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

CRIMINAL APPEAL NO.AAU 0085 of 2020
[In the High Court at Suva Case No. HAC 117 of 2016]

BETWEEN	:	**JOSAIA RASIGA TAWAKE**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. M. Fesaitu for the Appellant**
	:	**Ms. R. Use for the Respondent**
Date of Hearing	:	**10 August 2023**
Date of Ruling	:	**11 August 2023**

RULING

[1] The appellant had been charged in the High Court at Suva on a single count of rape. The charge is as follows.

COUNT TWO
Statement of Offence

RAPE*: Contrary to section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

JOSAIA RASIGA TAWAKE*, on the 1st day of June, 2016 at Lautoka in the Western Division penetrated the vagina of* ***LUISA WATI SOKILAU*** *with his penis, without the consent of the said* ***LUISA WATI SOKILAU****.*

[2] The majority of the assessors had opined that the appellant was guilty of rape. Having agreed with the assessors, the trial judge had convicted the appellant and sentenced him in his absence on 19 December 2019 to a sentence of 10 years. The effective sentence were to be 09 years', 10 months and 16 days imprisonment with a non-parole period of 08 years after deducting the remand period.

[3] The appellant had lodged in person an untimely appeal only against conviction. 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).

[4] The delay is over 06 months which is substantial. The appellant has stated that he waited for his private lawyer to file the appeal in time but the lawyer had later backed out and the intervening COVID and non-availability of the summing-up, judgment and the sentence order hampered his attempt to file the appeal in time. He managed to do so after obtaining them from his co-accused *via* Corrections Centre. Whatever the merits of his assertions, I would nevertheless see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The respondent has averred that prejudice would be caused by an enlargement of time.

[5] The prosecution case against the appellant had mainly depended on the evidence of the complainant and the evidence of PW2 who was an eye witness to the act of sexual intercourse. The trial judge had summarized the evidence in the judgment as follows.

> *1. The complainant informed the court that on 31st May, 2016 after work she went to a grog shop in Nadi Town where her two friends drank grog, from there she went to the Deep Sea Night Club. After having some drinks the complainant went to the White House Night Club where she met her two school mates, by this time it was 1am the next day.*

6. *The complainant and her two school mates continued drinking till 5 am when the complainant came out of the night club to go home there was only one taxi parked outside. Her friends boarded this taxi and left at this time a car came driven by the first accused. The first accused called out "taxi" the complainant responded by saying Saunaka and then she boarded the car.*

7. *In the car she sat in the front passenger seat fastened her seat belt and fell asleep when she woke up she saw the sea and some trees, her seat belt was still fastened. The driver was not in the car, he was drinking at the back of the car with three boys and a girl.*

8. *After some time the complainant got out of the car she was offered a bottle of beer to drink. After drinking, she became unconscious only to regain consciousness when her head hit the root of a tree. She saw the first accused was having sexual intercourse with her since the complainant was feeling weak she did not do anything.*

9. *The complainant felt pain on her vagina and her thighs she "blacked out" again. When she regained consciousness another man was having sexual intercourse with her at a different location. She was not wearing her panty and this person was on top of her, again the complainant fell asleep.*

10. *After sometime, a lady came and woke the complainant when she sat she noticed that she was without her shoes and panty. The complainant saw there were people gathered around her, at this time she realized something had happened. By this time it was after 9 am when she stood up she felt pain in her vagina.*

11. *The complainant was taken to a house where she was given a cup of tea, "Sulu" and panty to wear, on the same day the complainant reported the matter to the police.*

13. *The second witness Otto Delana informed the court that on 1st June, 2016 he was at work at about 7.30am renovating the roof of a customer at Vesi Crescent, Waiyavi, Lautoka. The witness was on the roof top when he saw two ITaukei boys and two ITaukei girls standing under a Vaivai tree.*

14. *After a while all of them moved to the volleyball court, he then saw one female move further into the grass and was having sexual intercourse, both the man and the girl were "fully drunk" while another man was taking pictures of them.*

15. *The witness came down from the roof and went near the scene, the young man was still on top of the girl when this man saw the witness he pulled up his pants and ran away.*

16. *The witness was able to recognize this man as the second accused since he knew the second accused from his earlier employment. He used to call the*

second accused "tau" meaning they were from the same ancestry. The witness saw the girl was naked and was "blacked out".

[6] The appellant had given evidence on his behalf and as summarized by the trial judge had state as follows

36. The second accused Josaia informed the court that at around 11pm, he went to the White House Night Club in Nadi where he drank a lot of alcohol till the night club closed. By this time he was heavily intoxicated.

37. After the night club closed he joined the first accused and his friends, as they were leaving the car park the complainant was waving for a transport. When the car was stopped the complainant spoke to Ben the first accused who was driving the car and then she came and sat in the front passenger seat, from there all went to Waimalika to buy more drinks.

38. From Waimalika they went to the Saweni Beach. At the Saweni Beach all started drinking when he went to sit in the car he "blacked out" since he was heavily intoxicated he does not know where the car went to. By "black out" the accused meant his mind and his whole body was not functioning, he does not know if he was talking or saw anyone. When he regained from his "black out", he stood up from beside the complainant, his pants were up to his knees.

39. The accused denied that he had sexual intercourse with the complainant as alleged by her because he had "blacked out". The accused further explained that when he "blacked out" his penis and his feelings were "off", he does not know whether his penis was erect or not or if he had urinated in his pants or had shit in his pants.

40. When Q & A 76 of the caution interview was shown to the accused he stated that the answer given by him was just a guess because of the situation he was in when he had woken up.

[7] The grounds of appeal urged by the appellant are as follows.

Conviction:

Ground 1

THAT the prosecution's case cannot be sustained on the evidence accepted by the trial Judge in light of the improbabilities between the complainant's account to the incident and the evidence of Prosecution witness Otto Delana (PW2), raising serious doubts as to the veracity of the allegation; and

Ground 2

THAT the learned trial Judge failing to evaluate the Appellant's state of intoxication to determine his state of mind, whether he knew or believed that the complainant was not consenting.

Ground 1 and 2

[8] The appellant's position is that he did not have sexual intercourse with the complainant as alleged by her because he had "blacked out". When he regained from his "black out", he stood up from beside the complainant, his pants were up to his knees.

[9] He submits that the complainant's evidence that she "blacked out" again after the co-accused earlier had sexual intercourse with her and when she regained consciousness another man was having sexual intercourse with her at a different location, cannot be reconciled with the evidence of PW2 Otto Delana. According to PW2 he saw two iTaukei boys and two iTaukei girls standing under a Vaivai tree and after a while all of them moved to the volleyball court. He then saw one female move further into the grass and was having sexual intercourse, both the man and the girl were "fully drunk" while another man was taking pictures of them. When he went near the scene, the appellant was still on top of the girl and when he saw the witness he pulled up his pants and ran away. The witness saw the girl naked and "blacked out".

[10] In other words, the appellant argues that according to PW1, the complainant was seen standing, then walking some distance and had sexual intercourse with the appellant. Had the complainant blacked out after the first act of sexual intercourse and only regained consciousness only to see the appellant on top of her, what PW2 described would not have been possible.

[11] Therefore, the appellant's counsel submits that even if the appellant's evidence is disbelieved there is a reasonable doubt as to whether the complainant had non-consensual sexual intercourse with the appellant, for PW2's evidence suggests that what he saw was an act of consensual sex.

[12] The respondent submits that even if the complainant had given consent it could not in law amount to consent as the complainant was not in a condition or had the capacity to give such consent due to her state of intoxication. PW2's evidence that he found the girl naked and 'blacked out' seems to support this contention. The appellant, however, submits that given PW2's evidence, the complainant did not seem to be in a state of

'black out' or temporary loss of consciousness due to intoxication and therefore could have lawfully consented to sexual intercourse. It is trite law that irrespective of the appellant's position, the prosecution had to prove lack of consent beyond reasonable doubt.

[13] I do not find these aspects being dealt with adequately in the summing-up or the judgment. Therefore, these are matters the full court should be left to consider with the help of the transcripts to see whether by reason of the above issues and any other inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence including that of the appellant, the court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt or not as to proof of guilt beyond reasonable doubt in the light of principles set out in **Kumar v State** [2021] FJCA 181; AAU102.2015 (29 April 2021) at para [8] to [24] and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) at para [36] to [44].

[14] The full court may also see whether the trial judge could have reasonably convicted on the evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

[15] The appellant also argues based on section 32 of the Crimes Act that intoxication on his part should be taken to negate the fault element of the offending. The fault element in rape is intention, knowledge or recklessness (see **Tukainiu v State** [2017] FJCA 118; AAU0086 of 2013 (14 September 2017). To me, it is clear from evidence that the appellant had been reckless as to whether the complainant was consenting even if he did not possess the required knowledge of lack of consent.

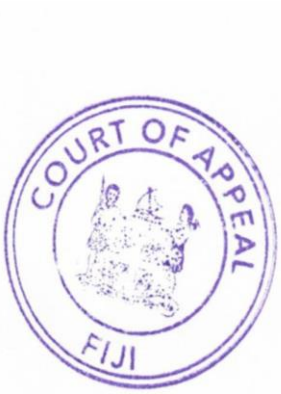
[16] However, the evidence of PW2 whom he relies on to impeach the credibility of the complainant also shows that the appellant was well aware of his surroundings and what he was doing in as much as he fled the scene upon seeing PW2 whom he possibly recognised in the same was PW2 recognised the appellant. Therefore, the appellant's evidence that he was so drunk that he blacked out and could not form the requisite fault element based on section 32 of the Crimes Act cannot be sustained in

the light of PW2's evidence. The same goes for the argument that the appellant was not physically capable of penetrating the complainants' vagina because his penis and feelings were non-functional due to intoxication also lacks credibility. He too was seen standing, walking with the group and having sexual intercourse with the complainant. PW2's evidence that the appellant's pants were up to knees supports the complainant's evidence that he was having sexual intercourse with her.

[17] However, this ruling should not be taken to necessarily mean that the appellant has a real prospect of success in his appeal before the full court. At this stage he certainly does not have a very high likelihood of success and therefore is not entitled to bail pending appeal.

Order

1. Enlargement of time to appeal against conviction is allowed.
2. Bail pending appeal is refused.



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