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

CRIMINAL APPEAL NO. AAU 092 of 2017
[High Court of Lautoka Criminal Case No. HAC 27 of 2013]

BETWEEN	**:**	**AMARJEET SINGH**
		Appellant
AND	**:**	**STATE**
		Respondent

Coram	**:**	**Prematilaka, RJA**
	:	**Bandara, JA**
	:	**Rajasinghe, JA**
Counsel	**:**	**Appellant in person**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	**:**	**02 February 2023**
Date of Judgment	**:**	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been charged in the High Court of Lautoka on two counts of attempt to commit rape [section 208], two counts of rape [section 207 (1) and (2) (a) and (3)] and one count of indecent assault [Section 212] contrary to the Crimes Act, 2009. The alleged acts had been committed on 18 (attempted rape and rape), 19 (attempted rape and rape) and 29 (indecent assault) January 2013 at Namulomulo, Nadi, in the Western Division.

[2] Under the 01st count the appellant faced an allegation of an attempt to insert his penis into the anus of YK, under the 02nd count an alleged insertion of his penis into the vagina of SK, under the 03rd count an alleged attempt to insert his penis into the anus of YK, under the 04th count an alleged insertion of his penis into the vagina of SK and under the 05th count it was alleged that he rubbed his penis on the leg of YK. At the time of the offences, YK and SK were 06 years and 07 years of age respectively.

[3] After trial, the assessors had expressed a unanimous opinion of guilty on all five counts. The learned High Court judge in the judgment had agreed with the assessors and convicted the appellant as charged. He was sentenced on 07 December 2015 to 03 years of imprisonment each on the two 'attempt to commit rape' charges, 14 years and 10 months and 15 days of imprisonment each on the two 'rape' charges and 02 years of imprisonment on the 'indecent assault' charge; all sentences to run concurrently with a minimum serving period of 12 years.

[4] The appellant's application for enlargement of time to appeal against conviction was refused by the single judge of this court and the appellant had renewed his application before the full court. On the day of the hearing of the appeal, he filed Form 3 seeking to abandon his sentence appeal which in any event had not been pursued at the earlier hearing before the single judge. This court having followed the guidelines given in **Masirewa v State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010) satisfied itself of all relevant matters regarding the appellant's application to abandon his sentence appeal and decided to allow the same. Accordingly, the appellant's sentence appeal should stand dismissed.

[5] The evidence against the appellant is summarized in the summing-up as follows:

01st victim (SK)

'*55. On 18th January, 2013 her parents had gone somewhere leaving her and her younger sister YK at home with Chintu. Chintu called her and her sister YK in his room. Then he asked YK to bring a condom form mother's room. Then he asked them to take off their clothes. She took off her clothes. Chintu also took off his trousers and underwear. He wore the condom on punnu and asked YK to do the sit-ups on his punnu,*

meaning penis. Chentu was lying down on the bed when YK was doing the sit-ups.

56. *After YK had finished, Chintu called her and asked her to do the same. He was holding his punnu with one hand while she was doing sit-ups on his punnu. His punnu went inside her pupu. Pupu is the part where they urinate from. She started having pain. Blood was coming out. YK was standing beside.*

57. *As her mother was coming home he asked them to hurry up and wear the clothes. He asked her not to tell mom, if she does he will go to jail and no one will be there to cuddle her.*

58. *On the following day, 19th January 2013, Chintu went to grandma's room and asked YK to bring coconut oil and a condom. YK brought all those and gave them to Chintu. Then he asked her to take off her clothes. He gave her the oil and asked her to put it on her pupu. YK was standing beside. Then he wore the condom and applied oil on pupu. He lied down and asked her to do the sit-ups. She did the sit- ups on his punnu. She had a strange feeling. When papa was coming he asked her to wear the cloths.*

59. *On the 29th January, 2013, Chintu took YK to the well. YK told her what Chintu did to her near the well. Chintu had opened up his zip, took out his punnu and rubbed it on her legs. YK had felt bad. She told her mom what Chintu did to them. Mum went to police and reported the matter. Police officers took them to the hospital where medical check-up was done.*

60. *Under cross examination, SK said that she told mother about this on 18th and in turn mum told her father. She was not in pain. On 19th she had a headache. She did not show blood to mom. She had already washed. Blood was not on her clothes. When asked about sit- ups, she demonstrated to us how she did sit ups.*

02nd victim (YK)

'62. Next witness for the Prosecution was complainant, YK. She was year one student in 2013. She said that Chintu was the person who did all bad things to her. She recognised the accused sitting in the dock.

63. *Chintu went to his room and called her and sister in. He asked her to bring a condom. She brought a condom from mother's room. He wore the condom on his punnu. He took off his clothes and asked her to do the sit-ups. He was lying on the bed. She started having pain when she was doing sit ups on his punnu. She said she won't do it. Then he asked her sister SK to do the sit-ups. She saw SK doing sit ups on Chintu's punnu.*

Then he showed her how his punnu becomes small. Then mum was coming. He asked them to hurry up and wear the clothes.

64. On 19th January, Chintu called her and her sister SK in his room. He asked her to bring oil. She brought oil and gave it to Chintu. He then took off their cloths and applied oil on their pupus. He asked to do the sit ups on his punnu. She refused as it is painful. Then he asked her sister SK to do the sit-ups. Father was coming. He asked them to go and told not to tell anything happened. She did not tell anybody until the incident near the well happened.

65. On 29th January, 2013, Chintu took her to the well. He opened up his dress and undressed her. Then he started rubbing his punnu on her legs. She went home and told her sister, SK, what happened to her near the well. SK in turn told mother. Mother reported the matter to Police. She told Police officers what happened and showed the room and the well when police visited home. She was feeling bad and strange.

66. Under cross examination, she said she and her sister were in pain and she saw blood on her. They were able to walk after Chintu did these things.

67. She said she knew about condoms. They are round and long. Mother had told about condoms when she was given them at the hospital. She told her mother about these incidents little by little because Chintu had told her not to tell and otherwise he would go to jail and no one will be there to cuddle them.

[6] The medical examination of the child victim SK had revealed that her hymen was not intact and torn and the vaginal opening was loose and soft. The doctor had been of the opinion that any kind of penetration whether penile or fingering could cause such a condition. Regarding the other child victim YK, the doctor had said that her hymen was intact. Her vaginal ores was normal and no signs of injuries had been observed. The doctor had concluded that there was no visible sign of penetration.

[7] The trial judge had also summarized the appellant's case in the summing-up as follows:

'78. The accused elected to give evidence. He said that he was staying at his small father Sailesh Kant's house till 2013, looking after his bullock. Sailesh is father of the complainants. Both complaints are his cousins.

79. He denied all the allegations levelled against him. He said that both complainants lied to Court on their mother Hem Lata's instructions. Hem Lata was jealous of him and was trying to chase him away from the house. She was not good with him as he refused to give her money although she always wanted money from him.

80. Hem Lata was having an affair with a person by the name of Mohammed Ameem. Ameem was a friend of Sailesh and was staying in the bush belonging to him. Ameem was on a bench warrant absconding arrest. Hem Lata cooked food for Ameem and took to the bush to feed Ammem.

81. Accused admitted that he was present at complainant's house with all other family members of the complainant on the 18th, 19th and 29th of January 2013.

82. Under cross examination, Accused said that Ameem was staying both in the complainant's house and in the bush. He said that he had informed his uncle Sailesh about the affair Lata was having with Ameem. But Uncle did not do anything to Lata. The whole village knew about the affair.'

[8] The appellant's appeal against conviction is out of time by over 01 year and 05 months. The Rules of Court have to be observed and must not be disregarded or ignored [vide **Halsbury's Laws** (4th Ed) Vol 37 para 25; **Revici v Prentice Hall Inc** [1969] 1 All ER 772 (CA); **Samuels v Linzi Dresses Ltd** [1980] 1 All ER 803, 812 (CA)] and in order to justify a court extending time there must be some material before court (vide **Ratnam v Cumarasamy** [1964] 3 All ER 933 at 935) and if no excuse is offered, no indulgence should be granted [vide **Revici v Prentice Hall Incorporated and Others** (supra)].

[9] The discretion to extend time is given for the sole purpose of enabling the court to do justice between the parties which means that such discretion can only be exercised upon proof on the material before court that strict compliance with the rules will work injustice to the applicant [see **Gallo v Dawson** [1990] HCA30; (1990) 93 ALR 479] . In addition, the practical utility of the remedy sought on appeal, the extent of the impact on others similarly affected, any impact on the administration of justice and any floodgates considerations have to be considered relevantly in exercising the court's discretion (see **R v Knight** [1998] I NZLR 583 at 589).

[10] 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).

[11] 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 may 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, for the incarcerated appellants who are unrepresented do face difficulties in the preparation of their appeals but those difficulties do not justify setting aside the requirements of the Act and the Rules (vide **Fisher v State** [2016] FJCA 57; AAU 132 of 2014 (28 April 2016)].

[12] The delay of this conviction appeal is very substantial. The appellant had not given any convincing explanation for the delay except that his trial counsel from the Legal Aid Commission (LAC) had allegedly informed him that his appeal would be prepared and lodged with the Court of Appeal Registry. The appellant claims to have got to know that the said counsel had not filed his appeal and resigned from the LAC. Then, he had filed his appeal in person belatedly. However, LAC represented him until the single judge hearing in the Court of Appeal where the counsel for the LAC had conceded that the length of the delay is substantial and the reasons for the delay

may not be justifiable. For example a misunderstanding between the petitioner and his counsel who appeared for the petitioner at the hearing before the justice of appeal and further delay on account of the difficulty in obtaining the papers necessary to prepare the petition were not considered as satisfactorily explanations for the delay of 01 year and 09 months by the Supreme Court [see **Tiritiri v State** [2014] FJSC 15; CAV9.2014 (14 November 2014)].

[13] Nevertheless, I would 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 not averred any prejudice that would be caused by an enlargement of time.

[14] For the purpose of the full court hearing this court would consider the appellant's grounds of appeal urged before the single judge and subsequent grounds of appeal filed thereafter.

Grounds of appeal before the single judge

'Ground 1: *That Learned Trial Judge erred in law and in fact having considered in his Judgment that the two complainants corroborated each other without any contradiction, when accepting their evidence to be credible, probable and believable, failing to consider that;*

i) Corroboration is not required by law; and
ii) The two complainants' evidence are not independent of each other.

Ground 2: *That Learned Trial Judge erred in law and in fact by not adequately directing himself and the assessors on how to approach the contradiction in the evidence of SK and Hem Lata in relation to Mohammed Ameen*

Ground 3*:* *That Learned Trial Judge erred in law and in fact, by taking into account in his judgment the hearsay evidence adduced by Hem Lata that her husband told her not to report the matter to police, placing considerable weight on such evidence, when assessing the delay of the complaint lodged with police.*

Grounds of appeal filed after the renewal application

Ground 4

THAT the Learned Appellate Judge erred in his duty to consider and analyse the explanation given by the complainant's mother to delay to report the incident by 7 days making the prosecution case to be unreliable to be given credit and trustworthiness.

Ground 5

THAT the Learned Appellate Judge erred in his duty to properly analyse and assess the independent element placed upon the second victim who did not show any slight penetration when medically examined by the independent expert witness medical findings. Failure to oversee this error cause a gross miscarriage of justice on the appellant.

Ground 6

THAT the Learned Appellate Judge erred in his duty by failing to ponder on the inconsistent statements given by the witnesses and their recorded caution interview records. Failure by the Single Judge of appeal to analyse this inconsistency caused the trial of the matter to miscarry from the outset.

01st ground of appeal

[15] The appellant's complaint is based on paragraphs 5 and 6 of the judgment. They are as follows:

> *'5. Prosecution evidence is consistent, plausible and believable. On the other hand, Defence version is not consistent and believable. Although the accused has nothing to prove his innocence or prove anything at all, he failed to create any doubt in the Prosecution case. Evidence led in the trial by the Prosecution proved all the charges beyond reasonable doubt.*
>
> *6. Both complainants presented direct evidence in respect of Rape and Attempted Rape incidents. Their evidence was consistent, probable and believable. **Although their evidence need not necessarily be corroborated by an independent source, they corroborated each other without any contradiction.** Prosecution case was further bolstered by recent complaint evidence of the mother of the complainants, Hem Lata and by doctor's expert evidence which is consistent with rape of SK. (emphasis added)*

[16] The appellant argues that it was wrong for the trial judge to have said that one victim corroborated the other when there was no requirement in law to look for corroboration. It is now trite law that by section 129 of the Criminal Procedure Act, 2009 the common law requirement of corroboration in sexual cases was abolished. However, that does not mean that when there is corroboration of the complainant's evidence such evidence should be disregarded. In fact evidence corroborative of the complainant's testimony, if available, would go to strengthen the prosecution case. No sensible and vigilant prosecutor should refrain from leading such corroborative evidence if and when available.

[17] In **Prasad v State** [2019] FJSC 3; CAV0024.2018 (25 April 2019) the Supreme Court looked into a direction by the trial judge on corroboration where he had said that though there is no rule requiring corroboration, the assessors may look for evidence supportive of the complainant's evidence but such evidence should come from some independent source to support the victim's story. The Supreme Court held:

> *'9. The effect of this passage was that the assessors were being told that they could conclude that Prasad was guilty even if there was no corroboration of the girl's account. But they could also take into account such corroboration of her account as there was in deciding whether her account was true. That meant that the judge had to explain to the assessors what evidence was capable of amounting to corroboration. The help he gave them was that it was "independent evidence" which supported her account. That was entirely correct, but some explanation of what "independent" meant in this context was required.* ***It did not mean that the evidence had to come from someone who was independent in the sense that they did not know the girl and therefore had no axe to grind. It meant that the evidence had to be independent of the girl. In other words, she could not be the ultimate source of the evidence if the evidence was to amount to corroboration of her account****. (emphasis added)*

[18] The appellant complains that the evidence of SK and YK cannot be treated as independent of each other and therefore, the impugned direction was erroneous. It is very clear from the evidence that SK's account of what happened to YK and YK's account of what happened to SK, was totally independent of each other. Neither relied on what one had told the other. They were the subjects as well as witnesses to the

bizarre sexual orgy the appellant perpetrated on them, one after the other. The fact that they happened to be blood relations *i.e.* sisters did not affect the independent nature of each one's account of what happened to the other. Each victim's evidence was independent of the other. Therefore, the evidence of the victims was mutually corroborative.

02nd and 06th ground of appeal

[19] The appellant complains that there was inadequate direction to the assessors and himself by the trial judge on how to approach the contradiction or inconsistency in the evidence of SK and her mother Hem Lata. The basis of this complaint emanates from Hem Lata's denial of any knowledge or affair by her with a man called Mohammed Ameen whereas SK had said that he used to come home and the mother knew him. The appellant's position had been that Hem Lata got the two daughters to falsely implicate him as he caught her affair with Mohammed Ameen which Hem Lata had denied. The trial judge had referred to this matter in paragraph 100 of the summing-up and paragraph 21 of the judgment:

> *'100. Hem Lata totally denied having an affair with Mohammed Ameem. She said that she did not even know such a person. SK said that Ameem used to come to her place and Hem Lata also knew him. You consider these contradictory versions affect the credibility of the prosecution version.*
>
> *'21. Hem Lata's evidence that she never knew Ameem is not consistent with that of her daughter, SK's while her sister, YK's evidence conformed to her mother's evidence on that point. I directed the assessors on inconsistencies. Assessors found Hem Lata's evidence truthful in light of overall evidence led in the trial. Finding of assessors, in my view, is not perverse.'*

[20] The appellant's suggestion to Hem Lata in my view is farfetched. It is unthinkable that Hem Lata, being a mother would involve 06 year old and 07 year old two daughters in sexual abuse charges including rape with the appellant (who was their cousin) merely because he caught her illicit affair with a man called Mohammed Ameen even if the appellant had in fact caught her affair with Ameen. On the other

hand the appellant's suggestion becomes even more hilarious when one considers the two child victims' versions of events where they had with undoubted clarity and detail described how the appellant committed sexual abuses on them. The manner and method of sexual abuses employed by the appellant had been somewhat unorthodox and could not have been fabricated by the two children or even the mother. Even if the mother had coached the daughters, they would not have been able to give a vivid description of them unless they themselves experienced it.

[21] In any event, the alleged inconsistency is not on a fundamental issue but only on some peripheral matter. Even if Hem Lata is totally disbelieved there was ample evidence to convict the appellate based on the evidence of the two victims and medical evidence. As stated in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the alleged contradiction cannot shake the foundation of the prosecution case.

> *'[13]…….. 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 (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*

[22] Further, the trial judge had adequately addressed the assessors of the appellant's position that Hem Lata had fabricated sexual abuse allegations against him and he challenged them through the daughters because he had refused to give her money and also because he had caught her having an affair with Mohammed Ameen (which according to the appellant the whole village was aware of and he had brought it to the notice of her uncle *i.e*. Hema Lata's husband but he had not done anything about it) – see paragraph 79-82 of the summing-up. The trial judge had addressed himself on the appellant's position in paragraphs 20-26 of the judgment.

03rd and 04th grounds of appeal

[23] The appellant criticizes the trial judge for having taken into account in the judgment what he calls some hearsay evidence adduced by Hem Lata in that she had told in evidence that her husband had told her not to report the matter to police. He points out paragraph 16 of the judgment.

'16. Hem Lata reported the matter to Police on 31st of January, 2013. She said that she took seven days to relate the matter to her husband because she thought it is a lie and she was not assured. There was another discouraging factor also. Chintu is her husband's nephew. Husband was insisting her not to report the matter to police. YK had told Hem Lata about these incidents little by little because Chintu had told her not to tell. YK had come up with the full story only after the incident at the well on the 29th of January 2013.In this context, explanation given by Hem Lata for the delay in reporting to Police is acceptable.'

[24] The appellant argues that because Hem Lata's husband was not called to give evidence what she had told about his having told her not to report to the police became hearsay and should not have been relied upon to explain the delay of 07 days in reporting the mater to police.

[25] The trial judge had dealt with the question of delay in paragraphs 92-95 of the summing-up. Paragraph 95 is as follows:

'95. Hem Lata reported the matter to Police on 31stof January, 2013. She said that she took seven days to relate the matter to her husband because she thought it is a lie and she was not assured. Chintu is her husband's brother's son. Husband was insisting her not to report the matter to police. YK told Hem Lata about these incidents little by little because Chintu had told her not to tell. In this context, you analyse the evidence and see whether Hem Lata has given a probable explanation for her delay in reporting to Police.'

[26] Therefore, it is clear that there were many reasons as to why Hem Lata delayed reporting the matter to the police other than her husband having insisted that she should not report. In any event delay in reporting is not an absolute or abstract concept and cannot be determined only in terms of days, weeks or months.

[27] In **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) the guidelines were suggested on how to deal with a delayed complaint. It was held:

*'[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-*

'The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is ***whether the complaint was made at the first suitable opportunity within a reasonable time*** *or* ***whether there was an explanation for the delay.'***

[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of ***Thulia Kali v State of Tamil Naidu****; 1973 AIR.501; 1972 SCR (3) 622:*

> *'A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well-wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.'*

[28] The learned trial judge cannot be faulted for not having strictly followed ***Serelevu*** for it was decided in October 2018 and the trial in this case had been concluded in November 2015. However, the trial judge had given his mind to the totality of the circumstances with regard to the delay of less than two weeks from the first incident and about 03 days since the last incident.

[29] In any event, I do not think that what Hem Lata had told in her evidence as to what her husband had told her comes strictly within the definition of hearsay evidence in the context of this case. It is a request made by her husband to Hem Lata not to report the matter to the police and not something that he had learned from another [see **Navaki v State** [2019] FJCA 194; AAU0087.2015 (3 October 2019) **Delailagi v State** [2019] FJCA 186; AAU0060.2015 (03 October 2019) and **Goundar v State** [2020] FJCA 4; AAU29.2015 (27 February 2020) for discussions on hearsay evidence]. Whether the husband had in fact told that to Hema Lata or not is a different question going to her credibility.

[30] Even if the impugned piece of evidence is excluded there was ample evidence before the assessors and the trial judge to convict the appellant. House of Lords in **Stirland, Appellant; and Director of Public Prosecutions, Respondent** [1944] A.C 315 laid down the test that should be applied in this type of situation 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,….'*

05th ground of appeal

[31] The appellant argues that medical evidence on lack of any penetration to YK's vagina casts a doubt on the credibility of her testimony.

[32] It is true that medical examination of YK revealed no signs of penetration. But, given her evidence, no penetration had taken place. That explains why only attempted rape charges were preferred against the appellant in respect of YK. She had not stated that on 18 January 2013 there was penetration of any degree whereas her elder sister SK had specifically said that the appellant's penis went inside her *papu*. YK refused to do 'sit-ups' on 19 February 2013 though the appellant asked her to do. There was no contact of the appellant's penis with her vagina on 29 January 2013. Thus, there was no surprise in the doctor's finding that YK's hymen was intact, the vaginal ores was normal and there were no signs of injuries.

[33] Although not taken up by the appellant I find that on YK's evidence coupled with SK's evidence, the 03rd count of attempted rape of YK on 19 January 2019 cannot be sustained. YK's evidence is that she denied the appellant's request to do the 'sit-ups' after applying oil on her *pupu* meaning vagina saying that it is painful. SK's evidence does not reveal that YK did any 'sit-ups' on 19 January 2013 other than sitting beside her. Thus, there may have a preparation to commit rape but no attempt had taken place as YK refused to do the act of sitting on the appellant's penis.

[34] This evidence could be contrasted with the evidence of SK and YK with regard to the incident on 18 January 2013. SK had clearly stated that the appellant's *punu* meaning the penis went inside her *pupu*. She even demonstrated how she did 'sit-ups' in court. Medical evidence corroborates acts of previous penetration. YK had also stated that she in fact sat on his *punu* but not spoken to any kind of penetration. Medical evidence shows that her hymen was still intact and no evidence of penetration was observed. Similarly, YK's evidence on what happened on 29 January was unequivocal.

[35] Therefore, the guilty verdict on attempted rape on the third count relating to YK cannot be supported having regard to the evidence and therefore it is unreasonable. Thus, the guilty verdict and conviction on the third count should be set aside in terms of section 23(1)(a) of the Court of Appeal Act.

[36] Since there is no real prospect of success with regard to the 01st, 02nd, 04th and 05th counts, enlargement of time to appeal should be refused. Since this court in this process has now fully considered the appellant's appeal against conviction, the appeal against conviction on the 01st, 02nd, 04th and 05th grounds of appeal should be dismissed in terms of section 23(1)(a) of the Court of Appeal Act.

Application to lead fresh evidence

[37] The fresh evidence the appellant seeks to adduce is that of two witnesses namely Salesh Kant and Rajesh Kumar who would speak to Hema Lata having eloped with Mohammed Ameen after the appellant's conviction and now living in Nawaka, Nadi

having a child of their own. The appellant wants to demonstrate through this evidence that Hema Lata was not truthful when she denied at the trial having any affair with Mohammed Ameen and to buttress his case theory that it was Hema Lata who used her influence on SK and YK to come out with 'false' allegations against him after he uncovered her affair with Mohammed Ameen. According to the appellant these witnesses are his uncles. In fact Salesh Kant appears to be Hema Lata's husband and the father of SK and YK.

[38] Section 28 of the Court of Appeal Act, provides that the Court of Appeal may, if it thinks it necessary or expedient in the interest of justice receive fresh evidence by way of documents or witnesses (see **Mudaliar v State** Criminal Appeal No. CAV 0001 of 2007: 17 October 2008 [2008] FJSC 25 and **Chand v State** CAV0014 of 2010: 9 May 2012 [2012] FJSC 6).

[39] In **Tuilagi v State** AAU0090 of 2013: 14 September 2017 [2017] FJCA 116 the Court of Appeal considered several past decisions and held that the main criteria for fresh evidence at the appeal stage is set out in **Ladd v Marshall** [1954] 3 All ER 745.

> *'[36] The Supreme Court in **Mudaliar** quoted with approval **Ladd v Marshall** [1954] 3 All ER 745 and stated there were three following preconditions to the reception of such evidence on appeal. The Supreme Court had referred to other decisions quoted in the following paragraphs as well.*
>
> > *(i) the evidence could not have been obtained prior to the trial by reasonable diligence;*
> >
> > *(ii) it must be such as could have had a substantial influence on the result and*
> >
> > *(iii) it must be apparently credible.'*
>
> *'[37] **Tuimereke v State** Criminal Appeal No. AAU 11 of 1998: 14 August 1998 [1998] FJCA 30 the Court of Appeal considered the principles governing the reception of fresh evidence in criminal matters. They referred to **Ratten v R** [1974] HCA 35; (1974) 131 CLR 510 and **Lawless v R** [1979] HCA 49; (1979) 142 CLR 659. In both **Ratten** and **Lawless** the High Court focussed upon the expression "miscarriage of justice" in the context of intermediate appellate courts dealing with criminal matters.'*

*'[41] In **Singh v The State** Criminal Appeal No.CAV0007U of 2005S: 19 October 2006 [2006] FJSC 15 the Supreme Court stated:*

> *"The well-established general rule is that fresh evidence will be admitted on appeal if that evidence is properly capable of acceptance, likely to be accepted by the trial court and is so cogent that, in a new trial, it is likely to produce a different verdict ..."*

[40] Firstly, the appellant had suggested to Hema Lata that she was having an affair with Mohameed Ameen and that he had told her husband about it. She had denied it and replied that her husband did not ask her anything about it. It is clear from the appellant's evidence that Hema Lata's husband did not care to probe into it when informed by the appellant. Never had it been suggested to Hema Lata that she had persuaded her two daughters SK and YK to come out with various allegations of sexual abuse due to the appellant having brought her affair with Ameen to the notice of her husband. The appellant's position had been that the allegations were false and Hema Lata (and not SK and YK) came out with them because the appellant caught her affair with Mohameed Ameen. It is clear from the evidence of SK and YK that Hema Lata got to know of the incidents concerned from SK and YK and not the other way around.

[41] Secondly, the appellant had not suggested to SK and YK that they came out with the allegations at the instance of their mother Hema Lata or she coached them to do so**.**

[42] Thirdly, the appellant also admits in his evidence that Hema Lata's husband Shalesh Kant did not do anything when he told him of her affair which he says the whole village was aware. He also had said that Hema Lata was jealous of him as he had money and she was asking for money. He admitted that in the whole month of January 2013 he was living with Hema Lata's family including SK and YK.

[43] Thus, the appellant could have easily procured the evidence of Salesh Kant and Rajesh Kumar at the trial. Their evidence would not have had a substantial influence on the outcome, for the appellant had already placed that evidence at the trial. Salesh Kant and Rajesh Kumar would not speak to anything that can affect the evidence of SK and YK which stands on its own. The credibility of Salesh Kant and Rajesh

Kumar is also in question as Salesh Kant had not taken any steps to probe into the alleged affair between Hema Lata and Mohammed Ameen and do not appear to have given statements to the police. Hema Lata had apparently left Salesh Kant, SK and YK and eloped with Mohammed Ameen after the appellant's conviction which happened in November 2015 whereas the alleged sexual abuse took place in January 2013.

[44] Therefore, applying the principles applicable to leading fresh evidence, I do not see any basis to allow the appellant's application to call Salesh Kant and Rajesh Kumar.

Bandara, JA

[45] I agree with the conclusions and orders proposed by Prematilaka, RJA.

Rajasinghe, JA

[46] I have read the judgment of Prematilaka, RJA in draft and agree with his reasons and proposed orders.

Orders of the Court:

1. Appeal against sentence is dismissed
2. Conviction on count 03 is set aside.
3. Enlargement of time to appeal against conviction on 01st, 02nd, 04th and 05th counts is refused.
4. Appeal against conviction on 01st, 02nd, 04th and 05th counts is dismissed.

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

.....
Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent