IN THE FIJI COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 090 of 2019

[High Court Case No. HAC 319 of 2015S]

BETWEEN : ALIPATE TUWAI

Appellant

AND : THE STATE

Respondent

Coram : Mataitoga, RJA
: Morgan, JA
: Clark, JA

Counsel : In Person for the Appellant
: Mr M. Vosawale for the Respondent

Date of Hearing : 3 November 2023
Date of Judgment : 29 November 2023

JUDGMENT

Mataitoga, RJA

1. I agree with reasons and conclusion of this judgment.

Morgan, JA

2. The Appellant was charged with one count of rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree 2009.

3. The Information read as follows:-

COUNT ONE

Statement Of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009

Particulars of Offence

ALIPATE TUWAI, between the 12th day of September 2015 to the 19th day of September 2015 at Suva in the Central Division, had carnal knowledge of SALANIETA TAKAVESI without her consent.

Brief Facts

4. The Appellant was 37 years old when the offence was committed and the complainant who lived next door to the Appellant was 13 years old. The material facts relating to the rape incident are stated by the trial Judge at paragraphs 11 to 19 inclusive of his judgment as follows:

> *"11. The complainant testified that she is now 15 years of age. Her date of birth is 11 September 2002. Therefore, as at 12 September 2015 to 19 September 2015, she would have just turned 13 years of age.*
>
> *12. The complainant testified that she was returning to her home in Gaji Road, Samabula, after spending one week at Wailoku (in Makelesi's house). She was accompanied by the accused, who is Makelesi's husband. This was on Saturday evening.*
>
> *13. The complainant and the accused had travelled in the Wailoku bus. The accused had been sitting in front of the bus and she was sitting at the back. The accused had rang the bell and signalled for her to get off at MH in Tamavua.*
>
> *14. After getting off the bus they went to Tuisowaqa Road. From there they walked to the Namadi main road. After coming out from Namadi they had gone down the Nabua Road. From Nabua they followed the short cut to Bayview. After reaching Bayview they had walked through the short*

cut to Raiwasa. They had gone past the Raiwasa Bridge. Then she had looked up and saw the road and she saw vehicles passing. She told the accused that this is the short cut to their home. The accused had said there is another short cut in front.

15. The complainant testified that the accused was in front and she was following him. He went right in front and waited for her. When she came near him, then he had given her a $10 note. When he gave the $10 then he had pushed her on the grass. The complainant tried to stand up. However, the accused had pointed on her forehead forcefully and she had fallen down.

16. Thereafter, the accused took off his t-shirt and used it to close her mouth. He took off his t-shirt and tied it on her mouth. After he tied the t-shirt on her mouth, he held both of her hands with his right hand. The complainant had tried to move around so she can get up. But she could not do so. The accused had then taken off her pants and her panty, with his left hand. At the time the complainant was lying down facing upwards.

17. Thereafter, the accused held the complainant's legs and put it up. Then he took off his pants and his underwear. He had pulled up her t-shirt and bra. Both at the same time. He took up one of her legs and pushed it up and he tried to separate both he thighs and he knelt between both of them. He sucked her nipple and bit it. Then he took his penis and put it into her vagina. His penis went inside her vagina. The complainant said it had been painful. She also testified that when the accused's penis went inside her vagina, she felt that it was cracked. The accused's penis had been in her vagina for a short time.

18. Thereafter, the accused pulled out his penis, and wore his pants. She had then got up and worn her clothes. The accused had then threatened her and told her not to tell anyone about the incident. He had said if she told it to anyone that he will kill her.

19. Thereafter, the complainant testified as to how she hand returned to her home at Gaji Road. She said that she did not tell anyone at home about the incident because the accused had threatened her."

5. At the trial in the High Court after the Summing Up, the Assessors unanimously opined that the Appellant was guilty of the charge of rape and in the Judgment delivered on 14 August 2018 the trial judge agreed with the Assessors and convicted the Appellant as charged. The Appellant was sentenced on 17 August 2018 to 13 years and 09 months of imprisonment with a non-parole period of 10 years and 09 months.

6. The Appellant did not appeal the conviction or sentence within the time prescribed by Section 26 of the Court of Appeal Act. On the 26th July 2020, the Legal Aid Commission on behalf of the Appellant made an application for enlargement of time to appeal pursuant to Section 35 (1) (b) of the Court of Appeal Act supported by an affidavit. The application disclosed a single ground of appeal namely that the conviction was unreasonable and not supported by the evidence.

7. The Legal Aid Commission filed submissions in support of the application on 16 September 2020 and the State filed submissions in response on 23 October 2020.

