

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

**CRIMINAL APPEAL NO. AAU 03 of 2022**  
**[In the High Court at Suva Case No. HAC 098 of 2019]**

**BETWEEN** : **RATU PENI NAVU** *alias* **PENI NAVU**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Prematilaka, RJA**

**Counsel** : **Appellant in person**  
: **Ms. Unaisi M. Ratukalou for Respondent**

**Date of Hearing** : **31 July 2024**

**Date of Ruling** : **01 August 2024**

**RULING**

[1] The appellant had been charged and convicted with one count of indecent assault and one count of rape under the Crimes Act 2009 in the High Court at Suva. The charges were as follows:

**COUNT 1**

**Statement of Offence**

**INDECENT ASSAULT:** *Contrary to Section 212 (1) of the Crimes Act 2009.*

**Particulars of Offence**

*RATU PENI NAVU between the 1<sup>st</sup> day of January 2019 to the 28<sup>th</sup> day of February 2019 at Verata, Tailevu, in the Eastern Division, unlawfully and indecently assaulted LOSALINI VEREVAKALOU by touching her vagina over her panty.*

## COUNT 2

### Statement of Offence

**RAPE**: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

### Particulars of Offence

**RATU PENI NAVU** between the 1<sup>st</sup> day of January 2019 to the 28<sup>th</sup> day of February 2019 at Verata, Tailevu, in the Eastern Division, on an occasion other than that mentioned in Count 1, penetrated the vulva of **LOSALINI VEREVAKALOU**, a child under the age of 13 years, with his finger.

- [2] After the unanimous opinion by the assessors that the appellant was guilty of both counts, the High Court judge convicted him and on 23 March 2020 sentenced the appellant to 03 years of imprisonment for indecent assault and 13 years of imprisonment on rape (both sentences to run concurrently) with a non-parole period of 10 years.
- [3] The appellant's appeal against conviction and sentence, almost 08 months late, is untimely. He had subsequently filed a Form 3 (Rule 39) dated 18 January 2024 intending to abandon his sentence appeal and at the hearing into his enlargement of time application on 31 July 2024, this court made relevant inquiries from the appellant in keeping with *Masirewa* guidelines (**Masirewa v State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010) and allowed his application to abandon his sentence appeal and proceeded only with his conviction appeal.
- [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] The delay in the sentence appeal is almost 08 months. The appellant's explanation for this inordinate delay is that he was unaware of the appeal process and his trial counsel had not advised him. However, the sentence order clearly states that he could appeal within 30 days. Thus, his explanation is unacceptable. However, I would still 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.

[6] The trial judge had summarized the facts in the summing-up as follows:

*[22] In relating to the first alleged incident, the complainant said she had returned home from school when the Accused called her to scratch his back. He was at her house and sitting beside a door when the alleged incident occurred. She said the Accused touched her 'pipi' pointing out to her genital area between her legs. She said she use her 'pipi' to urinate. She said she was wearing a skirt and a singlet and an underwear and that the Accused touched her pipi over her underwear for a short time using his fingers. She said when the alleged incident occurred her mother was at the shed beside their house. She said she did not tell anyone about the incident because the Accused told her not to report.*

*[23] In relating to the second alleged incident, the complainant said the incident occurred at the front porch of her house. The complainant said she was inside her house when the Accused called her to get his shoes from the shed. She said her mother was asleep and her sister was watching TV in the sitting room when the incident occurred. When she brought his shoes to him, he told her to open her mouth and when she kept her mouth closed he kissed her mouth and touched her 'pipi' from underneath her underwear. He was sitting on a chair beside the front door of the sitting room. She said the Accused touched her pipi inside using his fingers for a long time and that she felt pain. She said when he touched her pipi inside he was moving his hand. She said the Accused took his hand out of her underwear when her sister Mere came out on the porch. She said she went and woke her mother up and told her that the Accused had touched her 'pipi'. Her mother then confronted the Accused.*

*[24] The second witness for the prosecution was the complainant's elder sister. She is 12 years old and a class 8 student. She said she was watching television with the complainant in the sitting room when the Accused called the complainant from the front porch to get his flip flops. When she realized the complainant was taking long outside she went to the front entrance door. When she went to the door she saw the Accused's hand inside the complainant's dress and that the complainant was crying. She said when the*

*Accused saw her he pulled his hand out from inside the complainant's dress. She said the complainant went to their mother.*

[25] *The third witness was the complainant's mother. She told the court that she was watching television with her daughters when she fell asleep on the couch. On this day the Accused was at their home watching TV. She said the Accused went out on the porch before she fell off to sleep. She said the complainant came to her crying and woke her up. She said the complainant told her that the Accused taught her something bad. She said the complainant was distressed, crying and shivering. She called on the Accused to come inside. He responded "she is lying I only kissed her". She confronted the Accused but he maintained that he had only kissed the complainant. She then prodded the complainant in the presence of the Accused. She said the complainant told her that the Accused kissed her and put his fingers insider her underwear. She confronted the Accused after what the complainant told her. He sought her forgiveness and said he was only playing around.*

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

**'Conviction**

**Ground 1(a)**

**THAT** *the Learned Trial Judge erred in law and fact when he did not carefully, properly analyse the inconsistent sworn evidence in the prosecution witness at trial.*

**Ground 2(a)**

**THAT** *the Learned Trial Judge erred in law and fact when he shifted the burden of prove to the appellant.*

**Additional Grounds:**

**Ground 1(b)**

**THAT** *the Learned Trial Judge erred in law and fact when the assessors and the appellant guilty of the offence of Rape and Indecent Assault charged beyond reasonable doubt cause miscarriage of justice occurred.*

**Ground 2(b)**

**THAT** *the Learned Trial Judge erred in law and fact when the prosecution as proved the element of the offence of Rape and Indecent Assault charged beyond reasonable doubt cause miscarriage of justice occurred.*

**Ground 3**

***THAT*** the Learned Trial Judge erred in law and fact when he did not give any urgent reasons when he have no reasons to disagree with the assessors guilty opinions on the available evidence led by the prosecution proved beyond reasonable doubt cause a miscarriage of justice has occurred.

**Ground 4**

***THAT*** the Learned Trial Judge erred in law and fact when the guilty verdict was unreasonable and cannot supported by the evidence cause injustice.

**Ground 5**

***THAT*** the Learned Trial Judge erred in law when he did not make an independent assessment on the available evidence led by the prosecution at trial before making any proper decision.

**Grounds 1(a) and 5**

[8] This complaint is without merit. There are no ‘inconsistent sworn evidence’ in the prosecution witnesses highlighted by the appellant. The trial judge had summarized the evidence of the victim, aged 09, her elder sister and the mother in sufficient detail and I do not see any basis for the appellant’s grievance among those testimonies. Secondly, the trial judge had clearly stated in the judgment that the assessors had obviously found the prosecution witnesses credible and reliable. His own independent assessment is that the guilty opinions are available on the evidence led by the prosecution and therefore he had no reasons to disagree with the assessor. Therefore, one cannot say that the trial judge had not given his independent mind in evaluating and analyzing the evidence before convicting the appellant.

[9] In any event, when the trial judge agrees with the assessors, the law<sup>1</sup> does not require the judge to spell out his reasons for agreeing with the assessors in his judgment. In his concise judgment the trial judge appears to have given his mind to the fact that the verdict of court was supported by the evidence and was not perverse. So the trial judge’s agreement with the assessors’ opinion cannot be viewed as a mere rubber stamp of the assessors’ opinion. In my own view, given the summary of evidence in

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<sup>1</sup> See paragraph [23] in **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)

the summing-up, I have no doubt that the verdict is supported by evidence and is not unreasonable.

**Ground 2(a)**

- [10] The trial judge had clearly directed the assessors on the burden and standard of proof at paragraphs 4, 5, 32 & 33 of the summing-up. This ground is totally unmeritorious.

**Grounds 1(b) and 2(b)**

- [11] The trial judge had apprised the assessors of all the elements of indecent assault and rape in the summing-up backed up by the items of evidence on each of those ingredients. Given the totality of direct evidence of the victim, circumstance trial evidence of her sister and recent complaint evidence of her mother, there was ample evidence, if believed, to prove both charges beyond reasonable doubt. Evidence of distress at the time or shortly after the alleged offence of rape shown by the victim and observed by the victim's sister and her mother could have been considered as yet another item of evidence for the prosecution in as much as the obvious distress of the victim at the time was not feigned and therefore the victim's appearance could have been considered by the assessors to be consistent with the incident – See **Bebe v State** [2021] FJCA 75; AAU165.2019 (18 March 2021). Nevertheless, such evidence of distress had in fact not been considered against the appellant at the trial.

**Ground 3**

- [12] The trial judge did not have to give 'cogent reasons' for not agreeing with the assessors when he in fact agreed with them. A trial judge cannot agree and disagree with assessors at the same time on the same charges. This argument is rather illogical and misconceived. The law is that when the trial judge *disagrees* with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give '*cogent reasons*' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical

examination in the light of the whole of the evidence presented in the trial – See *Fraser*.

#### Ground 4

[13] Considering a complaint that the verdict is either unreasonable or cannot be supported by evidence under section 23 of the Court of Appeal Act, 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.<sup>2</sup>

[14] Although, I do not have the benefit of the trial transcripts at this stage, going by the summing-up, I do not see any *real prospect of success* on this ground of appeal or in any of the other grounds of appeal. 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 offences. In my view, acting rationally, the assessors ought not to have entertained a reasonable doubt as to proof of guilt. I am also of the view that the trial judge could have reasonably convicted on the evidence before him.<sup>3</sup>

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<sup>2</sup> Kumar v State AAU 102 of 2015 (29 April 2021); Naduva v State [2021] FJCA 98; AAU0125.2015 (27 May 2021) & Sahib v State [1992] FJCA 24; AAU0018u.87s (27 November 1992)

<sup>3</sup> Kaiyum v State [2014] FJCA 35; AAU0071.2012 (14 March 2014)

**Orders of the Court:**

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



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

**Solicitors:**

Appellant in person

Office of the Director of Public Prosecution for the Respondent