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

CRIMINAL APPEAL NO.AAU 0127 of 2015
[In the High Court at Labasa Case No. HAC 024 of 2014LAB]

BETWEEN	**:**	**MOHAMMED MOUSIN**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
	:	**Bandara, JA**
	:	**Hamza, JA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	**:**	**06 May 2021**
Date of Judgment	**:**	**27 May 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been indicted in the High Court of Labasa with one count of rape contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009 committed at Labasa in the Northern Division on 09 July 2011.

[2] 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 opinion of the assessors, convicted the appellant as charged and sentenced him to imprisonment of 08 ½ years with a non-parole period of 07 years.

[3] The appellant's appeal against conviction had been timely. Altogether three out of four grounds of appeal (fourth ground of appeal not being pursued) had been canvased against conviction by the Legal Aid Commission unsuccessfully at the leave to appeal stage with the single Judge refusing leave on 31 May 2019. The four grounds placed before the single Judge were as follows:

> 1. *That the learned trial Judge erred in law and in fact when he failed to direct the assessors on the use of recent complaint evidence to assess the credibility of the complainant.*
>
> 2. *That the learned trial Judge erred in law and in fact in failing to comprehend and/or evaluate the alibi evidence properly and/or adequately.*
>
> 3. *That the learned trial Judge erred in law and in fact to declare the alibi evidence as tainted for the reason that they were blood elated, which were highly prejudicial to the appellant's case."*
>
> 4. *That the learned trial Judge erred in law and in fact to consider that the complainant and the appellant has a domestic relationship, resulting in a miscarriage of justice.*

[4] The Legal Aid Commission has on 27 November 2020 renewed the second ground of appeal in an amended form for leave to appeal and submitted a fresh ground of appeal against conviction before the full court and filed written submissions. The state too had filed written submissions for the full court hearing. The grounds of appeal are as follows:

> 1. *That the learned trial Judge erred in law and in facts having not properly evaluated the alibi evidence that had raised a reasonable doubt on prosecution's case.*
>
> ***Fresh ground of appeal***
>
> 2. *The learned trial Judge erred in law and in facts to have not directed the assessors adequately on the burden of proof in light of there being two conflicting versions , that of the complainant and the appellant.*

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA; 171AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

Facts in brief

[6] On 09 July 2011, the complainant (PW1) was 18 years old and her husband was 25 years old. They were living as *de facto* husband and wife. The husband was Nakim Fazil Mohammed (PW2). The appellant was the husband's first cousin (*i.e.* his mothers' elder brother's son) and 22 years old at the time. The complainant and her husband were living with the husband's father, mother (Hazra Bi – DW2) and brother (Saiban Ali – DW3). By about 11am on 09 July 2011, the complainant's mother-in-law and brother-in- law were out of the house having gone to the family's sugar cane farm in Seaqaqa. Her father-in-law and husband were also away from home at work. She was alone at home. The appellant came into their house and asked the complainant if he could watch a movie and the complainant told him that no one was at home and asked him to come back when everyone was at home in the evening. However the appellant did not leave the house and went to the kitchen where the complainant was to drink some water. He then forcefully held her by her wrist and took her to the bedroom, forcefully took off her clothes, pushed her onto the bed and had sexual intercourse with her without her consent. She asked the appellant not to do it. She shouted and resisted but to no avail.

[7] The appellant gave evidence at the trial and took up the position that he was not at the crime scene at the material time. According to him, he along with Saiban Ali (DW3) left home at 8.00 a.m. on the day in question, and reached Labasa town and did some shopping and returned home only at 4.00 p.m. Saiban Ali also gave evidence supporting the appellant's narrative. Hazra Bi (DW2) testified that she was at home throughout the day and the appellant went with Saiban Ali to the town in the morning.

01st ground of appeal

[8] The appellant's counsel has argued that the trial judge had not adequately assessed the evidence of the *alibi* raised to be sure that the prosecution had disproved it.

[9] The trial judge had appraised the assessors adequately on the appellant's *alibi* evidence at paragraphs 18, 19 and 24-26 of the summing-up. The counsel for the appellant has admitted that the direction at paragraph 26 of the summing-up is in line with the general direction for *alibi* and no complaint has been raised in that regard. In **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) the Court of Appeal said of the required direction in cases where there is a defense of *alibi* in the following words which were reiterated in **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020):

> *'[29] When an accused relies on alibi as his defence, in addition to the general direction of the burden of proof, the jury (in Fiji the assessors) should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (**R v Anderson** [1991] Crim. LR 361, CA; **R v Baillie** [1995] 2 Cr App R 31; **R v Lesley** [1996] 1 Cr App R 39;'*

[10] This court has held that whether the trial judge agrees or disagrees with the assessors the judgment of a trial judge cannot 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) [now amended by Criminal Procedure (Amendment) Act 2021/Act No.02 of 2021), should collectively be referred to as the judgment of court. A trial judge

therefore, is not expected to repeat every word he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) when he agrees or 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 (see **Fraser v State** AAU 128 of 2014 (05 May 2021).

