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

CRIMINAL APPEAL NO. AAU 107 of 2016
[In the High Court at Suva Case No. HAC 143 of 2013]

BETWEEN	**:**	**JOSEPH SHYAM NARAYAN**
		Appellant
AND	**:**	**STATE**
		Respondent

Coram	**:**	**Prematilaka, RJA** **Gamalath, JA** **Nawana, JA**
Counsel	**:**	**Ms. S. Prakash for the Appellant** **Ms. P. Madanavosa for the Respondent**
Date of Hearing	**:**	**01 November 2022**
Date of Judgment	**:**	**24 November 2022**

JUDGMENT

Prematilaka, RJA

[1] I have had the benefit of reading the draft judgment of Nawana, JA and agree with his reasons and orders proposed.

Gamalath, JA

[2] I have read the judgment in draft and the conclusion of Nawana, JA and I agree.

Nawana, JA

[3] This appeal arises out of applications for renewal and enlargement of time for leave to appeal against the conviction of the appellant dated 18 July 2016 on charges of sexual assault and rape on two counts before High Court of Fiji in Suva.

[4] The statements and the particulars of the offences, upon which the appellant stood charged, were as follows:

> *'**FIRST COUNT***
> ***Statement of offence***
>
> ***SEXUAL ASSAULT:*** *Contrary to section 210 (1)(a) of the Crimes Decree, No. 44 of 2009.*
>
> ***Particulars of offence***
>
> ***JOSEPH SHYAM NARAYAN*** *between the 1st and 28th day of February 2013 at Nasinu in the Central Division unlawfully and indecently assaulted SS.*
>
> ***SECOND COUNT***
> ***Statement of offence***
>
> ***RAPE:*** *Contrary to section 207 (1) and section 207 (2)(b) of the Crimes Decree, No. 44 of 2009.*
>
> ***Particulars of offence***
>
> ***JOSEPH SHYAM NARAYAN*** *on the 13th day of March 2013 at Nasinu in the Central Division penetrated the vagina of SS with his tongue without her consent.'*

[5] After trial, the assessors returned a unanimous opinion of guilty, with which, the learned trial judge agreed. A sentence of imprisonment for eleven years, with a nine-year non-parole period, was imposed on the appellant. The operative period of imprisonment that the appellant was ordered to serve was eight years, ten months and eighteen days, after reducing the time period that the appellant had spent in remand.

[6] The appellant applied for leave to appeal against the conviction and the sentence. A single Justice of Appeal, upon consideration of the matter, refused leave to appeal against the conviction and allowed the application for leave to appeal against the sentence, by the ruling dated 16 June 2017.

[7] The Court of Appeal, after hearing into the sentence appeal on 13 November 2018, enhanced the sentence of imprisonment to a period of fourteen years with a non-parole period of eleven years. The enhancement of the sentence on appeal, which was by a majority decision dated 29 November 2018, was not appealed.

[8] Instead, the appellant, in the instant appeal, has sought renewal and enlargement of time to appeal against the conviction dated 18 July 2016 after more than six years from the date of conviction; and, more than two years from the date of single judge's ruling disallowing leave to appeal against the conviction.

[9] The grounds of appeal urged before the Full Court are:

> *'(i) The learned trial judge erred in law and in fact when he convicted the appellant without the element of identification being properly satisfied by the State thus making the conviction unsafe and causing a grave miscarriage of justice against the appellant; and,*
>
> *(ii) The learned trial judge erred in law and in fact when convicted the appellant with the State's case not fully and properly made out against the appellant with regard to the date of offending for count of rape thus making the conviction unsafe and causing a grave miscarriage of justice to the appellant.'*

[10] The appellant relies on section 35 (3) of the Court of Appeal Act in support of the application for renewal and enlargement of time for leave to appeal. The delay and the reasons for the failure to invoke the jurisdiction of the court in terms of section 35 (3) of the Court of Appeal Act remain unexplained both in the renewal application dated 10 July 2019 of the appellant filed in person; and, in the amended renewal notice dated 14 June 2021 filed by the Legal Aid Commission on the appellant's behalf.

[11] The grant of applications for renewal and enlargement of time by this court is not automatic. Instead, the full court is required to consider the relevant criteria on the basis of judicial precedents. These criteria have been formulated bearing in mind the inviolable need to conform to the rules of court while addressing only justifiable needs to ensure justice to a deserving litigant at default.

[12] Learned counsel for the appellant at the hearing into this appeal, amongst others, relied on the decision of this court in **Vakacegu v State** [2020] FJCA 2; AAU82.2014 (27 February 2020). She specifically relied on following holdings, which I think, are appropriate to be reiterated as they set down the legal position as regards applications for renewal and enlargement of time to appeal:

> *"[12] The reach of the ultimate objective has been left to the discretion of the court. The discretion is not unfettered. That is a discretion that has to be exercised reasonably, fairly and lawfully by applying inter alia the principles enunciated in the judicial precedents on the facts and circumstances of each case. The principle laid down by the Judicial Committee of the Privy Council in the United Kingdom in **Ratnam v Cumaraswamy** [1964] 3 All ER 933 at 935, is a sound principle to start with. It said:*
>
> > *The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.*
>
> *[13] The exercise of the discretion by court in this sphere was explained by way of a series of guidelines by the Supreme Court of Fiji as it considered the matter on enlargement of time in **Kumar v State** and **Sinu v State** [2012] FJSC 17; CAV0001 of 2009: (21 August 2012), where it was held that:*
>
> > *Appellate courts examine five factors by way of a principled approach to such applications. Those factors are: (i) the reasons 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 a substantial delay, nonetheless is there a ground of appeal that will probably succeed?; and, (v) if time is enlarged, will the respondent be unfairly prejudiced.?

[14] The Supreme Court of Fiji, having reinforced the above criteria, reiterated on the discretion and its purposive exercise in dealing with applications for enlargement of time. The Supreme Court held in ***Rasaku v State*** *[2013] FJSC 4: CAV0009; 0013.2013: (24 April 2013; that:*

> *The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed specific period for lodging his application.*

[15] The above principles were adopted and applied, as recently as in June 2019, in the case of ***Nasila v the State*** *[2019] FJCA 84; AAU0004.2011: (06 June 2019) in dealing with a similar application for enlargement of time, where it was held that the new grounds should be considered subject to the guidelines applicable for enlargement of time to file an application for leave to appeal.*

[18] In ***Fisher v State*** *[2016] FJCA 57; AAU132.2014 (28 April 2016), the issues of delay; and, how such delays should be addressed in dealing with an application for enlargement of time to appeal by an imprisoned convict, were considered. It was observed in that decision that:*

> *[12] The Supreme Court has acknowledged that incarcerated appellants who are unrepresented do face difficulties in the preparation of their appeals. However, those difficulties do not justify setting aside the requirements of the Act and the Rules:* ***Raitamata –v- The State****, CAV 2 of 2007; 25 February 2008 and* ***Sheik Mohammed –v- The State****, CAV 2 of 2013; 27 February 2014. The explanation for the delay will not by itself ordinarily lead to the conclusion that an enlargement of time should be granted. It is usually*

> *necessary to consider whether the appeal has sufficient merit to excuse the Appellant's non-compliance with the Rules. It is necessary for the Appellant to show that his appeal grounds have sufficient merit to (a) excuse the delay and (b) be considered by the Court of Appeal. (Underlined for emphasis)*
>
> *[19] The courts have, therefore, consistently taken the view that, even though the delay could be excused, that by itself would not allow the defaulting appellant to get leave to appeal out of time as a matter of course. The appellant, instead, will certainly have to show that the grounds of appeal, in respect of which, leave is sought to appeal out of time, bear sufficient merit."*

[13] I will now turn to consider the evidence led before the trial court in order to consider whether the two grounds urged in support of the renewal application for leave to appeal bear merit in light of the above legal position on the matter.

[14] The victim-girl, who shall be referred to as SS, was 17 years and 6 months old by March 2013. SS was a student in Form 6, who was also holding the position of Deputy Head Girl of a school in her locality of residence. She had come to live with the mother in 2011, who, by then, was in a *de facto* relationship with the appellant.

[15] The mother of SS was running a bean cart little away from the residence and used to be at work from early morning till the evening. The appellant, then 37 years of age, was a taxi driver, who used to take SS to and from school on some days. It so happened that the appellant used to spend the afternoon at home after SS returns from school.

[16] The evidence of SS was that the appellant used to pass comments on SS as she started living with them and prevailed upon her not to call him 'father'. The comments passed on SS were alluring, which made SS quite uncomfortable but she kept offering him a fatherly respect. The appellant's alluring conduct, according to the evidence of SS, had not, however, changed.

[17] It was the evidence of SS that she used to smoke to relieve herself of stress. On a date in February 2013, while she was smoking inside the bathroom being naked for a shower, the appellant opened the door and touched her vagina to which she did not consent. The appellant told SS to keep that conduct of the appellant a secret and that he would keep her smoking a secret. SS did not disclose the incident to anyone as she had felt scared.

[18] On 11 March 2013, the appellant brought Marijuana and wanted SS to smoke it after she returned from school. As SS refused taking in any puff of Marijuana, the appellant forced her to smoke without leaving the puff out. The appellant also remarked that he had wanted to lick SS's vagina, after touching and kissing her. The appellant insisted that SS should go to the bathroom and wash herself. As SS washed herself, the appellant came inside the bathroom and took her inside the bedroom where he made SS to lie on the bed with her feet on the floor. The appellant, thereupon, knelt-down on his knees, lifted SS's legs, licked the vagina and inserted his tongue into the vagina (pages 296-311 of the copy record).

[19] SS was subjected to lengthy cross-examination by learned counsel for the appellant. It was suggested that SS's stepmother had caught her with a boyfriend in a guesthouse and that incident had caused her problems with the stepmother. Other than the reason sought to be attributed for her problems of adversity on the above premise, the case for the defence was run on the basis of lack of credibility of SS's evidence alluding to the fact that SS was making-up stories. This was how the learned counsel for the appellant placed the case before High Court:

> *'Credibility is the issue that seek is able [sic] to make up stories every time she is coming out to get herself out of the problems. That is the line of defence I am running I had told Your Lordship, as today I am going on credibility. And that is why I said I asked her one question whether there was any other problem if she would have come out rightly.'*

[20] SS, throughout in her testimony, referred to the appellant as 'Joseph'. Learned Judge, at the close of the prosecution case, recorded as follows:

> *"So, in this case, there is no dispute that Joseph, the witness [was] referring to the accused."*

[21] Moreover, the line of questioning of the appellant in his evidence-in-chief, puts beyond any doubt that the appellant was the person that SS had referred to in her complaints of sexual advancements and sexual attacks. The appellant was thus referred to the place of crime as follows:

> *'Witness, you have heard that the incident which is alleged to have occurred near washroom or around washroom or inside washroom, can you tell this court what type of lock does your washroom [have]?'*

[22] It is clear, upon an examination of the evidence at the trial, that the prosecution had presented its case on the basis of recognition of the appellant by his name as 'Joseph', who was SS's step-father, with whom SS started to live from 2011 when she was attending school. The identity of the appellant was not put in issue by the defence, too, when one considers the proceedings had before the trial court.

[23] It would, however, be relevant to consider how the learned trial judge had dealt with the matter when he summed-up the case to the assessors. The learned trial judge stated to the assessors as follows:

> *"57. The first element of both counts is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence. From the manner in which the witnesses were examined and cross examined, there was no dispute that the 'Joseph' the complainant referred to is the accused and it is an agreed fact that the accused is the complainant's stepfather. However, the accused says that he could not have committed the offences as he was elsewhere. Having in mind my directions on dealing with the defence of alibi, you should decide whether the*

prosecution has proved beyond reasonable doubt that it is the accused who committed the offence. This applies in respect of both counts.

61. Again, the first element involves the identity of the accused. I have already explained to you about this element. Accused says that he could not have committed the offence as he was elsewhere.

68. Considering all the evidence led in this case, if you are satisfied that the prosecution has proved beyond reasonable doubt that the accused penetrated the vagina of the complainant with his tongue, then you should find the accused guilty of the second count. If you have a reasonable doubt, or if you think that the variance between the date mentioned in the charge and the complainant's evidence regarding the date of offence caused a prejudice to the accused in respect of his defence, then you should find him not guilty of the second count."

(Underlined for emphasis)

[24] It would appear that the learned judge has adequately dealt with the issue of identity in his summing up in a manner that the assessors were able to deliberate on. It is, therefore, reasonable to conclude that the issue of identity was rightly placed with the assessors as a question of fact to be decided by them. An appellate court would be exceptionally hesitant to intervene into questions of fact when it is rightly placed with the triers of fact. Judicial precedents on the issue are abound.

[25] Dealing with questions of fact, in **R v Hopkins-Hudson** [1950] 34 Cr App R 47, it was held that it was not the function of a criminal appellate court to substitute its own view of the evidence. This is how their Lordships of the English Court of Criminal Appeal held in relation to a matter dealing with the findings on pure questions of facts by a jury:

'...[I]t has been held from an equally early period in the history of this court that the fact that some members of the court think that they themselves would have returned a different verdict is again no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country. If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable

jury could not arrive at, this court will not set aside the verdict of guilty, which has been found by the jury.'

[26] Furthermore, the High Court of Australia in **The Queen v Baden-Clay** [2016] HCA 35, it was held that:

"setting aside of a jury's verdict on the ground that it is 'unreasonable' ... is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal, which has not seen or heard the witnesses called at trial."

[27] In my view, even though there are remarkable differences between trials before juries and assessors, one common factor is that both systems recognize that the issues of facts are left for them. The legal position insofar as the matters with a jury is concerned, as ruled in **M. v The Queen** [1994] 181 CLR 487, [1994] 126 ALR 325, [1994] 69 ALJR 83 (13 December 1994), is as follows:

"It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[28] Moreover, in **Navaki v State** [2019] FJCA 194; AAU0087.2015 (3 October 2019), adopting the reasoning of the House of Lords in **Stirland, Appellant v Director of Public Prosecutions** [1944] AC 315, this court considered the legal position as follows:

> *"When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should be applied.*
>
> *A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict. ..."*

[29] It was observed in **Vakacegu** *(supra)* that the jury system found elsewhere is remarkably different from an assessor-based system as found in Fiji. The principles laid down above conceptually can be taken into account to the assessor-based system in Fiji as the assessors render their opinions as primary triers of fact to help the trial judge in making the verdict. If inroads are made to the fact-finding arena of the assessors, the overall effect of trial by peers will, in my view, suffer and run into disarray.

[30] Moreover, the Fiji Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) held that:

> *"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. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*

> *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. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
>
> *We are not able to usurp the functions of the lower Court and substitute our own opinion."*

[31] Upon consideration of the legal position, as set-out above, it is opportune now to consider as to how the learned trial judge had dealt with the issues of fact including that of the identity of the appellant before the assessors. The learned judge stated to the assessors as follows:

> *"Considering all the evidence led in this case, if you are satisfied that the prosecution has proved beyond reasonable doubt that the accused penetrated the vagina of the complainant with his tongue, then you should find the accused guilty of the second count. If you have a reasonable doubt, or if you think that the variance between the date mentioned in the charge and the complainant's evidence regarding the date of offence caused a prejudice to the accused in respect of his defence, then you should find him not guilty of the of the second count."*

[32] Considering the facts, as set-out above, and the forgoing judicial precedents, I am of the view that the learned trial judge had adequately considered the matters of identity and the dates of offending and rightly summed-up the case to the assessors to deliberate and rule on the issue of guilt or otherwise of the appellant. In pronouncing the judgment, the learned judge directed himself with his directions on the questions of law and the facts, as he ought to have, in the discharge of his functions as a judge having overall control over the trial.

[33] When the issue of identity is concerned, as raised in the first ground of appeal, I hold that it was not really put in issue at the trial. Nevertheless, in the overall discharge of the duties as the trial judge, the matter of identity was rightly put before the assessors in an objective and reasonable manner. The appellant's appeal, in the circumstances, has the inefficacy of inviting this court to substitute its own decision in place of the decision of

the assessors, which is not permissible to do in the exercise of the appellate functions of this court as empowered by the Court of Act, 1949, (Cap 12).

[34] I, therefore, hold that there is no merit in the two grounds of appeal for them to be considered as viable grounds to be urged in an appeal against the conviction in this case. I, accordingly, reject both grounds of appeal and dismiss the renewal application for enlargement of time to appeal against the conviction.

Orders of the Court:

(i) The renewal application for enlargement of time for leave to appeal against the conviction is dismissed; and

(ii) The conviction of the appellant on counts (1) and (2) affirmed.

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL