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

CRIMINAL APPEAL NO.AAU 0053 of 2016
[High Court Criminal Case No. HAC 14 of 2013]

BETWEEN : **KAMELI SAUDUADUA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. Ratu. S for the Appellant**
Mr. Vosawale. M for the Respondent

Date of Hearing : **17 May 2019**

Date of Ruling : **06 June 2019**

RULING

[1] The appellant had commenced proceedings by way of a handwritten application for extension of time to file an application for leave to appeal accompanied by the proposed grounds of appeal against the conviction that had been received by the Court of Appeal Registry on 17 May 2016. However, the appellant's documents had been dated 16 April 2016.

[2] The appellant had been charged on two counts of rape; one penile and the other oral under section 207 (1) and 207 (2) (a) the Crimes Decree, 2009 (now the Crimes Act, 2009) alleged to have been committed on 16 December 2012 at Navua in the Central Division by having had carnal knowledge (first count) and penetrated the mouth (second count) of P (name withheld) without her consent.

[3] Upon conclusion of the trial, the assessors had returned unanimous opinions of guilty of rape against the appellant on both counts and he was then convicted and sentenced on 25 September 2015 to a total of 10 years imprisonment (*i.e*. 09 years each on both counts but in respect of the second count the period of 09 years to start running one year after the date of sentence) on both counts with a non-parole period of 08 years by the trial judge.

[4] On 20 March 2017 when the matter called before the President of the Court of Appeal for the first time where the appellant had appeared in person, the court had noted that the appeal was out of time by 07 months. On 02 October 2017 the court had directed the appellant's counsel to file an application for enlargement of time along with an affidavit within 14 days. Thereafter, the appellant's affidavit and an amended petition of appeal dated 18 February 2019 had been tendered to court seeking enlargement of time.

[5] The purpose of an application for extension of time to accompany the notice of appeal or an application for leave to appeal (as required by Rule 40 of the Court of Appeal Rules read with Form 6) is for the Court to see *inter alia* whether there is a ground of merit or a ground of appeal that will probably succeed in deciding the issue whether an enlargement of time to file a belated application for leave to appeal should be granted or not.

[6] The appellant's amended petition of appeal contains the following grounds of appeal against the conviction and sentence.

> Ground 1
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> *'The Learned Trial Judge erred in law and in fact when he failed to consider that the appellant was not identified by the complainant nor any of the prosecution witnesses and therefore a vital element of the offence was not proved beyond reasonable doubt.*
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> Ground 2
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> *'The Learned Judge erred in law and in fact when convicting the Appellant as the Conviction was unreasonable and cannot be supported by evidence.'*

Ground 3 (sentence)

'The Learned Trial Judge erred in law and fact when he sentenced the Appellant with a one (1) year consecutive without any consideration for any special circumstances to justify the same which was prejudicial to the Appellant.

[7] The facts of the case could be summarised as follows. On a Saturday morning the victim had gone with two of her uncles to Navua Club to drink beer. She had remained there until the club closed up that night which was about 01 a.m. Then she had left and gone downstairs and was talking to somebody. As she was talking somebody came up from behind and held her. He had punched her on the face and she had fallen to the ground. She had tried to kick him and shout but she had been slapped and her panties removed. It was then that he had put his penis inside her. She had been shocked and felt terrible and hadn't agreed for him to do that. When he had finished, she was dragged to the grass area and then she had seen a group of faces - more than five. They were stepping on her and trying to open her legs and about 4 of them had inserted their penises inside her vagina one after another. One of the men had tried to force his penis inside her mouth. She had moved her head away but he had persisted and managed to get it in about "one quarter", another act she had not consented to. The victim had said that although she was at the Club for a long time, she was not drinking all of the time and she was very aware of what was happening. She knew the men concerned and she was able to identify them in Court. In cross examination the victim had been confronted with two documents, a declaration and a police statement in which she had said she did not want to proceed against these young men and that they had not committed the offence and she wanted to pardon them. However, when re-examined she had clarified that she had said so at the request of the boys' mothers although she had really been raped.