[11] The Court of Appeal also stated in **Fraser v State** (supra) as to the scope of the trial judge's function when agreeing with the opinion of the assessors in his judgment as follows:

> *'[23] What could be identified as common ground arising from several past judicial pronouncements is 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 his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise 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 the trial 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)]'*

[12] The trial judge had rejected in his judgment the appellant's *alibi* in the following terms:

> *'5. ……I have heard the complainant's evidence. I have also heard the accused's evidence. I have also carefully analysed the defence's alibi evidence. In my view, I don't accept the alibi evidence. DW1, DW2 and DW3 were not credible witnesses. They were all blood related and it appeared, as a result, that their evidence was tainted because of that. DW2 admitted she did not like the complainant, as her daughter-in-law.'*

[13] The criticism of the appellant's counsel has been directed at this paragraph of the trial judge that it is not an adequate assessment of the *alibi* evidence. Given the scope of duty of the trial judge in agreeing with the assessors where they had rejected the appellant's *alibi* the above conclusion of the trial judge cannot be faulted.

[14] However, in view of the appellant's counsel's argument, I myself analysed the *alibi* evidence presented on behalf of the appellant. In the course of my independent evaluation and analysis, I find that the complainant (PW1) had said in her evidence that her mother-in-law and brother-law after their trip to Seaqaqa returned only on Sunday *i.e.* the day after the incident. This piece of evidence had gone unchallenged. Neither do I find any suggestion to the complainant to the effect that her brother-in-law left to go to Labasa town with the appellant in the morning and returned in the evening or that her mother-in-law was at home throughout the day. The complainant had been confronted only with her statement to the police where she had apparently said that her mother-in-law went to the town and she clarified that by stating that the mother-in-law went to the town and then to Seaqaqa. This shows that the appellant's *alibi* position had not been effectively put to the complainant affecting its credibility immensely.

[15] The appellant's position in his evidence that the motive for the 'false' complaint of rape against him was because he had asked the complainant and her husband to leave his house where they had stayed for a month. This too had not been suggested to the complainant at all. The trial judge had found the appellant to be an evasive and augmentative witness.

[16] The complainant's mother-in-law (DW2) had agreed under cross-examination that the appellant was her biological brother's son whereas the complainant was not blood related her. She had also admitted that her son and the complainant had eloped and she had disapproved the complainant as her daughter-in-law and her disapproval had continued throughout. After 06 months of the complainant's rape allegation her husband had left her and brought a new wife. DW2 had not specifically stated that she did not go to their farm at Seaqaqa with her younger son on the day of the incident. The trial judge had recorded her demeanour as that of a very evasive witness.

[17] The complainant's brother-in-law (DW3) had admitted that he and his mother were used to go their farm at Seaqaqa and kept silent as to whether they did not go there on the day of the incident. He had admittedly been very close to the appellant as his first cousin.

[18] This court is mindful of the benefit the assessors and the trial judge had in seeing the witnesses giving evidence at the trial as succinctly put in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992):

> *'It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere…….*

[19] Therefore, I cannot find fault with the trial judge's conclusion that the defence witnesses were not credible witnesses and obviously DW2 and DW3 had attempted to save their blood relation as opposed to the complainant who was an outsider. In the circumstances, the assessors and trial judge was right in rejecting the appellant's alibi and by the complainant's evidence the prosecution had disproved the defence of *alibi*.

[20] Accordingly, there is no reasonable prospect of success or merits in this ground of appeal.

Fresh ground of appeal

[21] Given that the appellant had been sentenced on 17 September 2015, the delay in filing the fresh ground of appeal is over 05 years and 02 months. Therefore, this court would now follow ***Nasila*** guidelines regarding the fresh ground of appeal and see whether enlargement of time should be granted to urge it before this Court.

