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

CRIMINAL APPEAL NO.AAU 20 of 2020
[High Court at Suva Case No. HAC 57 of 2018]

BETWEEN	**:**	**RUSIATE KOTOBALAVU**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. S. Waqainabete for the Appellant**
	:	**Ms. K. Semisi for the Respondent**
Date of Hearing	**:**	**12 August 2022**
Date of Ruling	**:**	**15 August 2022**

RULING

[1] The appellant had been indicted in the High Court at Suva on a single count of rape of a child of 11 years contrary to section 207 (1) (2) (a) and (3) of the Crimes Act, 2009 committed on 08 May 2012 at Mau Village, Navua in the Central Division.

[2] The appellant was found not guilty by the assessors but the trial judge overturned their decision and convicted his as charged. He was sentenced to ten (10) years and eleven (11) months of imprisonment with non-parole period of six (6) years and eleven (11) months.

[3] The appellant's appeal against conviction and sentence is late by about 04 months. His counsel indicated at the hearing that he wished to abandon the sentence appeal

and filed a From 3. Accordingly, the Legal Aid Commission pursued only the conviction appeal.

[4] The trial judge had summarised the evidence against the appellant in the sentencing order as follows:

> *2. It was proved during the hearing that you have called the complainant into your house when she was walking back home from her grandmother's place in the evening of the 8th of May 2012. You then took her to the kitchen and asked her to remove her clothes. Once she removed her clothes, you penetrated into her vagina with your penis. You have committed this crime on her while three other youths were present. The complainant was eleven years old at that time.*

[5] While the prosecution case entirely depended upon the testimony of the child victim, the appellant remained silent at the trial. Nor did he call any witnesses.

[6] 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).

[7] 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.

[8] The delay of this appeal is not substantial for an appellant who had appealed in person. The appellant's explanation is that he lacked legal knowledge to draft and file appeal papers in time and did not know that he could appeal. He was represented by a private senior counsel at the trial and the sentence order clearly states that he could appeal within 30 days. Thus, the reasons for the delay are not acceptable. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds 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.

[9] The ground of appeal urged on behalf of the appellant is as follows:

> *'Ground 1*
>
> *THAT the Learned Trial Judge erred in fact and in law when he did not independently assess all the evidence adduced during the trial and in not doing so resulted in the Judgment of his Lordship not being cogent ultimately causing the conviction being unsafe and further causing* a *grave miscarriage of justice.*

[10] The appellant has a few specific complaints under this ground of appeal. First of them is that the victim's evidence that it was 'Juta' who asked her to go to the appellant's house as 'Sukulu' wanted to see her was hearsay evidence in that 'Juta' was not called by the prosecution. This cast doubt on victim's credibility. The trial judge's failure to consider this aspect was an error and caused a grave miscarriage of justice.

[11] It is in evidence that the appellant was also known as 'Sukulu' and well-known to the victim. It is true that what 'Juta' had supposedly told the victim was hearsay in its strict sense. However, it does not appear that the prosecution had relied on that part of the victim's evidence to prove the charge of rape against the appellant. This hearsay evidence (assuming it to be so) was only meant for the purpose of showing what made her go to the appellant's house. As to what happened inside the house including the

act of rape was directly spoken to by the victim. In **Chand v State** [2017] FJCA 139; AAU112.2013 (30 November 2017) the Court of Appeal dealt with hearsay evidence and its parameters in detail.

[12] It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made [vide **Subramaniam v Public Prosecutor** [1956] 1 WLR 965 at 970] and The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', i.e., as establishing some fact narrated by the words (vide **Ratten v R [** 1972] AC 378 at page 387; (1972) 56 Cr App R 18.

[13] The appellant also submits that from the victim's evidence it can be gathered that there had been three other boys whom she identified but as to what happened to them when the appellant raped the victim was unknown. It now transpires that those three were the 01st, 02nd and 04th accused in the same case and convicted by the trial judge for acts of rape, however, on different days. They were juveniles and dealt with accordingly in the sentencing order dated 04 October 2019. They do not appear to have committed acts of sexual abuse on 08 May 2012.

[14] Thirdly, the appellant submits that the trial judge had not given adequate consideration to the discrepancies in the victim's evidence. However, the appellant had not identified what those discrepancies were. 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 [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016)].

[15] 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 **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)]. In my view, the trial judge has discharged his burden sufficiently in convicting the appellant despite the contrary view taken up by the assessors.

Order

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

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