[8] Another witness Prashneel, who corroborated the incident in general, had seen two other boys having sex with the victim after she had fallen to the ground due to the punch and according to Prashneel when the police arrived the appellant and another boy had been "out" on the concrete near the scene of the offence. The witness had said he had known these men for a long time, some for years and one for 01 year. He had been able to identify all the men he had named in Court.

[9] A doctor had examined the victim on 17 December and found that she had a swollen face and a bruise to her eye. There had been abrasions to the wall of her vagina and grass over her thighs and genitalia. According to the doctor his observations were consistent with the victim's claim that she had been raped by a group of boys earlier that day.

[10] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.

[11] In ***Rasaku*** the Supreme Court held

> *'[18] The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application. As the Judicial Committee of the Privy Council emphasised in Ratnam v Cumarasamy [1964] 3 All ER 933 at 935 at 935:*
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> *The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.*

[12] In ***Kumar*** the Supreme Court held

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

[13] In ***Rasaku*** the Supreme Court further held

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

[14] I shall now consider each of the above factors.

Reasons for the failure to file within time

[15] The reason given in the appellant's affidavit for the delay of 07 months is that he had sent his notice of appeal within 30 days to the Court of Appeal but it had not reached there. Secondly, he states that his parents were looking to retain a private lawyer but could not raise enough funds. When he made inquiries of his appeal through his parents he realised that his appeal had not been lodged.

[16] In the first place, there is no material whatsoever to conclude that the appellant had sent any appeal papers to the Court of Appeal Registry within the appealable period. Ordinarily, any communication from a prisoner should come *via* the respective correction centre. The first such communication dated 16 April 2016 expressing his desire to appeal his conviction and sentence had reached the court registry on 17 May 2016 from Suva Correction Centre. Hoverer, it does not contain any averment that he had already sent a petition of appeal within time. It is only his typed purported affidavit (undated and unsigned) sent *via* Nasinu Correction Centre on or about 27th September 2017 that has an averment that he had sent a petition of appeal within 28 days from Suva Correction Centre. Therefore, the appellant's contention that he had sent a petition of appeal within 30 days lacks any credibility.

[17] Secondly, it is unthinkable that he had not inquired from his parents about their effort to retain a private lawyer for 07 months when he appears to have known that he had to appeal within 30 days. There is no affidavit filed by any his parents substantiating this position. In any event there was nothing to prevent him from sending even an informal communication expressing his intention to appeal the conviction and

sentence within the appealable time from whatever the correction centre he was being held as he had done twice albeit belatedly; once in April 2016 and again in September 2017. Therefore, I reject his explanation based on his parents' inability to find money to retain a lawyer for the delay of 07 months.

The length of the delay.

[18] The appellant's counsel admits that the appellant's appeal is out of time by 07 months and the delay is substantial. Thus, the delay in this instance cannot be excused.

Is there a meritorious ground of appeal or a ground of appeal that will probably succeed?

[19] The threshold that an appellant has to reach under this heading is higher than the bar to be overcome in obtaining leave to appeal. The Court of Appeal in recent times has raised the bar in timely leave to appeal applications by applying the test of 'reasonable prospect of success' to identify whether an arguable ground of appeal exists (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and **Sione Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019.

[20] In my view, therefore, the threshold for enlargement of time should be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal. If not, an appeal with a substantial delay such as this does not deserve to reach the stage of full court hearing.

[21] The test of 'real prospect of success' would help achieve the criteria for enlargement of time as set out by the Supreme Court in ***Rasaku*** as follows

> '*[19]* ***Enlargement of time has generally been permitted by courts only exceptionally****, and only in an endeavor to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court.'*

[22] Otherwise, belated and unmeritorious appeals would consume the limited resources of the appellate court at the expense of timely and meritorious appeals which have successfully passed the threshold for leave to appeal and in such cases some of the appellants may be forced to serve the full sentence before their appeals finally reach the full court.

[23] Under this heading I shall now examine the appellant's proposed grounds of appeal.

> Ground 1
>
> *'The Learned Trial Judge erred in law and in fact when he failed to consider that the appellant was not identified by the complainant nor any of the prosecution witnesses and therefore a vital element of the offence was not proved beyond reasonable doubt.*

[24] I find from the summing up that the complainant had in fact identified the appellant in court.

> *'[13] Tessa said that although she was at the Club for a long time, she was not drinking all of the time and she was very aware of what was happening. She knew the men concerned and* ***she was able to identify them in Court****.'*

[25] The trial judge has repeated the same position in his judgment as follows

> *'[2] The victim in this case told of drinking all day at the Navua Club. At 1.00am (closing time) she went downstairs. The first accused was talking to her downstairs and then punched her. She fell to the ground and he pulled her lower garments off and he raped her. She saw 4 or 5 faces hovering over her and was then raped by at least three other men.* ***She knew the men and was able to name them****.* ***The third accused even forced his penis into her mouth****.'*

[26] Prashneel also has seen the appellant at or about the scene of the offence soon after the incident of rape. In any event the identification of the appellant does not solely depend on the testimony of the victim and to a lesser extent that of Prashneel. The appellant's caution interview which was admitted in evidence itself speaks to his identity. It is significant that the appellant does not challenge the admissibility of the caution statement or leading the same at the trial as part of the prosecution case under any of the proposed grounds of appeal before this court, presumably for good reasons. Therefore, even without the evidence of the complainant or that of Prashneel there is ample evidence by way of his own confessional statement to establish his identity.

[27] Therefore, this ground of appeal has no merit. It is unlikely to succeed and has no real prospect of success.

Ground 2

'The Learned Judge erred in law and in fact when convicting the Appellant as the Conviction was unreasonable and cannot be supported by evidence.'

[28] This ground of appeal is based on an apparent contradiction between the evidence of Prashneel and a police officer (witness No.4) called by the prosecution. The trial judge had addressed the assessors on these parts of evidence as follows.

> *'……. Prashneel and Ameniasi decided between them that they would call the Police, which they did. While waiting for the Police, he saw Manoa having sex with the girl and saw Josefa pull down his trousers and "go on top". They then went outside the gate and called the Police again. The Police arrived and he opened the gate. He saw Jo and Marika running. They caught Jo; and Kameli and Abarama were "out" on the concrete……'*

> *'One of the Policemen who arrived at the scene was PW4. When he got there he saw a group of boys standing around a half-naked girl. He apprehended two of the boys (Kameli and Josefa) and took them into the vehicle. He went back for another (Abarama) who was lying on the concrete.'*

[29] The contradiction complained of is that while both witnesses had been at the scene, Prashneel had said that the appellant was 'out' on the concrete whereas the police officer had said that he was part of the group of boys standing around the complainant. The appellant's argument appears to be that according to Prashneel, he

was arrested whilst lying on the concreate but as per the police officer he had been arrested while standing around the victim.

[30] It is clear that the places described by both witnesses are not far from each other. Further, the words "'out' on the concrete" cannot be necessarily taken to mean that the appellant was lying on the concreate. Given the fact that several boys were involved in the act of rape and upon the arrival of the police officers they had got into a panicky mood and behaved differently and, two of them started running away so that the police officers had to chase them, it is understandable that there can be the kind of variance highlighted by the appellant as to what the appellant was exactly doing and where he was at the time of his arrest.

[31] In would be helpful to keep in mind the observations in the following cases of the Supreme Court of India in evaluating the truthfulness and credibility of the evidence of several witnesses who have witnessed an incident simultaneously and given evidence of what they saw years later mainly from their memory.

[32] In **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat** (1983) 3 SCC 217

> *'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…. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details….. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another…. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder ….. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person…. Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on ……. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-*

examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him — Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.'

[33] **State of UP v. M K Anthony** (1985) 1 SCC 505

'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ is some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross Examination is an unequal duel between a rustic and a refined lawyer.'

[34] **State of UP v. Naresh** (2011) 4 SCC 324

'In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and also make material improvement while deposing in the court, it is not safe to rely upon such evidence. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground to reject the evidence in its entirety.

[35] Therefore, in the light of above observations and the facts of this case it is clear that the contradiction highlighted by the appellant is not significant at all as far as the appellant's conviction is concerned. Nothing material turns on it in the end.

[36] Therefore, the second ground of appeal has no merit. It is unlikely to succeed and has no real prospect of success.

Ground 3 (sentence)

'The Learned Trial Judge erred in law and fact when he sentenced the Appellant with a one (1) year consecutive without any consideration for any special circumstances to justify the same which was prejudicial to the Appellant.

[37] The appellant contends that the trial judge has erred in law in terms of section 22(1) of the Sentencing and Penalties Act, 2009 by imposing an additional year of imprisonment on him on account of count 02 as a consecutive sentence to the sentence on count 01. The relevant paragraphs in the sentencing order are as follows

> *'[20] The third accused is convicted of two counts of rape, one vaginal and one oral. He says in his cautioned interview (obviously accepted as true) that he saw the second accused having sex with the woman and he asked the second accused if he too could have sex which he did. He later forced himself into the victim's mouth. Although this has been charged as a separate count of rape, it is a further indignity inflicted on the vulnerable and subjugated victim and he must therefore be additionally punished over and above the usual concurrent sentence.*
>
> *From a starting point of nine years for the first count (Count 3), I add one year for the indignity of public assault and deduct one year for his clear record and for the short time he has spent in custody leaving a final sentence of nine years imprisonment.*
>
> *[21] For the second (oral rape - Count 4) I also pass a sentence of nine years imprisonment. **This term will commence one year from today which means he will serve eight years of the second sentence currently with the first and one year consecutively**. In effect, the third accused will serve a total term of ten years imprisonment for both offences. He will serve a minimum term of eight years before being eligible for parole*

[38] Therefore, it would appear that the trial judge had imposed 09 years of imprisonment on both counts but had directed that the sentence of 09 years on the second count should commence after one year from the date of the sentence making the appellant serve 10 years of imprisonment. Thus, one year out of the sentence on count 2 would run consecutively to the sentence on count 1.

[39] Section 22(1) of the Sentencing and Penalties Act, 2009 reads as follows

> '*Concurrent or consecutive sentences*
>
> *22. — (1) Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.'*

[40] It is clear that the imprisonment imposed on the appellant does not come under sub-section (2) of section 22. Therefore, the justification for the consecutive sentence should be considered under section 22(1) itself. It looks as if the words '*unless otherwise directed by the court'* in section 22(1) permits the trial judge to make a sentence consecutive to another sentence even when section 22(2) does not apply. The issue is in what circumstances the discretion vested in the trial judge by those words should be exercised and whether the discretion exercised in this instance could be justified.

[41] The reason given by the trial judge is 'further indignation' caused to the complainant by the appellant by forcing himself into the mouth of the victim for making one year consecutive.

[42] It is clear that *'forcing himself into the mouth of the victim'* is part of the elements of the charge under count 2. It is also clear that the trial judge had already added 01 year for the indignity of public assault in determining the lead sentence of 09 years and therefore the matters of oral rape and that it happened at a public place should not have been relied upon to make one year of the lead sentence on count 2 consecutive. Thus, directing the appellant one more year than 09 years imposed on both counts does not appear to be justified.

[43] In addition in terms of section 23(1) of the Sentencing and Penalties Act, 2009, a sentence of imprisonment commences on the day that it is imposed. Therefore, the trial judge's direction that the 09 years of imprisonment on the second count should commence one year after the date of sentence seems to be obnoxious to section 23(1).

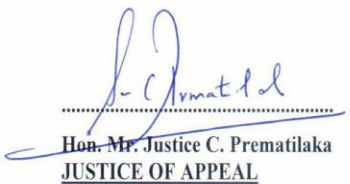
[44] Therefore, the third ground of appeal has merit. It is likely to succeed and has a real prospect of success.

[45] In the circumstances, I would refuse enlargement of time on first and second grounds of appeal against conviction but grant enlargement of time for leave to appeal on the third ground of appeal against the sentence on the limited question discussed above.

[46] Therefore, I also grant leave to appeal against the sentence on the issue whether making one year out of the sentence of 09 years of imprisonment on count 02 consecutive legal in terms of section 22 and 23 of Sentencing and Penalties Act, 2009 and other relevant principles of sentencing. The appellant is free to perfect the third ground of appeal against sentence as permitted by law before the hearing of the appeal before the full court, if he so advised.

The Orders of Court are

1. Enlargement of time is granted on the 03rd ground of appeal against sentence.
2. Leave to appeal is granted on the 03rd ground of appeal against sentence.
3. Enlargement of time and leave to appeal are refused on the 01st and 02nd grounds of appeal against conviction.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL