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

CRIMINAL APPEAL NO.AAU 103 of 2020
[In the High Court at Suva Case No. HAC 291 of 2017]

BETWEEN	:	**RATU RAVUAMA VUNIVALU VUIBAU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. T. Kean for the Appellant**
	:	**Ms. M. Konrote for the Respondent**
Date of Hearing	:	**19 October 2022**
Date of Ruling	:	**20 October 2022**

RULING

[1] The appellant had been indicted in the High Court at Suva with one count of rape [section 207 (1) and (2) (b) of the Crimes Act 2009], one count of sexual assault [section 210 (1) (a) of the Crimes Act 2009], three counts of indecent assault [section 212 (1) of the Crimes Act 2009] and two counts of indecently annoying any person [section 212 (1) of the Crimes Act 2009] at Nakorosule, Naitasiri, in the Eastern Division in the months of May, June, August and September 2017.

[2] After trial, the assessors had expressed a unanimous opinion that the appellant was guilty of all counts. The learned High Court judge had agreed with their opinion and convicted the appellant as charged. The appellant had been sentenced on 29 October 2019 to total term of 18 years of imprisonment with a non-parole period of 15 years.

After deducting the remand period the head sentence became 16 years and 02 months subject to a non-parole period of 13 years and 02 months.

[3] The appellants' appeal in person only against conviction is late by about 09 months. The Legal Aid Commission has subsequently filed the current application for enlargement of time to appeal against conviction.

[4] 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? (vide **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).

[5] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. 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. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[6] The delay of the appeal is very substantial. The appellant's explanation given for his belated appeal is that due to COVID 19 lockdown his appeal remained in the correction centre and could not be forwarded to the Court of Appeal Registry. It is not possible to verify the above assertion. Nevertheless, I would see whether there is a

real prospect of success for the belated ground of appeal against 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 to appeal.

[7] The appellant was the Head Teacher at Nakorosule District School where all 06 victims were his students. All of them along with teacher Rejeli Seru had given evidence to establish the charges. The appellant had excised his right to be silent at the trial. The appellant totally denied the allegations contained in the 01st and 02nd counts while admitting the rest of the charges but with the qualification that those acts were done with the consent of the victims. However, consent is not a defense to any of the charges from counts 3-7 in the information [see section 212(2) of the Crimes Act, 2009]. He had further alleged that he was framed for the allegations levelled against him in the 01st and 02nd counts.

[8] The appellant's sole ground of appeal is as follows:

> *"Ground 1*
>
> *THAT the Learned Trial Judge had not independently evaluated the totality of the evidence before deciding whether to agree with the opinions of the assessors that the Appellant is guilty of all charges."*

[9] The appellant submits that the trial judge had not independently evaluated the evidence before agreeing with the assessors. He further argues that the trial judge does not have to give cogent reasons in agreeing with the assessors but should engage in an independent evaluation of evidence.

[10] The Court of Appeal in **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) summarised the relevant law as follows:

> *'[23] …… 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)]*

*[24] When the trial judge disagrees with the majority of assessors he 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)]*

[25] ……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.'

[11] The trial judge had examined the evidence and directed himself in accordance with the summing-up (see paragraph 4 of the judgment). Having examined all the charges and the evidence, the trial judge had said in conclusion as follows:

*'**[28]** The Assessors have found the evidence of prosecution as truthful and reliable, as they have by a unanimous decision found the accused guilty of all the charges. Therefore, it is clear that they have rejected the version put forward by the accused.*

***[29]** In my view, the Assessor's opinion was justified in respect of all the charges. It was open for the Assessors to unanimously find the accused guilty on the available evidence. I concur with the unanimous opinion of the Assessors in respect of those charges.*

[30] *Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offences set out in counts 1-7 with which the accused is charged.'*

[12] The counsel for the appellant draw the attention of court to some inconsistencies (not highlighted in the appellant's written submissions) which the trial judge had failed to mentions or consider in the judgment. According to the counsel, these were material and if considered could have cast a doubt on the prosecution case on allegations in counts 01 and 02.

[13] The trial judge's directions on inconsistencies or omissions at paragraphs 20 and 21 of the summing-up cannot be criticised. I have considered those alleged inconsistencies in MN's evidence per se and *vis-à-vis* other witnesses. One of the more crucial ones referred to by counsel is mentioned in the summing-up [for example paragraph [97] (xx)]. However, TK had corroborated MN's evidence at the trial in this regard [paragraph 102(vii)]. Similarly, in my view the variance between the evidence of teacher Seru regarding what she observed on the day when the alleged rape took place and MN's evidence on the same incident, both of which are referred to in the summing-up [see paragraphs 97 (viii) and 103 (iii)] are not material inconsistencies. The same goes to the variance of dates on the day of the incident according to MN and witness Seru. In addition, MN's explanation for the late complaint that the appellant had threatened to expel her from school if she revealed the incident to anyone is quite probable.

[14] Witnesses cannot be expected to be human tape recorders. **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280 vividly deal with inconsistencies in evidence, particularly in rape victims. No human testimony is perfect and no witness is under a memory test in court. No two witnesses have a similar memory of an incident or observe the same incident exactly in the same way.

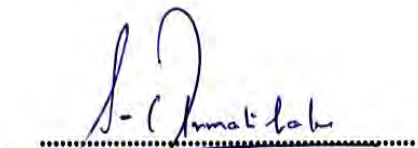
[15] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the Court of Appeal held that be they inconsistencies or omissions both go to the credibility of the

witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (supra).

[16] Therefore, it is clear that the assessors as well as the trial judge were aware of the alleged inconsistencies or omissions and despite them they had believed the prosecution witnesses. They had seen the demeanour/deportment of those witnesses. Their decision on credibility of those witnesses should not be lightly interfered with. It was wholly open for the assessors and the trial judge to have found the appellant guilty of the charges on the evidence available. There is no cause to believe that the verdict is unreasonable or cannot be supported having regard to the evidence. Thus, his appeal has no real prospect of success.

Order of the Court:

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



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