[22] In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) faced with a similar situation the Court of Appeal stated:

> *'[14] Therefore, in my view, the most reasonable and fair way to address this issue is to act on the premise that the new grounds of appeal against conviction submitted by the LAC should be considered subject to the*

guidelines applicable to an application for enlargement of time to file an application for leave to appeal, for they come up for consideration of this court for the first time after the appellant's conviction. This should be the test when the full court has to consider fresh grounds of appeal after the leave stage. In other words, the appellant has to get through the threshold of extension of time (leave to appeal would automatically be granted if enlargement of time is granted) before this court could consider his appeal proper as far as the two fresh grounds are concerned.'

'[15] 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.'*

[23] 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?

[24] 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).

[25] It is clear that the delay is very substantial and the appellant has not explained the delay. As far as the prejudice is concerned, there will be undue hardship on the victim to relive her story again in court if there is to be fresh proceedings. Nevertheless, if there is a **real prospect of success** in the belated grounds of appeal in terms of merits this court would be inclined to grant extension of time (vide ***Nasila).*** The respondent had not specifically averred any prejudice that would be caused to the state by an enlargement of time.

[26] The counsel for the appellant has taken up the position that the trial judge had failed to address the assessors adequately on the burden of proof in the light of there being two conflicting versions of the complainant and the appellant. He seem to rely on **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015), **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and **Liberato v The Queen** [1985] HCA 66; 159 CLR 507. The Liberato direction requires that, *". . . even if the jury does not positively believe the defence witness and prefers the evidence of the prosecution witness, they should not convict unless satisfied that the prosecution has proved the defendant's guilt beyond reasonable doubt".*

[27] The trial judge had directed the assessors on burden of proof and standard of proof at paragraphs 4 and 5 of the summing-up. His directions on how to evaluate the evidence of the complainant and the appellant along with his witnesses are at paragraphs 25-28 of the summing-up.

[28] In the first place it should be remembered that in ***Gounder*** and ***Prasad*** the conflicting versions between the prosecution and defence was limited to the narrow issue of consent. In the present case the appellant's position is one of denial on the basis of his *alibi.* Therefore, what was required was a proper direction on *alibi* which the trial judge had administered.

[29] The totality of the trial judge's directions at paragraphs 25-28 of the summing-up shows that he has informed the assessors that the burden of proof never shifts to the appellant, he does not have to prove anything but the burden of proof beyond reasonable doubt is always with the prosecution and if they find the appellant's evidence on *alibi* as credible they should find him not guilty. However, even if they reject his *alibi* defence still they should critically look at the complainant's evidence and if they find her evidence credible only they should find the appellant guilty as charged. If they reject both versions still they should find the appellant not guilty meaning that if they are not sure of either of the versions the benefit of that should accrue to the appellant.

[30] I do not think that with these directions to the assessors there would have been any risk that that the assessors may have been left with the impression that *". . . the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt."* and therefore in my view as held in **De Silva v The Queen [2019]** HCA 48 (decided 13 December 2019) a word to word *Liberato* direction was not required. The same goes with ***Gounder*** and ***Prasad*** guideline directions as well.

[31] Therefore, there is no real prospect of success or merits in the fresh ground of appeal and enlargement of time to appeal should therefore be rejected.

[32] Recently, the Court of Appeal set down in **Kumar v State** AAU 102 of 2015 (29 April 2021) the test regarding grounds of appeal based on verdicts that are supposedly 'unreasonable or cannot be supported having regard to the evidence':

> *'[23] Therefore, it appears that where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.*
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> *[24] However, it must always be kept in mind that in Fiji the assessors are not the sole judges 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]. Therefore, there is a second layer of scrutiny and protection afforded to the accused against verdicts that could be unreasonable or cannot be supported having regard to the evidence.'*

[33] The appellant's complaints must be considered under *'unreasonable or cannot be supported having regard to the evidence'* in section 23(1)(a) of the Court of Appeal Act. Having examined the record, I would conclude that either by reason of improbabilities, inconsistencies, discrepancies, or other inadequacy; or in light of other evidence including that of the defence, I am not satisfied that the assessors and the trial judge, acting rationally, ought to have entertained a reasonable doubt as to proof of guilt. I think that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of guilt beyond reasonable doubt (see also **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992). Consequently, I hold that the verdict is reasonable and can be supported having regard to the evidence. As a result pursuant to section 23(1) of the Court of Appeal Act the appeal must be dismissed.

Bandara, JA

[34] I have read the draft judgment of Prematilaka, JA and agree with his reasoning and conclusions.

Hamza, JA

[35] I have read in draft form the judgment of Prematilaka, JA and agree that the appeal against conviction should be dismissed.

Order

1. Appeal is dismissed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice R. Hamza
JUSTICE OF APPEAL