8. The application was heard by Prematilaka JA on 8 December 2020 and a ruling was delivered on 09 December 2020 refusing leave for enlargement of time to appeal.

9. Being dissatisfied with the ruling the Appellant filed a renewal application pursuant to Section 35 (3) of the Court of Appeal Act on 31 December 2020 (*"The renewal application").* The Appellant also filed together with his renewal application seven additional grounds of appeal against conviction and submissions on the amended grounds of appeal against conviction. Curiously however the submissions relate to further additional grounds which were filed later on 23 January 2023.

10. The Appellant filed an affidavit in support of his application to appeal out of time on 10 November 2021 and submissions for amended grounds of appeal against conviction on 18 November 2021. Again these submissions relate to the additional grounds that were filed later on 23 January 2023.

11. The Appellant filed a further notice of additional grounds of appeal on 23 January 2023 pursuant to Order 37 of the Court of Appeal Rules comprising 4 additional grounds and which contained the following statement:-

> *"…the above grounds are to be considered by the Court of Appeal therefore all other grounds are deemed abandoned forthwith."*

12. On 20 April 2023, the Appellant filed submissions for the amended grounds of appeal against conviction that were filed on 31 December 2020. Although the submissions in the

heading purported to be in respect of grounds filed on 31 December 2020, they in fact relate to the additional grounds referred to above filed on 23 January 2023.

13. The State filed written submissions addressing the Appellants additional grounds of appeal filed on 23 January 2023 on 9 November 2023.

Statutory Authority

14. Section 35 (3) of the Court of Appeal Act provides:-

> *"(3) If the Judge refuses an application on the part of the appellant to exercise a power under subsection (1) in the appellants favour, the appellant may have the application determined by the court as duly constituted for the hearing and determining of appeals under this Act."*

15. At the hearing before this Court on 8 November 2023, Mataitoga RJA explained to the Appellant that the hearing before this Court was to consider his application for leave for enlargement of time to appeal against conviction. This Court could therefore not consider the additional grounds of appeal filed subsequent to the hearing by a single judge and could only consider the grounds and submissions that were before the single judge on the hearing of his application for enlargement of time. The additional grounds of appeal and the submissions in support thereof could only be considered if leave for enlargement of time was granted.

16. The Appellant confirmed to the Court that he understood this. He was also asked whether he had applied to the Legal Aid Commission to represent him in this hearing and he responded that he had and that they had refused his application.

17. He was also asked whether he wanted time to consult with the Legal Aid Commission or any other party before proceeding with the hearing and he responded that he did not wish to.

18. Neither party made submissions before this Court on the application for leave for enlargement of time or on the Ruling of Prematilaka RJA refusing leave dated 9 December 2020.

19. I have read and analysed the High Court Record (including the Summing Up, Judgment and Sentence) and the submissions made by the Appellant and the State in support and in opposition to the application for leave for enlargement of time to appeal against conviction. I have also read, analysed and reviewed the Ruling of Prematilaka RJA dated 9 December 2020 and concur with his reasoning and decision to refuse enlargement of time. In particular I note and concur with the following:-

(a) Guidance for the determination of an application for extension of time

I concur with the following analysis of the law in this regard at paragraphs (5) to (10) of the Ruling and can do no better than repeat them here:-

*"5 Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009, 24 April 2013 [2013] FJSC 4, **Kumar v State; Sinu v State** CAV0001of 2009: 21 August 2012 [2012] FJSC 17.*

6. In ***Kumar*** *the Supreme Court held*

'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors 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?

7. ***Rasaku*** *the Supreme Court further held*

'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court.

*8 The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.*

'(a).....

(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.

(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.

(d) 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.

(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'

9. *Sundaresh Menon JC also observed*

'27....it virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.'

10 *Under the third and fourth factors in* ***Kumar,*** *test for enlargement of time now is* ***'real prospect of success'.*** *In* ***Nasila v State*** *[2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said:*

'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a ***'real***

prospect of success' (*see* ***R v Miller*** *[2002] QCA 56 (1 March 2002) on any of the grounds of appeal....."*

(b) Reasons for delay

The period of delay was 10 months.

20. The Appellant filed a further affidavit on 18 November 2021 subsequent to the hearing of his application for enlargement of time setting out explanations for the delay where he claims:-

> *"3. That I have a memo to prove that I have filed a request to the registrar of the High Court seeking them to provide me copies of Summing Up, Judgment and Sentence and Sets of Disclosures dated 17 April 2019*
>
> *4. That my trial counsel Mr Vosarogo never returned my trial documents to me after trial."*

21. In an affidavit however filed on the 26 July 2019 in support of his application seeking an enlargement of time for leave to appeal against conviction, the Appellant swore as follows;

> *"4. After I was sentenced by the High Court I did not have any documents with me that of my summing up, judgment and sentence. I could not prepare my appeal. I had written to the High Court criminal registry for copies of my court documents to be made available to me, however the court registry had not sent to me all my court documents at once but one after the other.*
>
> *5. I was represented by a private lawyer which I did not make attempts to contact any trial counsel to obtain any court documents after I was sentenced."*

22. I note that the memo to the court is dated well outside the time for appealing.

23. I agree entirely with the following statement of Prematilaka JA at paragraph 14 of his Ruling:

> *"The appellant's excuse for the delay is that he did not have his court documents such as the summing-up, judgment and sentence and therefore could not settle his appeal. The state counsel summited that all accused are given those documents by the trial court and they should be in their possession. In any event, the appellant had been defended by a senior attorney and the appellant could have sought his assistance to appeal but the appellant had stated that he did not make contact with him after he was sentenced. Therefore, the delay was his own making and the explanation for it is not acceptable."*

24. I also agree that the delay of 10 months is substantial on the authority of the Court of Appeal in **Qarasaumaki v State** (2013) FJCA 119; AAU0104.2011 (28 February 2012)

(c) Merits of the Appeal

I agree with the view of Prematilaka RJA that delay alone will not decide the matter of extension of time and the Court should consider the merits of appeal as well. This involves applying the third and fourth factors in **Kumar** supra.

25. The trial judge summarised the evidence in his sentencing as follows:-

> *"4. It was proved during the trial that, between the 12 September 2015 and the 19 September 2015, at Suva, you penetrated the vagina of ST, with your penis, without her consent.*
>
> *5. You are an immediate neighbour of the complainant at Gaji Road in Samabula. The complainant was only 13 years of age, at the time you committed the above offence on her (her date of birth being 11 September 2002), and as such, she was a juvenile.*
>
> *6. The complainant clearly testified as to how, you penetrated her vagina with your penis, without her consent. You were entrusted to take the complainant to her home on that fateful Saturday evening. Instead, on the way, you lured her to a grassy spot and raped her. By your shameful act you have robbed the innocence of a 13 year old child."*

26. The only submission made by the Appellant at the hearing for leave was that had the trial judge independently evaluated the evidence he would have entertained a reasonable doubt as to whether there was a lack of consent and whether the Appellant had known that the complainant was not consenting. I can again do no better than repeat the findings of Prematilaka RJA in this respect in his ruling at paragraphs 22 to 25 of the Ruling:-

> *"22. The appellant relies on the decision in **Kaiyum v State**; [2014] FJCA 35; AAU0071.2012 (14 March 2014) and **Chandra v State** [2015] FJSC 32; CAV21 of 2015 (10 December 2015) in support of his argument that the judge had failed in his duty as aforesaid.*
>
> *23. However, what could be identified as common ground arising from several past judicial pronouncements is that 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 trail 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(27February 2014)* ***Kaiyum v State*** *[2014] FJCA 35; AAU0071.2012 (14 March 2014),* ***Chandra v State*** *[2015] FJSC32, CAV 21.2015 (10 December 2015) and* ***Kumar v State*** *[2018] FJCA 136; AAU103.2016 (30 August 2018)].*

24. *On the other hand, the trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. 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.*

25. *On a perusal of the judgment it is clear that the trial judge had directed himself in accordance with the law and the evidence which the judge had discussed in the summing-up to the assessors. Thus, the trial judge had performed his task quite satisfactorily in agreeing with the assessors and in the process had considered all the evidence once again."*

27. I have considered the evidence of the victim relating to the issue of consent particularly as set out in paragraph 58 of the Summing up and agree with the trial judge that the evidence demonstrates that the victim had not consented to sexual intercourse and that the Appellant should have known that she had not consented.

28. I am also of the view that the trial judge properly directed the assessors with respect to how they should analyse the issue of consent when he stated at paragraphs 48 to 52 of his summing up as follows:-

"48. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

49. Apart from proving that the complainant did not consent for the accused to insert his penis, into her vagina, the prosecution must also prove that, either the accused knew or believed that complainant not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

50. A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case had just turned 13 years of age at the time of the incident, and therefore, she had the mental capacity to consent.

51. It must be noted that in our law, no corroboration is needed to prove all allegation of a sexual offence. Corroborative evidence is independent that supplements and strengthens evidence already presented as proof of a factual matter or matters.

52 If you are satisfied beyond any reasonable doubt that the accused, between the 12 September 2015 and the 19 September 2015, at Suva, penetrated the vagina of ST with his penis, without the consent of the complainant and the ache accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting, then you must find him guilty of the count of Rape."

29. Prematilaka RJA concluded at paragraph 28 of his Ruling as follows:-

> *"28. The trial judge had summarized and once again considered the complainant's evidence including her evidence on lack of consent from in paragraphs 11-18 of the judgment. There is no doubt whatsoever of lack of consent on the part of the victim in this case. In any event lack of consent was not a trial issue at all. The appellant's position had been that there was no such incident of rape as alleged by the victim."*

I agree entirely with this conclusion.

30. Having considered the evidence as a whole, I too must reach the conclusion that I cannot say as contended by the Appellant that the verdict was unreasonable and cannot be supported by the evidence. There was evidence on which the verdict could be based and it was reasonable for the trial judge to convict the Appellant on the evidence presented at the trial. I also agree with Prematilaka JA that there is therefore no real prospect of success of the appellants appeal under Section 23 (1) of the Court of Appeal Act.

Prejudice to the Respondent

31. I agree with Prematilaka RJA that there is no prejudice to the respondent by an extension of time but the victim would be prejudiced if there were a re-trial after an appeal in view of her victim impact statement referred to in paragraph 7 of the sentencing order.

32. Notwithstanding the pronouncements of Mataitoga RJA in paragraph 15 above, because the Appellant was not represented at the hearing, I make the following comments in respect of the Appellant's additional grounds of appeal:-

33. The Appellant gave notice in his renewal application filed on 31 December 2020 pursuant to Section 37 (1) (a) and (b) of the Court of Appeal Rules that he would be filing supplementary grounds. He also noted in his Notice of Additional Grounds of Appeal filed on 23 January 2023 that he sought leave pursuant to Rule 37 of the Court of Appeal Rules to file additional grounds of appeal.

34. The procedure relating to notices of appeal is governed by Rule 35 of the Court of Appeal Rules.

35. The relevant part of Rule 35 provides:-

"35(1) an appeal to the Court of Appeal shall be by way of re-hearing and shall be brought by notice of motion (in these Rules referred to as "notice of appeal")

"(3) A person desiring under the provisions of the Act, to appeal to the Court of Appeal, shall commence his or her appeal by sending to the Registrar a notice of appeal or notice of application for leave to appeal or notice of application for extension of time within which such notice shall be given, as the case may be, in the form of such notices respectfully set forth in Schedule 2.

(4) in addition to complying with Rule 5 such notice of appeal shall precisely specify the grounds (including, if any questions of law) upon which the appeal is brought."

36. The procedure relating to amendment of notices of appeal is governed by Rule 37 which provides:-

"37(1) a notice of appeal may be amended:-

(a) by or with the leave of the Court of Appeal at any time;

(b) without such leave, by supplementary notice filed with the Registrar in quadruplicate and served, not less than 14 days before the opening day of the sitting of the Court of Appeal at which the appeal is listed to be heard, upon each of the parties upon when the notice to be amended was served."

37. It is noted that in his renewal application for leave to appeal against conviction on 31 December 2020 the Appellant advised that he would rely on the ground argued before the single judge and gave notice pursuant to Rule 37 (1) (a) and (b) that he would be filing supplementary grounds in addition to the ground already filed.

38. Although not put before this Court there may be an argument, in the circumstances of this appeal, that the filing of the Appellant's additional grounds was in effect an amendment of his notice of application for extension of time which he was entitled to do under Rule 37 (1) (b). Without deciding this point, because the accused was unrepresented, I am of the view that I should consider the Appellants additional grounds filed on the 23 January 2023.

39. The Appellant has filed four additional grounds which are as follows:

"***Ground One***

"THAT the learned trial judge erred in law and in fact by not adequately allowing the appellant in having additional witness for the defence under part

XI (7) and (2) of the Crimes Decree and directing this collated information to the assessors as evidence to the complainant during the trial.

Ground Two

THAT the learned trial judge erred in law and in fact when he failed to direct himself and the assessors the importance of the medical practitioners' report which challenges the credibility of the complainant's statement. This is a miscarriage of justice and prejudiced to the appellant.

Ground Three

THAT the learned trial judge erred in law and in fact in not directing himself and the assessors on the inconsistent statements by the complainant that has resulted in a miscarriage of justice and prejudice to the appellant

Ground Four

THAT the learned Trial Judge erred in law and in fact when he failed to consider that the charge against the appellant was defective thus resulting in a miscarriage of justice."

40. I will now deal with each of these grounds.

41. ***Ground One***

"THAT the learned trial judge erred in law and in fact by not adequately allowing the appellant in having additional witness for the defence under part XI (7) and (2) of the Crimes Decree and directing this collated information to the assessors as evidence to the complainant during the trial."

This ground is frivolous. The Respondent stated the following in paragraphs 14 to 17 of its submission

"14. At the close of prosecution case, the appellant was given options by the learned Trial Judge at paragraph 61 of the summing up (refer to page 95 of Court record); the learned trial judge had directed the assessors, stating:

"61…At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to remain

silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent."

15. *The appellant was represented by a senior defence counsel at trial, it was the defence position after case to answer (refer to page 389 of Court record) that they were to remain silent.*
Mr. Vosarogo: We already have discussed. We going to remain silent. Now, we are ready to close tomorrow.

16. *The appellant had filed notice of alibi (refer to page 117 of Court record) on 24th February 2016, at trial the appellant abandoned his alibi defence and not pursued it any further.*

17. *The appellant through his counsel had made clear during trial that the defence was of complete denial (refer to page 281 of Court record)"*

42. I concur with the above

43. ***Ground Two***

"THAT the learned trial judge erred in law and in fact when he failed to direct himself and the assessors the importance of the medical practitioners' report which challenges the credibility of the complainant's statement. This is a miscarriage of justice and prejudiced to the appellant."

The evidence of Dr Elvira Ongbit was recorded at paragraph 60 of the summing up as follows:-

"i. Currently she is serving as a Medical Officer at Medical Services Pacific (MSP). She has been based at MSP since 2012. She has been practising as a Medical Officer for more than 35 years. She now specialises in Obstetrics and Gynaecology.

ii. She conducted a medical examination on the complainant, on 28 September 2015 at 1600hours. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE2.

iii. The Doctor testified as to her specific medical findings (column D12) or vaginal examination findings. She said the hymen was fimbriated and elastic. There were healed, incomplete, hymenal lacerations at the 3.00 o'çlock, 5.00 o'clock, 7.00 o'clock and 9.00 o'clock positions.

iv. The Doctor explained in layman's terms as to what was meant by the above medical findings.

v. The Doctor also explained that in view of the nature of the lacerations the healing period would be minimum of 7 days to a maximum of 14 days.

vi. In cross-examination, the following question was put to the witness:

Q. If during the course of a sexual intercourse, a breakage sound occurs, does that mean anything in your medical field? A cracking sound? Does that mean anything in your medical field?

A. No. If the hymen breaks, it doesn't give a sound"

44. The trial judges directions to the Assessors with respect to the Doctors evidence was as follows:-

> *"The prosecution relies upon the evidence of the Medical Officer, Dr. Elvira Ongbit. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise."*

45. I do not consider that the doctor's evidence challenges the credibility of the complainant's evidence as a whole in support of the charge of rape. I therefore do not consider that this ground has any merits.

46. ***<u>Ground Three</u>***

> *"THAT the learned trial judge erred in law and in fact in not directing himself and the assessors on the inconsistent statements by the complainant that has resulted in a miscarriage of justice and prejudice to the appellant"*

47. The Judge directed the assessors in paragraphs 20; 21, 69 and 70 of his summing up regarding inconsistencies as follows:

> *"[20] in assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.*

[21] However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.

[69] The defence also showed an inconsistency in the evidence given by the complainant during her testimony in Court in comparison to her statement made to the Police. I have already directed you on how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, they you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected. However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question.

[70] To what extent such inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide."

48. These directions cannot be faulted.

49. The Judge also stated the following in paragraph 4 of his Judgment:-

> *"4. I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors."*

There is no merit in this ground.

50. ***<u>Ground Four</u>***

> *"THAT the learned Trial Judge erred in law and in fact when he failed to consider that the charge against the appellant was defective thus resulting in a miscarriage of justice."*

This ground is frivolous. The Defence Counsel at the trial did not raise any issue with the charge. There is no merit in this ground.

51. I do not consider that the additional grounds and submissions filed by the Appellant subsequent to the Ruling of Prematilaka RJA dated 9 December 2020 alter my conclusion in paragraph 30 above that there is no real prospect of success of the Appellants appeal under Section 23 (1) of the Court of Appeal Act.

Clark JA

52. I concur in the judgment of Morgan JA.

53. **Order**

I therefore order that;

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

The Hon Mr. Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

The Hon Mr. Justice Walton Morgan
JUSTICE OF APPEAL

The Hon Madam Justice Karen Clark
JUSTICE OF APPEAL