining the presence of witnesses in the case of fresh proceedings.

Order

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

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL