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

CRIMINAL APPEAL NO.AAU 0088 of 2017
[In the High Court at Labasa Case No. HAC 04 of 2015]

BETWEEN	**:**	**BESUN DEO**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Ms. J. Singh for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	**:**	**01 April 2021**
Date of Ruling	**:**	**07 April 2021**

RULING

[1] The appellant had been indicted in the High Court of Labasa with another (02nd accused in the High Court and the appellant in AAU 153 of 2016) on one count of murder contrary to section 237 of the Crimes Act, 2009 committed on 13 January 2015 at Labasa in the Northern Division.

[2] The information read as follows:

Statement of Offence

MURDER*: Contrary to Section 237 (a), (b) and (c) of the Crimes Decree No: 44 of 2009.*

Particulars of Offence

BESUN DEO *and* ***SHAREEN WATI RAJ*** *on the 13th day of January 2015 at Labasa in the Northern Division murdered* ***PARMA NAND****.*

[3] At the conclusion of the summing-up on 02 September 2016, the assessors' unanimous opinion was that the appellant was guilty as charged. The learned trial judge had agreed with the assessors in his judgment delivered on the same day, convicted the appellant as charged and on 06 September 2016 imposed mandatory life imprisonment with 20 years of minimum serving period on the appellant.

[4] The appellant had signed an untimely appeal against conviction in person on 18 May 2017 (received by the court of Appeal registry on 12 June 2017). The delay is about 07 months and two weeks. Thereafter, R Vananalagi & Associates had sought an extension of time to appeal against conviction along with the appellant's affidavit and amended grounds of appeal on 19 April 2019. Later R Vananalagi & Associates had withdrawn its appearance from the case and the appellant had retained Legal Aid Commission to prosecute his appeal and the LAC had tendered amended grounds of appeal and written submissions against conviction on 08 February 2021. The state had tendered its written submissions on 10 February 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] The delay as already stated is about 07 months and two weeks 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 given in his affidavit is that Mr. Paka from the Legal Aid Commission had visited him at Vaturekuka Corrections within two weeks of the sentence and helped him draft and sign his appeal papers. Mr. Paka had been the co-accused's trial counsel. The appellant had later understood that Mr. Paka had left the LAC. Thereafter, he had with the assistance of an inmate had tenderd his appeal to the CA registry. The appellant had not explained why he could not file the draft appeal prepared by Mr. Paka and signed by him within time. Obviously, Mr. Paka had not accepted his appeal on behalf of the LAC and he was under no obligation to come back to the appellant. It also appears that the appellant could have

got his trial counsel to file the appeal within time as the same counsel had later filed his extension of time papers. In the circumstances, the appellant's explanation for the delay is unacceptable.

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 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."*

[16] 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 lack of an acceptable explanation, the prospects of his appeal would warrant granting enlargement of time.

[17] The grounds of appeal against conviction urged on behalf of the appellant are as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *That the Learned Trial Judge erred in law when he did not properly and/or adequately direct the assessors on the issue of causation.*
>
> ***Ground 2***
>
> *That the Learned Trial Judge erred in law and in fact when he found the evidence of PW1 believable and not plausible.*
>
> ***Ground 3***
>
> *That the Learned Trial Judge erred in law and in fact when he failed to adequately address the issue on alibi.*

[18] The learned trial judge had summarized the evidence led by the prosecution in the sentencing order as follows:

> *'[2] The deceased was the estranged husband of the second accused who after leaving her husband entered into a relationship with the first accused. Divorce proceedings between the deceased and the second accused were being contested over matrimonial property and custody of the one child and the protracted nature of these proceedings appeared to severely irk the first accused, the wife's new de facto partner and between them they resolved to "settle" the matter once and for all. The deceased was seen to have been arguing with the couple in a bus on the 13th January 2015 and the deceased feared for his safety by telling a neighbour that "they will kill me and throw me".*
>
> *[3] In the early evening of the 15th the two accused took a bus to Tabicola Tiri on the outskirts of Labasa where the deceased lived. The ex-wife called the deceased and asked him to come and meet her because she had brought their son to see him. The deceased did go to meet her but took a friend with him. When they encountered the ex-wife she was with the first accused but no son. They met on the road in a desolate farm area. A dispute quickly arose about the matrimonial property and the first accused started attacking the deceased. He was punched by the first accused and hit with a stone by the second accused. The deceased fell to the ground and on the instructions of the wife the first accused attempted to strangle him. This was all observed by the deceased's friend. When the victim was semi-conscious or unconscious they both picked his body up and took it a few metres off the road and threw him face down into a swamp filled with water.*
>
> *[4] The pathologist has opined that he died of asphyxiation by drowning.*

01st ground of appeal

[19] The appellant argues that given that the cause of death is asphyxiation by drowning the deceased had not died as a result of the attack by the appellants and therefore the trial judge should have adequately directed the assessors on the issue of causation. He relies on **R v David Keith Pagett** [1983] Crim LR 394, (1983) 76 Cr App R 279, [1983] EWCA Crim 1 where Lord Justice Robert Goff said:

> *'In cases of homicide, it is rarely necessary to give the jury any direction on causation as such. Of course, a necessary ingredient of the crimes of murder and manslaughter is that the accused has by his act caused the victim's death. But how the victim came by his death is usually not in dispute……*

Even where it is necessary to direct the jury's minds to the question of causation, it is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that ***his*** *act contributed significantly to that result. It is right to observe in passing, however, that even this simple direction is a direction of law relating to causation, on the basis of which the jury are bound to act in concluding whether the prosecution has established, as a matter of fact,* ***that*** *the accused's act did in this sense cause the victim's death. Occasionally, however, a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a causa sine qua non of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim's death, thereby relieving the accused of criminal responsibility. Such intervention, if it has such an effect, has often been described by lawyers as a* ***novus actus interveniens****. We are aware that this time-honoured Latin term has been the subject of criticism. We are also aware that attempts have been made to translate it into English; though no simple translation has proved satisfactory, really because the Latin term has become a term of art which conveys to lawyers the crucial feature* ***that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused****. At the risk of scholarly criticism, we shall for the purposes of this judgment continue to use the latin term.'*

[20] The asphyxiation by drowning is not clearly something independent of the act of the appellant and his co-accused but is a direct result of their acts. Therefore, this is not a case where it was necessary to give the assessors any direction on causation as such.

[21] In any event, the issue of causation was not a trial issue kept alive or contested by the appellant at the trial. Therefore, the directions at paragraph 6 of the summing-up are adequate.

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

02nd ground of appeal

[23] The appellant contends that the trial judge had erred in law when he found the evidence of the eye-witness (PW1) to be believable and not plausible.

[24] The trial judge had addressed the assessors on the evidence of the eyewitness at paragraph 12-18 of the summing-up including matters raised by the appellant.

Obviously, the assessors had believed PW1. The trial judge agreed with the assessors in the judgment.

[25] I undertook some analysis of past several decisions of the Supreme Court and the Court of Appeal regarding the trial judge's role in trial proceedings with 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) followed by a few other rulings. My conclusions were subsequently summarized in **State v Mow** [2020] FJCA 199; AAU0024.2018 (12 October 2020) and several other rulings. They are as follows:

> "*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 is supported by evidence 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)]."*
>
> *"…… 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."*

[26] Therefore, there was no obligation on the part of the trial judge to have embarked on a further analysis as to the credibility of PW1.

[27] Thus, there is no real prospect of success in the second ground of appeal.

03rd ground of appeal

[28] The appellant complains that the trial judge had not adequately addressed the assessors on his *alibi*.

[29] On the contrary, the trial judge had adequately directed the assessors on his *alibi* evidence at paragraph 52-55 and 72 & 73 of the summing-up. It appears that the appellant had not filed an *alibi* notice as required by law and seems to have cross-examined PW1 suggesting that the appellant somehow may have been there at the scene. The trial judge had adverted to this at paragraph 6 of the judgment too.

[30] The judge's directions at paragraph 71 on how the assessors should treat *alibi* evidence cannot be faulted in the light of guidance given in **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and later in **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020). The assessors had obviously rejected the appellant's *alibi*. The trial judge had considered the *alibi* evidence at paragraph 6 of the judgment and rejected it too. In the light of overwhelming evidence against the appellant including that of the eyewitness it is not surprising that both the assessors and the trial judge had rejected the defence of *alibi*.

[31] In Fiji the assessors are not the sole judges of facts. The judge is the sole judge of facts 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).

[32] Therefore, there is no real prospect of success in the 03rd ground of appeal.

[33] The prosecution had relied on eye-witness evidence, circumstantial evidence, medical evidence, the appellant's cautioned statement and his charge statement to prove its case.

[34] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it considers whether verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act (which were echoed in **Abourizk v State** AAU0054 of 2016:7 June 2019 [2019] FJCA 98):

> *'……..**Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based**…*….

[35] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[36] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict is tested on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[37] In my view the evidence led by the prosecution satisfies tests in both **Sahib** and **Kaiyum**.

Prejudice to the respondent

[38] The respondent had not pleaded any prejudice. However, given the lapse of time since the commission of the offence, there can always be difficulties for the state to trace witnesses.

Order

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

COURT OF APPEAL FIJI

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL