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

CRIMINAL APPEAL NO.AAU 0150 of 2017
[In the High Court at Lautoka Case No. HAC 55 of 2014]

BETWEEN : **SAMUELA NAVUNISARAVI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, JA
Qetaki, JA

Counsel : **Appellant in person**
: **Ms. R. Uce and Mr. J. Nasa for the Respondent**

Date of Hearing : **02 May 2023**

Date of Judgment : **25 May 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant, a teacher had been indicted in the High Court at Lautoka on two counts of rape contrary to section 149 and section 150 of the Penal Code committed against two of his students aged 08 years, identified as AB and GM (not their real names) between 01 October 2006 and 30 November 2006 at Nadi, in the Western Division.

[2] The assessors had unanimously opined that the appellant was guilty of the two charges and the learned trial judge had agreed with them and convicted the appellant as charged. On 11 September 2017, he had been sentenced to 13 years 11 months and 02 weeks imprisonment with a non-parole period of 11 years.

[3] A single Judge of this Court on 05 November 2020 had refused the appellant's application for enlargement of time to appeal against conviction and the appellant had renewed his application before the full court. At the hearing, the appellant confirmed that he would rely on the grounds of appeal set out in his '*Notice of Additional Ground of Appeal*' dated 18 January 2023 and '*Full Court Written Submissions*' dated 14 February 2023 except the 05th and 11th grounds of appeal which he abandoned. Further, the appellant did not pursue his application to lead fresh evidence.

[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)].

[6] For example, an incarcerated unrepresented appellant may up to 03 months of delay might persuade a court to consider granting leave if other factors are in his or her favour (see **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013). 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.

[7] The delay in filing the notice of appeal dated 29 June 2020 against conviction is about 02 years and 08 ½ months out of time and the appellant's fresh grounds of appeal before the full court had been filed on 18 January 2023 making them 05 years and 04 months out of time. Thus, the delay in the appeal against conviction is very substantial. The appellant has not explained the delay in an affidavit. At the hearing before the single Judge, as instructed by the appellant, his counsel had submitted that the appellant was unaware of the process of filing an appeal and was under the impression that sentence appeal was sufficient for both conviction and sentence. There is no explanation at all for the subsequent delay since the Ruling in filing fresh grounds of appeal. As for prejudice to the respondent, it has averred none that could possibly be caused by an enlargement of time.

[8] Despite the excessive and unexplained delay, if the strength of the grounds of appeal and the absence of prejudice are such that it would be in the interests of justice that leave be granted to the applicant [see **State v Patel** [2002] FJCA 13; AAU 0002U2002S (15 November 2002)]. Delay alone will not decide the matter of extension of time and the court would consider the merits as well [see **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013)].

[9] However, in the backdrop of the inordinate delay and lack of a compelling explanation, the appellant has to pass a higher threshold of '**real prospect of success'** [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) (as opposed to 'reasonable prospect of success' for leave to appeal in a timely appeal) in terms of merits in order to succeed in persuading this court to allow him an enlargement of time to appeal out of time. Thus, I would see whether there is a real prospect of success for the belated grounds of appeal against conviction.

[10] Grounds of appeal against conviction urged on behalf of the appellant are as follows:

> 1. *That the learned trial Judge may have fallen into an error of law and in fact when his Lordship misdirected himself by failing to seriously consider the contradiction*

of the evidence of the medical officer in court in comparison to her evidence contained in the medical report which is part of the admitted facts result in a substantial miscarriage of justice.

2. *That the learned trial Judge may have fallen into an error of law when his Lordship failed to adequately and or sufficiently direct himself and the assessors on the probative value of the specific medical report together with the doctors opinion whilst giving evidence in court result in a substantial miscarriage of justice.*

3. *That the learned trial Judge may have fallen into an error of law and in fact when his Lordship failed to adequately direct himself and the assessors on the contradictions and variations of evidence of both complaint and the specific medical evidence in relation to penetration.*

4. *That the learned trial Judge may have fallen into an error of law and in fact when his Lordship failed to direct himself and the assessors on the inconsistent, contradictions, variations and improbabilities of evidence of both complainant and the prosecution witness.*

6. *That the learned trial Judge erred in law and in fact when he discredited the defence witness evidence than that of the prosecution witness.*

7. *That the learned trial Judge may have fallen into an error of law and in fact when the prosecution had failed to prove beyond any reasonable doubt the physical element of the offence of rape on both counts one and two.*

8. *That the learned trial Judge erred in law and in fact when he failed to direct / misdirect the assessors on the issue of recent complaint causing a miscarriage of justice.*

9. *That the learned trial Judge erred in law and in fact when he failed to direct himself and/or the assessors on the issue of the belated charge causing a miscarriage of justice.*

10. *That the learned trial judge erred in law when he failed to put to the assessors the defence case in a fair, balance and objective manner.*

12. *That the verdict is unreasonable and cannot be supported having regards to evidence.*

Facts in brief

[11] In 2006, the complainants 'GM' and 'AB' aged 08, were class 3 students of a Primary School. The appellant was their class teacher. According to GM, between 01 October 2006 and 30 November 2006, he took her to the last cubicle in the classroom on more than one occasion. GM had some errors in her book. The appellant made her sit on his

lap and spread his legs so that her legs would move apart. Whilst sitting on his lap, she would face away from him. He would then ask questions from her book and if she failed to answer he would squeeze or pinch the side of her vagina by putting his hand underneath her dress, then pulling the side of the underwear, he would insert his penis in her vagina. She had felt his penis and the pain. She did not cry out but was only biting her lips. When cross-examined as to how many centimetres deep was the penile insertion, she had said 'half way through' but it was not clarified by either counsel as to what she meant by that phrase. This had been repeated on more than one occasion. She did not tell anyone about what the appellant was doing to her because she didn't know at that time what he was doing was right or wrong.

[12] 'AB' testified that during the same time, the appellant would take her to the last cubicle in the classroom and make her sit on his lap with the book in front of them. Whilst sitting on his lap, the complainant would be facing away from him. He would ask questions and if she failed to answer he would try to shift her panty to one side but as her panty was too tight, he would pull it down to her ankle and then squeeze or pinch on the top layer of her vagina. She had explained that what she referred to as the top layer of the vagina was the clitoris. He would rock her back and forth by holding her waist with his hands and whilst rocking she could feel his penis on the top layer of her vagina which was her clitoris. She was scared and therefore did not say anything. This happened on more than one occasion.

[13] The third prosecution witness was Dr. Elvira Ongbit. On 28 November 2006, the doctor had examined both the complainants. The specific medical findings for both the complainants were that their hymen was intact. The hymen being intact meant that there was no injury on the hymen.

[14] The final prosecution witness Shane Pickering, a fellow student in the same class as GM and AB said that between 01 October 2006 and 30 November 2006, he saw GM sitting on the lap of the appellant in between his legs inside the last cubicle when he went to give his attendance book to him. The appellant told the witness to go back and take his seat.

[15] The appellant had testified that in the year 2006, he was teaching both the complainants but denied all allegations made against him by GM and AB. However, he had admitted that both GM and AB were bright students and GM was quite talkative and acted as the leader of the pack. He had also admitted that he pinched them on their stomach and thighs because they were cheating during scoring which, however, was not even suggested to GM and AB. He had denied Shane Pickering's evidence. The appellant was not sure why GM and AB had chosen to make the allegations but had attributed his strictness towards his students for making such allegations against him. However, no other student had complained against him. Nevertheless, he had admitted that in his experience as a teacher, a 08 year old would have almost zero knowledge about sexual activity. According to him under cross-examination, the cubicle could not accommodate two unless in a standing position and it cannot fit when an adult is seated and a 08 year old sits on his lap even if the chair is slightly moved to the back of the cubicle.

[16] The appellant's witness Penina Takobe in the year 2006 was teaching the class adjacent to the appellant's class. She was able to see his classroom through the glass. According to her, GM was a quite student, hardly speaks and moody at times who would speak only when spoken to. At no time did the witness see GM or AB sitting on the lap of the appellant. Further, the witness had said that the cubicle could only fit one student and it is not possible for two people to be seated inside and if the chair was slightly put back the other students would see. However, under cross-examination, the witness had said that she could see only the appellant's head when seated inside the cubicle and if the appellant sat in the cubicle with a student on his lap, she would not be able to see the student. She further admitted that an adult sitting in the cubicle with a student on his lap would fit there by shifting the chair back but would have been seen by other students in the classroom.

01st ground of appeal

[17] The gist of the appellant's complaint is that what had been recorded in the medical reports and the doctor's expert opinion given under oath are inconsistent and should not have been relied upon. The bone of contention is that Dr. Elvin Ongbit had

recorded in the medical reports that the hymen of both GM and AB were intact but she had opined in her evidence that it does not mean that there was no penetration.

[18] In **R. v. Abbey** [1982] 2 S.C.R. 24 speaking for the Court, Dickson J. (as he then was) said at p. 42:

> *With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)*

[19] It was held by Lord Cooper in **Davie v. Magistrates of Edinburgh** [1953] S.C. 34, at p. 40, on experts:

> *Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.*

[20] In **R v Beland** [1987] 2 SCR 398; [1987] 43 DLR the Supreme Court of Canada stated:

> *'16. ……… The function of the expert witness is to provide for the jury or other trier of fact an expert's opinion as to the significance of, or the inference which may be drawn from proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact. The expert witness is permitted to give such opinions for the assistance of the jury. Where the question is one which falls within the knowledge and experience of the triers of fact, there is no need for expert evidence and an opinion will not be received.'*

[21] Thus, an expert's findings on record as well as his opinions are admissible in a court of law. Recorded findings are directly the result of any observations, examination, testing, experiment etc. of a person or a thing while an opinion consisting of inferences, assumptions, conclusions etc. is based on the expert's subject-knowledge, expertise, experience, and related to the factual context *vis-à-vis* the findings.

[22] Medical evidence was that the hymen was intact in GM as well as AB and no hymnal lacerations were seen in either of the victims. The doctor had opined that the size of the vaginal opening of a 08 year old was around 0.4cm and the diameter of an erected penis was at least 3.5cm which will it find it hard to go through the vaginal opening of a 08 year old. On GM's evidence, the doctor had remarked that, however, if it was possible for the glans penis (the rounded, gland-like head or tip of the penis) to touch the clitoris, it was possible for it to have contact with the vaginal opening due to the close proximity of the clitoris to the vaginal opening. She confirmed under cross-examination that if an erected penis touches the clitoris, it would definitely touch the vaginal opening. If the head of the penis were to touch the vaginal opening, the doctor would consider that as penetration though it was not full penetration. Dr. Elvin Ongbit had further elaborated that if the victim had felt that the penis had made contact with her clitoris, it means that it had made contact with the vaginal opening and the penis had penetrated though it was not full penetration. If it was full penetration, she would expect to see hymnal lacerations but would not expect to see the same if the glans penis made only a partial insertion. According to the doctor, for a 08 year old it is not possible to cause hymnal laceration when only the tip of the glans penis was inserted. Her opinion was that contact of penis with vaginal opening is mild penetration different from vaginal penetration which is full penetration and trying to insert the penis inside is a form of penetration. Under cross-examination, she was emphatic that a penis coming into contact with the clitoris of a 08 year old amounts to a form of penetration and no hymnal laceration could not mean that there was no penetration. Finally the doctor had added referring to AB that if it was mild rocking back and forth and there was no thrusting, there would not be any lacerations but if the penis was already in the vaginal opening during the process of rocking and force was exerted there would be lacerations. However, she had explained that since the appellant was sitting he had no room to thrust his penis into her vagina and as a result there was less force applied on the vaginal opining which explains why there was no hymnal laceration in AB.

[23] Thus, it is clear that the doctor's opinion in the form of her evidence, both under examination-in-chief and cross-examination, was based on the specific factual context of the case whereas his findings recorded in the Medical Officer's Reports were the

result of her examination of GM and AB. She had expressed her expert opinion based not only on the medical findings but also on the facts of the case as presented to her during the trial which was not available to her at the time of the examinations and her 31 years of experience as a qualified medical expert. This is exactly what an expert is expected to do. I do not see any inconsistency or contradiction between her findings at the examination and her opinions expressed at the trial.

[24] The Court of Appeal in **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) made the following helpful remarks in relation to the question of penetration upon a 14 year old child victim.

> *'[13] .... There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.*
>
> *[14] Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.*
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> *[15] Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of*

rape. Therefore, in the light of Medical Examination Form and the complainant's statement available in advance, the prosecution should have included vulva also in the particulars of the offence. Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established..... '.

[25] However, the appellant had been charged under the Penal Code and there was no definition of carnal knowledge or penetration in the Penal Code. Thus, the common law interpretations should apply to understand these terms. At common law it is not necessary to prove penetration of the actual vagina or rupture of the hymen to establish carnal knowledge; 'carnal knowledge' is complete upon penetration of any part of the female genitalia including the labia (**R v Lines** (1844) 174 ER 861; **R v Randall** (1991) 53 A Crim R 380; **Holland v R** (1993) 117 ALR 193).

[26] Thus, the requirement of penetration in the case of common law rape could be satisfied without penetration of the actual vagina. At common law it is not necessary to prove rupture of the hymen to prove rape (**Reg. v. Hughes** (1841) 2 Mood. 190 (169 ER 75), **Reg. v. McRue** (1838) 8 Car. and P 641 (173 ER 653); **The People (Attorney General) v. Dermody** (1956) IR 307). However, it is not sufficient for the relevant body part to have simply been touched. It must have been penetrated to some extent (**Anderson v R** [2010] VSCA 108). The penetration only needed to be slight or fleeting (penetration "to any extent") (see **Randall v R** (1991) 55 SASR 447; **Anderson v R** [2010] VSCA 108). The purpose of the penetration is irrelevant. It need not have been committed for the purposes of sexual gratification (**R v Dunn** 15/4/1992 CA NSW).

[27] In **Randall** (1991) 53 A Crim R 380 Cox J of the South Australian Court of Criminal Appeal commented at page 382:

> *'[I]t would appear that, at least for the last 150 years, the common law, for obvious practical reasons, has made no attempt to distinguish for [the purpose of proving "sexual intercourse" ...] between penetration of the vulva, as denoted by the labia majora, or other lips, and penetration of the vagina itself. What little explicit authority on the point may be found in the books supports the wider notion of sexual intercourse. In* ***Lines*** *(1844) 1 Car & K 393; 174 ER 861, Parke B was trying a man for carnal knowledge of a female child*

under 10. There was evidence that the hymen of the child was not ruptured and counsel for the prisoner submitted that all the physical appearances were consistent with a failure to penetrate the vagina so that his client could not be convicted of the completed offence. The learned judge's ruling was:

> *"I shall leave it to the jury to say, whether, at any time, any part of the virile member of the prisoner was within the labia of the pudendum of the prosecutrix; for it ever it was (no matter how little), that will be sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offence."*

***Lines** has always been cited in textbooks and judgements dealing with the physical requirements of rape without, so far I am aware, ever attracting adverse comment [...].'*

[28] ***Lines*** is the case of **R v Joseph Lines** (1844) 1 Car & Kir 393; 174 ER 861, 861-862 approved in **R v DD** (2007) 19 VR 143. In ***Lines*** it was held that:

> *If on the trial of an indictment for carnally knowing and abusing a female child under ten years old, the jury are satisfied, that at any time, any part of the virile member of the prisoner was within the labia of the pudendum of the child, no matter how little, this is sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offence.*

[29] Pudendum is external genitalia. The term pudendum (singular) is used to describe external genitalia regardless of sex. The labia majora, labia minora, clitoris, penis, scrotum, testes, and so on are all parts of the human pudenda (plural). The female pudendum is also called the vulva.

[30] Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape (vide section 149 of the Penal Code). It is no defence to a charge for unlawful carnal knowledge of a girl under the age of thirteen years to prove that she consented to the act (vide section 155(3) of the Penal Code).

[31] Thus, neither the Penal Code nor the common law has made any distinction between the penetration of vulva and vagina for the purpose of constituting carnal knowledge which is what the amended information alleged against the appellant. On the evidence given by GM and AB coupled with expert medical opinion supported fully by the legal literature alluded to above, it is clear that the appellant had definitely penetrated the vulva, if not the vagina of both victims constituting carnal knowledge.

02nd ground of appeal

[32] The appellant complains about inadequacy of the summing-up and the judgment with regard to the probative value of medical evidence.

[33] Both medical reports (GM and AB) had been admitted under agreed facts. The learned trial judge had dealt with medical evidence *in extenso* at paragraphs 54-63 and how to approach it at paragraphs 64-66. He had again discussed medical evidence at paragraphs 105 & 106. In the judgment, the trial judge, having directed himself according to the summing-up, had again given his mind to medical evidence at paragraphs 11 and 12. As to the weight to be attached to medical evidence, the trial judge had specifically directed the assessors at paragraphs 64 and 65 as follows:

> '64. *You have heard the evidence of the Doctor who was called as an expert witness on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The Medical Reports of the complainants are before you and what the Doctor said in her evidence as a whole is to assist you.*
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> 65. *An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the Doctor you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the Doctor.'*

[34] I do not think that any serious concern could be raised with regard to how the trial judge had dealt with the probative value of medical evidence.

03rd ground of appeal

[35] The appellant submits that the trial judge had failed to direct himself and the assessors on the contradictions in the evidence of GM and AB *vis-à-vis* medical evidence in relation to penetration.

[36] According to GM, the appellant would pull the side of the underwear and insert his penis inside her vagina. She had felt his penis and the pain. She did not cry out but was only biting her lips the whole time, and this evidence had gone unchallenged. The admitted strictness of the appellant on his students too might have had a part to play why GM did not make any noise. When cross-examined as to how many centimetres deep was the penile insertion, she had said 'half way through' but it was not clarified by either counsel as to what she meant by that phrase. The fact that GM had felt the appellant's penis somewhere in her vagina which may indeed have been her vulva, shows that there had been penetration establishing carnal knowledge. A 08 year old child cannot be expected differentiate between her vulva and vagina and to give the degree of penetration by centimetres and faced with that question she had answered 'half way through'.

[37] As for AB, the appellant would rock her back and forth by holding her waist with his hands and whilst rocking she could feel his penis on the top layer of her vagina which was her clitoris. She was scared but did not say anything. According to the doctor, when the penis had touched the clitoris that amounted to mild penetration. Thus, there had been penetration of her vulva which is carnal knowledge.

[38] As the doctor had correctly remarked, a 08 year old gild was not a medical doctor and cannot give a medical opinion and even a 19 year old girl cannot (when GM and AB gave evidence they were 19 years) do so and they could not have differentiated between mild penetration and full penetration. In the case of both GM and AB, a mild penetration was quite possible. These aspects have been referred to by the trial judge

in the summing-up which had guided him in the judgment as well though not repeated verbatim.

[39] I do not see any material contradictions or inconsistencies between the evidence of GM and AB and that of Dr. Elvira Ongbit in relation to penetration.

04th ground of appeal

[40] The appellant's complaint arises from the alleged contradictions of the evidence of Shane Pickering with those of GM and AB. Pickering had not seen any other student on the appellant's lap in the cubicle except GM whereas in his police statement he had said that he saw both GM and AB but not others. When confronted with this contradiction, Pickering had insisted that he did not see AB on the appellant's lap. Though, it is technically a contradiction, in my view it does not affect his evidence adversely, for if Pickering was an untruthful witness he could have fallen in line with his police statement and stated that he saw AB too on the appellant's lap. The fact that he steadfastly maintained his position under oath that he saw only GM in fact goes to enhance his credibility, because he appears to have had no intention to implicate the appellant falsely.

[41] On the other hand, GM never said that Shane Pickering came to see the appellant while she was on his lap. In fact neither GM nor AB was asked by either counsel whether Pickering came or saw any one of them sitting on the appellant's lap. Thus, I do not see any contradiction between the evidence of GM and AB with that of Pickering.

[42] Pickering was shown to have stated to the police that he went to see the appellant in order to ask a question with regard to his pace test whereas his evidence in court was that he walked up to the appellant to show him the attendance book. He had admitted that what he told the police was correct. This no doubt is a contradiction but how material it is to impeach his credibility is another matter.

[43] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the Court of Appeal having considered several previous decisions including **Singh v The State** [2006] FJSC 15; CAV0007U of 05S (19 October 2006); **Ram v State** [2012] FJSC 12; CAV0001.2011 (09 May 2012), set down as to how to evaluate discrepancies, contradictions, inconsistencies or omissions:

> *[13] ....be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. 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).*

[44] In **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280 the Indian Supreme Court said on discrepancies as follows:

> *"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; .... (3) The powers of observation differ from person to person. What one may notice, another may not. ...... It is unrealistic to expect a witness to be a human tape recorder;"*

[45] Pickering has explained that he had to go to see the appellant because the latter did not come to him although he put up the flag as was the practice. Therefore, whether it was to show the attendance book or to discuss the pace test, Pickering had a legitimate reason to go and see the appellant where he happened to see GM on the appellant's lap. I do not consider this contradiction as something going to the very root of his evidence as to impeach his credibility in the light of the law relating to evaluation of discrepancies, contradictions, inconsistencies or omissions.

[46] Moreover, the evidence of Shane Pickering was only of corroborative value. The main evidence of the two acts of rape came from GM and AB. It is also clear that the inconsistency of Shane Pickering's evidence relates to the purpose as to why he

approached the appellant and not on what he actually saw going on between the appellant and GM. Thus, the contradiction was on a peripheral matter. His evidence did not touch the other victim, AB at all.

[47] Therefore, even if the evidence of Shane Pickering were to be completely disregarded there was sufficient evidence of GM and AB to support the assessors' opinion and the trial judge's verdict. The case against the appellant had to stand or fall on the evidence of GM and AB and not on Pickering's evidence. The contradictions in Shane Pickering's evidence did not affect the evidence of GM and AB but if at all they affected his own evidence.

06th ground of appeal

[48] The appellant's contention is that the trial judge was wrong to have discredited the evidence of the defence witness Penina Takobe who *inter alia* said that if the appellant sat in the cubicle with a student on his lap, she would not be able to see the student and that an adult sitting in the cubicle with a student on his lap would fit there by shifting the chair back but would have been seen by other students in the classroom. However, it was not suggested to GM and AB that the cubicle could not accommodate the appellant, who was seated, with either GM or AB sitting on his lap, particularly if the chair was slightly moved to the back of the cubicle. The only suggestion was that two people cannot be in the cubicle at the same time. Moreover, it was the unchallenged evidence of GM that if another student moves his or her chair back a little in the cubicle, he or she would have to rock the char to see the other students on the same line. Thus, it is clear that a slight movement of the chair backwards in a cubicle would not allow other students in their cubicles to see who were in the cubicle in question unless the students rock their chairs. Consequently, it would have possible for the appellant to keep GM or AB on his lap inside the cubicle by adjusting the chair slightly without necessarily being seen by other students or witness Penina Takobe.

[49] Secondly, according to witness Penina Takobe, GM was a quite student, hardly speaks and moody at times. However, the appellant was emphatic that GM was bright, talkative and acted as the leader of the pack and resented opposite sex. Thus, the

appellant and his witness had contradicted themselves as to what type of a student GM was. Further, the appellant had said in his evidence that he pinched both GM and AB because they were caught cheating during scoring. This was never suggested to GM or AB. In addition, there would possibly have been no reason for GM and AB, being bright students as admitted by the appellant to have cheated. In any event, the appellant had not explained why he pinched them on their stomachs and thighs when he knew that it was inappropriate to do so on female students. He had also not explained the circumstances as to how the school principal happened to advise him not to do so.

[50] Finally and perhaps most importantly, neither the appellant nor his witness Penina Takobe had been able to explain how two 08 year old girls, who admittedly had zero knowledge on sexual activities, managed to describe the manner in which the incidents happened with such precise details and how and what they felt as a result of the appellant's sexual intrusions on their genitalia. Nor has the defence even suggested any sinister motive on the part of GM, AB or Pickering, all were of the same age at the time of the incidents for them to have falsely implicated the appellant. Thus, in my view there were ample reasons for the trial judge to have disbelieved both the appellant and his witness Penina Takobe.

[51] One sure way the consistency of the testimony of GM and AB could have been tested was by comparing and contrasting it with their previous statements such as police statements. The defence had not been able to point out material omissions or contradictions with their police statements in the evidence of the victims in cross-examination. When the testimony of GM and AB was accepted beyond reasonable doubt by the assessors and the trial judge, it meant that the version of the appellant was invariably discredited and rejected.

07th ground of appeal

[52] The appellant argues that penetration being the physical element of rape had not been proved as the hymen of GM and AB had been intact. I have already addressed this aspect in detail under the first, second and third grounds of appeal and needs no repetition.

08th ground of appeal

[53] The appellant contends that the trial judge had failed to direct the assessors on recent complaint evidence. There is nothing to indicate in the summing-up or the judgment that the prosecution had relied on any evidence that could be regarded as recent complaint evidence to enhance the credibility of the victims *via* consistency. In fact, nothing had been revealed in evidence of any possible recent complaints made by GM or AB other than the fact that GM's mother appears to have reported the matter to the police. Consequently the doctor had examined both victims on 29 November 2006 but she had not testified to any history revealed to her by GM and AB to be considered as recent complaint evidence. In the circumstances, there was no obligation on the part of the trial judge to direct the assessors on recent complaint evidence.

09th ground of appeal

[54] The gist of the appellant's grievance appears to be that charges had been brought against him in October 2013 after a considerable delay when the complaint had been made in November 2006. The proceedings in the High Court had been initiated in May 2014 and concluded in September 2017. There is no unacceptable delay in the post charge proceedings. The appellant seems to argue that because of the long delay of 11 years from the date of offending to the conclusion of the trial in the High Court there is a doubt of the victims' evidence in that it is doubtful whether they could actually recollect the events that happened in 2006.

[55] Firstly, the reasons for the pre charge delay are not clear from the summing-up or the judgment. Thus, where the blame should lie for the delay cannot be ascertained. Secondly, if at all the delay was more to the detriment of the prosecution rather than to the defence in terms of the memory of GM, AB and Pickering who had become 19 years when they gave evidence in the High Court, but only 08 years when the incidents took place in 2006.

[56] The defense had not brought up either pre-charge or post-charge delay as an issue during the trial. No application for a stay of proceedings was made by the defense to the High Court. Courts are empowered to refuse to allow the indictment to proceed to trial on abuse of process (see **Connelly v Director of Public Prosecutions** [1964] AC 1254). Courts also have an inherent jurisdiction to prevent a trial which would be oppressive and vexatious (see **Humphrys** [1977] AC 1). Delay itself, could, in appropriate circumstances, be such as to render criminal proceedings an abuse of process (see **Central Criminal Court, *ex parte* Randle** [1991] 1 WLR 1087). Courts also have an inherent jurisdiction to prevent a trial which would be oppressive because of unreasonable delay (see **Bell v Director of Public Prosecutions of Jamaica** [1985] AC 937). In ***Bell*** (i) the length of delay (ii) the prosecution's reasons to justify the delay (iii) the accused's efforts to assert his rights and (iv) the prejudice caused to the accused, have been laid as guidelines for determining whether the delay would deprive the accused of a fair trial. Australian cases have added a fifth factor, namely the public's interest in the outcome of the case. In ***Ex parte Randle*** despite a delay of 23 years, lack of prejudice to the accused was held to be fatal to the application for the proceedings to be stayed on the ground of unreasonable delay. In assessing what prejudice has been caused to the accused on any particular count by reason of delay, the court should consider what evidence directly relevant to the defense case has been lost through the passage of time; vague speculation that lost documents or deceased witnesses might have assisted the defendant is not helpful; the court should also consider what evidence has survived the passage of time, and examine critically how important the missing evidence is in the context of the case as a whole (see **F. (T.B)** [2011] EWCA Crim 726; [2011] 2 Cr. App. R. 13).

[57] Sections 15 (1) and (3) of the Constitution of the Republic of Fiji guarantees an accused the right to a fair trial and the right to have his case determined within a reasonable time. The appropriate remedy for a breach of the right to a trial within a reasonable time is not necessarily for the proceedings to be stayed. Such a breach should result in a stay of the proceedings only if a fair trial is no longer possible, or it would for some other compelling reason such as bad faith, executive manipulation and abuse of process be unfair to try the accused (see **Archbold Criminal Pleadings, Evidence and Practice 2020** at 4-80 at page 393). In **Sawoniuk** [2000] 2 Cr. App. R.

220, where the case turned on eye-witness evidence who was subject to cross-examination, and the jury had been afforded a view of the *locus in quo*, it was held that a fair trial had not been impossible, despite a delay of 56 years. It was held in **Warren v Att.Gen. for Jersey** [2012] 1 A.C. 22, PC that the question to be determined is whether a stay is necessary in order to protect the integrity of the criminal justice system; fairness to the accused, although not irrelevant, is subsumed in this primary consideration. Where delay was the sole ground for seeking a permanent stay, the accused must be able to show *'that the lapse of time is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute'* (**Jago v District Court of New South Wales** (1989) 63 ALJR 640 per Mason CJ at 644 quoting **Clarkson** [I9871 VR 962, 973). Deane J at page 655 & 654 in ***Jago*** also agreed that abuse of process could be called in aid if the inevitable effect of unreasonable delay would be to make any subsequent trial an unfair one. However, he thought that delay due to limited institutional resources had to be accepted as a 'normal incident' of the due administration of justice and, without more, could not be regarded as unfairly oppressive or an abuse of the process of the court.

[58] I have considered the appellant's complaint in the light of above legal principles regarding the alleged 'delay' and I find no basis to uphold this ground of appeal, for the appellant has not demonstrated how his defense was prejudiced by the so called delay or how the alleged delay infringed his right to a fair trial or how the criminal proceedings had not been fair to him. There is no abuse of process here and the trial against the appellant had not been oppressive and vexatious.

10th ground of appeal

[59] The learned trial judge had dealt with the defence case at paragraphs 77-88 and then analysed it at paragraphs108-114 of the summing-up where *inter alia* the trial judge had said in a most favourable and fair manner to the appellant that:

> *'110. It is for you to decide whether you believe the evidence of the accused and his witnesses. If you consider that the account given by the*

defence through the evidence is or may be true, then you must find the accused not guilty of either or both counts.'

[60] Overall, I cannot find any aspect of the defence that the trial judge had failed to address the assessors on. The summing-up had been delivered in a well-balanced, objective and fair manner. The appellant had failed to point out in what respects the trial judge had failed to meet the required degree fairness or objectivity in his summing-up.

[61] In **R v Clayton** (1948) 33 Cr App R 22 Lord Goddard CJ had this to say about putting the defense case to the jury:

> *"The duty of a judge in any criminal trial .... is adequately and properly performed .... if he puts before the jury, clearly and fairly, the contentions on either side, omitting nothing from this charge, so far as the defence is concerned, of the real matters upon which the defence is based. He must give to the jury a fair picture of the defence, but that does not mean to say he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence ...."*

[62] In my view, the summing-up measures up to what ***Clayton*** prescribed and does not suffer in any significant manner from any of the shortcomings identified at paragraph [52] in **Chand v State** [2017] FJCA 139; AAU112.2013 (30 November 2017) but it should be borne in mind that there is no single template to deliver a summing-up. The shortcomings identified were:

(i) The summing up not tailored to the facts and circumstances of the case.
(ii) The weaknesses and defects of the prosecution evidence not appropriately highlighted.
(iii) Little weight given to the strong points for the defence and a fair picture of the defence not given to assessors.
(iv) The contentious issues put in a way favourable to the prosecution and unfavourable to the Appellant.
(v) The Judge at times appears to have usurped the fact finding function of the assessors.
(vi) As a whole the summing up is not a fairly balanced and a fair presentation of the case to the jury.

11th ground of appeal

[63] When examining whether a verdict is unreasonable or cannot be supported by evidence, as stated by the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence including defense evidence, the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was reasonably open to the assessors to be satisfied of guilt beyond reasonable doubt which is to say whether the assessors ***must*** as distinct from ***might***, have entertained a reasonable doubt about the appellant's guilt.

[64] Having applied the above test, it cannot be said that on the record of evidence the assessors ***must*** have entertained a reasonable doubt about the appellant's guilt, for upon the whole of the evidence it was reasonably open to the assessors to be satisfied beyond reasonable doubt of the commission of the offence under the second count. In my view, acting rationally, the assessors ought not to have entertained a reasonable doubt as to proof of guilt.

[65] **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) too applied more or less a similar test in considering whether the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

[66] When a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him [vide **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014)]. I think that in this case the trial judge could have reasonably convicted the appellant of rape.

[67] Therefore, in my view, none of the grounds of appeal a real prospect of success in appeal and enlargement of time to appeal ought to be refused. Since, in this exercise I have considered the full merits of the appeal, the appeal too should stand dismissed.

Mataitoga, JA

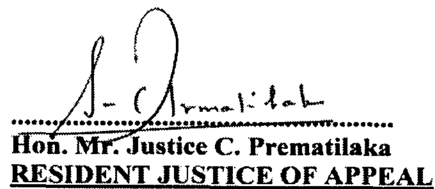
[68] I have the draft judgment you sent me. I agree with the reasons and the conclusion that the appeal be dismissed.

Qetaki, JA

[69] I have read and carefully considered the draft judgment written by Hon. Mr. Justice C. Prematilaka in this case. I agree with the judgment, the reasoning and the orders of Court.

The Orders of Court are:

1. Enlargement of time to appeal against conviction is refused.
2. Appeal is dismissed.



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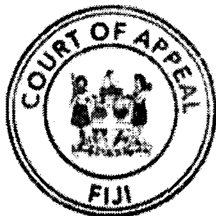
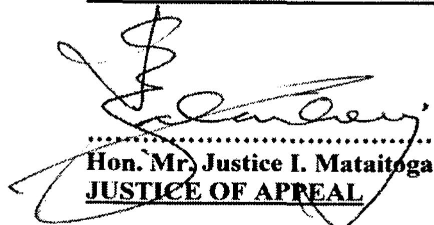
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL





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Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL

....
Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

Solicitors:

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