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

CRIMINAL APPEAL NO.AAU 0076 of 2020
[In the High Court at Suva Case No. HAC 53 of 2014]

BETWEEN	:	**KELEMETE LEPANI YAMOYAMO**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**08 July 2022**
Date of Ruling	:	**11 July 2022**

RULING

[1] The appellant had been charged in High Court at Suva on one count of rape of VNT (name withheld) contrary to section 207(1) and (2) of the Crimes Act, 2009 on 10 April 2014 at Rakiraki in the Western Division.

[2] At the end of the trial, the assessors had unanimously opined that the appellant was guilty as charged and the trial judge had found the appellant guilty of rape and sentenced him on 22 February 2019 to a sentence of 07 years imprisonment with a non-parole period of 05 years.

[3] The appellant had appealed against conviction and sentence in person 01 year, 03 months and 16 days out of time. The Legal Aid Commission had subsequently filed an application for enlargement of time to appeal against conviction along with the appellant's affidavit and written submissions. The state had tendered its own written submissions. The appellant had also filed an application in Form 3 indicating his

desire to abandon the sentence appeal which will have to be considered by the full court.

[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 had in his affidavit attributed his inability to appeal within time to the failure of a counsel from the Legal Aid Commission (LAC) to return to get his instructions, who had promised to attend to filing of the appeal in the aftermath of his conviction and sentence. In the first set of appeal papers the appellant had stated the name of the LAC counsel and come up with the same reason for the delay. Though, I do not have any confirmation or denial on the part of the said counsel of the appellant's position, it is clear that LAC had defended the appellant at the trial and now appears for the appellant in appeal.

Therefore, there seems to be some credibility in the appellant's explanation. I would now see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent has averred that a significant prejudice would be caused by an enlargement of time to the juvenile victim in case there is to be a new trial.

[7] The single ground of appeal urged on behalf of the appellant against conviction is as follows.

Conviction

Ground 1

The learned trial Judge erred to have accepted what was relayed by the complainant to her aunt [PW2] as recent complaint when the complainant and the aunt did not testify to terms of the complaint, thereby causing a miscarriage of justice.

[8] This is a case of gang-rape of the complainant (VNT) on 10 April 2014. The evidence against the appellant was that after the appellant in AAU 40 of 2020 (Vanavasa Dave) finished his act of rape and when she wanted to get away from there, the appellant Kelemete came and pushed her back to the ground and held her and he sat down. She was trying to release herself. Then, when he was having carnal knowledge of her, he kissed her. She in turn bit his tongue. She did not like what he was doing to her. She did not agree for Kelemete to have carnal knowledge of her.

[9] To support its version, the prosecution had relied on recent complaint evidence and the complainant's subsequent conduct to prove her consistency. The complainant had said that she relayed the incident promptly to Timoci at the school and on the following day, to her aunt, Salaseini, and reported the matter to the police on the 12 April 2014. Salaseini, the aunt of the complainant had said that she received a complaint from the complainant on the following day (11 April 2014) that she was raped by 04 boys at school.

[10] The appellant had given evidence and denied the allegation of forcible sexual intercourse. He had contradicted his statement to police where he had admitted that his tongue was bitten by the complainant when he was having sexual intercourse.

[11] Overall, defense had taken-up the position that complainant's conduct was consistent with consensual sexual intercourse based on the following evidence.

(i) The complainant had ample opportunity to make a prompt complaint to her teachers after the first three incidents, but she did not complain.

(ii) The complainant never shouted calling for help or kicked.

(iii) She had not received any injuries in her body.

(iv) It is not probable for her to follow 01st accused's instructions to go and pick guavas and to agree to tell stories under a tree with Ame when she knew about 01st accused's previous conduct.

(v) She eventually complained against the accused to save herself when she learnt that the students had spread the story in the school.

01st ground of appeal

[12] The counsel for the appellant argues that given what is stated at paragraphs 51 and 63 of the summing-up, what the complainant (VNT) had told her aunt Salaseini cannot be treated as recent complaint evidence in that VNT had stated in her evidence that she told her aunt what happened to her in school as opposed to the aunt stating in evidence that VNT told her that four students raped her beside the classroom. The counsel relies on **Raj v State** [2014] FJSC 12; CAV0003 of 2014 (20 August 2014) [and as previously held in **Senikarawa v State** [2006] FJCA 25; AAU 0005 of 2004S (24 March 2006)] to buttress his argument where it was held *inter alia* that the complaint must disclose evidence of material and relevant unlawful sexual conduct on the part of the accused though all of the ingredients (*i.e.* full extent of the sexual conduct) need not be disclosed. The argument goes to elaborate that *'what happened to her'* does not disclose any material and relevant unlawful sexual conduct on the part of the accused and could not be treated as recent complaint evidence.

[13] The respondent argues that given VNT's detailed evidence as summarized in the summing-up from paragraphs 37-62, the trial judge had not told the assessors a verbatim account of what she had told her aunt, but put them in a nutshell by using the phrase 'what happened to her'. This sounds plausible as in the judgment the trial judge had referring to the recent complaint evidence, stated that the complainant said that she relayed the incident on the following day to her aunt, Salaseini.

[14] Therefore, it is quite possible that in both instances the trial judge had been economical with his description of what VNT in her own words had told her aunt. However, only a reading of the full transcript of the evidence of VNT would reveal what exactly she had told her aunt. Nevertheless, as far as this enlargement of time to appeal application goes, I think that VNT may have in fact disclosed evidence of material and relevant unlawful sexual conduct on the part of the appellant namely the act of rape, for Salaseini had said in her evidence that VNT told her that she was raped by four boys at school and therefore, it could have been legitimately treated as recent complaint evidence.

[15] The counsel for the appellant also argues that it was wrong for the trial judge to have concluded at paragraph 16 of the judgment that Salaseini's recent complaint evidence bolstered the version of the prosecution. This argument is also based on the pronouncements made on the law relating to recent complaint evidence in **Raj v State** (supra) and **Senikarawa v State** (supra) to the effect that recent complaint evidence is not evidence of the facts complained of and cannot be regarded as corroboration of the complainant's evidence but goes only to the consistency of the conduct of the complainant with her evidence given at the trial. In other words, recent complaint evidence would only support and enhance the credibility of the complainant *via* her consistency. In that context it was held in ***Senikarawa*** that it would be a misdirection to say that recent complaint evidence would strengthen the complainant's evidence but to state that it would strengthen the complainant's credibility will not be regarded as a misdirection.

[16] When the entirety of the summing-up and the totality of the judgment is considered rather than just the impugned sentence, I have no doubt that what the trial judge had meant by saying that recent complaint evidence bolstered the version of the prosecution

was that for all purposes it strengthens or enhances the credibility of the complainant or her evidence thereby strengthening the credibility of the prosecution case as a whole. The trial judge had been satisfied with the credibility of the complainant's version.

[17] In my view, even without recent complaint evidence, on the material available it was open to the assessors and the trial judge to find the appellant guilty of rape (see **Kumar v State** [2021] FJCA 101; AAU 102 of 2015 (29 April 2021); **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021), **Pell v The Queen** [2020] HCA 12 and **M v The Queen** (1994) 181 CLR 487, 494) and thus, the verdict is reasonable and could be supported by the evidence.

[18] I am further convinced that conviction, even without recent complaint evidence, appears to be inevitable and therefore, there has not been a substantial miscarriage of justice [**Naduva v State** (supra)].

Order

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

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