IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 82 OF 2014
(High Court Criminal Case: HAC 34 of 2013)

BETWEEN : **ESEROMA VAKACEGU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath JA**
Prematilaka JA
Nawana JA

Counsel : **Mr M Fesaitu for the Appellant**
Mr L J Burney for the Respondent

Date of Hearing : **12 February 2020**

Date of Judgment : **27 February 2020**

JUDGMENT

Gamalath JA

[1] I have read in draft form the judgment and the conclusions contained therein. I agree with Nawana, JA.

Prematilaka JA

[2] I have read in draft the judgment of Nawana, JA, and agree with the reasons, orders proposed therein.

Nawana JA

[3] The appellant stood charged for having abducted a young girl below the age of eighteen years, an offence punishable under Section 285 of the Crimes Act, 2009, in count No (1); for committing rape by penetrating the mouth of the girl, an offence punishable under Section 207 (1) read with (2) (c) in count No (2) ; and, for having carnal knowledge with the girl, an offence punishable under Section 207 (1) read with (2) (a) in count No (3), of the Crimes Act, 2009. The charges, as presented by the Director of Public Prosecutions (DPP) on the information dated 04 April 2013, were as follows:

> ***"First Count***
> ***Statement of Offence***
> ***ABDUCTION*** *: Contrary to section 285 of the Crimes Decree 44 of 2009*
>
> ***Particulars of Offence***
> ***ESEROMA VAKACEGU,*** *on the 18th day of January 2013 at Suva in the Central Division, unlawfully took '**UT**', being under the age of 18 years, out of the possession and against the will of her father.*
>
> ***Second Count***
> ***Statement of Offence***
> ***RAPE*** *: Contrary to section 207(1) and (2) of the Crimes Decree 44 of 2009.*
>
> ***Particulars of Offence***
> ***ESEROMA VAKACEGU,*** *on the 18th day of January 2013 at Suva in the Central Division, penetrated the mouth of '**UT**' with his penis, without her consent.*
>
> ***Third Count***
> ***Statement of Offence***
> ***RAPE*** *: Contrary to section 207(1) and (2) (a) of the Crimes Decree 44 of 2009.*
>
> ***Particulars of Offence***
> ***ESEROMA VAKACEGU,*** *on the 18th day of January 2013 at Suva in the Central Division, had carnal knowledge of '**UT**' without her consent."*

[4] The name of the complainant-victim is suppressed. She will be referred to as the complainant for purposes of reference in this judgment.

[5] After trial, the appellant was found guilty of the charges in counts (1) and (3) by a unanimous opinion of the assessors. He was found guilty of the charge in count (2) by a majority opinion. The learned trial judge, having directed himself on the legal principles given in the summing-up and the evidence, agreed with the opinions of the assessors. The appellant was, accordingly convicted on 07 March 2014.

[6] The appellant was, thereupon, sentenced on 11 March 2014 to a term of two-year imprisonment for count (1); and, to a term of thirteen-year imprisonment each in respect of counts (2) and (3). Applying the totality principle in sentencing, the terms of imprisonment were ordered to take effect concurrently. Having taken into account the provisions of Section 18 (1) of the Sentencing and Penalties Act, 2009, the appellant was ordered to serve a ten-year term of imprisonment before being eligible for parole.

[7] The appellant sought leave to appeal out of time by filing an application in terms of Section 26 (1) of the Court of Appeal Act both against the conviction and the sentence. The application against the sentence was subsequently withdrawn when the appellant filed an amended notice of appeal on 18 May 2016. The single Justice of Appeal, in his ruling dated 28 October 2016 after a hearing, refused the application for leave to appeal out of time against the conviction.

[8] The Legal Aid Commission, appearing on behalf of the appellant, filed a renewal notice for enlargement of time for leave to appeal against the conviction on 16 July 2019, which was supported by written-submissions dated 16 January 2020. Learned counsel for the state, too, filed written-submissions in reply dated 22 January 2020 resisting the application for renewal. Both parties relied on written-submissions and supplemented their arguments at the formal hearing before the full court on 12 February 2020.

[9] The appellant's renewal application for leave to appeal out of time was made in terms of Section 35 (3) of the Court of Appeal Act in consequence of the refusal of the application for leave by the single Justice of Appeal in the exercise of jurisdiction of the court under Section 35 (1) (b) of the Court of Appeal Act.

[10] The appellant, as urged in his renewal notice for the enlargement of time to appeal dated 16 July 2019, relied on the following grounds against the sentence. They were:

> *(i) The learned judge erred in law and in fact when he did not properly consider the credibility of the complainant when she lied to her parents when they enquired why she came late although she said that she did not have the courage to tell them what happened;*
>
> *(ii) The learned trial judge erred in law and in fact when he did not consider the opportunities of escape [sic] and raising alarm for assistance available to the complainant when the appellant left to go to the Ministry of Education; and,*
>
> *(iii)The learned judge erred in law and in fact when he did not consider that the complainant had people to report to about the alleged rape soon after the alleged incident but she did not.*

[11] The grant of enlargement of time to appeal out of time; or, the grant of renewal of the application for enlargement of time once refused by a single Justice of Appeal acting in terms of Section 35 (1) of the Court of Appeal Act, is not automatic. It, instead, involves a process by the full court where the application of the relevant criteria is considered in a stringent manner as laid down by judicial authorities. The criteria have been laid down bearing in mind the inviolable need to conform to the rules of the court; and, the justifiable need to ensure justice to a litigant at default.

[12] The reach of the ultimate objective has been left to the discretion of the court. The discretion is not unfettered. That is a discretion that has to be exercised reasonably, fairly and lawfully by applying *inter alia* the principles enunciated in the judicial precedents on the facts and circumstances of each case. The principle laid down by the Judicial Committee of the Privy Council in the United Kingdom in ***Ratnam v Cumaraswamy*** [1964] 3 All ER 933 at 935, is a sound principle to start with. It said:

> *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.*

[13] The exercise of the discretion by court in this sphere was explained by way of a series of guidelines by the Supreme Court of Fiji as it considered the matter on enlargement of time in ***Kumar v State*** and ***Sinu v State*** [2012] FJSC 17; CAV0001 of 2009: (21 August 2012), where it was held that:

> *Appellate courts examine five factors by way of a principled approach to such applications. Those factors are: (i) the reasons 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 a substantial delay, nonetheless is there a ground of appeal that will probably succeed ?; and, (v) if time is enlarged, will the respondent be unfairly prejudiced.?*

[14] The Supreme Court of Fiji, having reinforced the above criteria, reiterated on the discretion and its purposive exercise in dealing with applications for enlargement of time. The Supreme Court held in ***Rasaku v State*** [2013] FJSC 4: CAV0009; 0013.2013: (24 April 2013; that:

> *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 specific period for lodging his application.*

[15] The above principles were adopted and applied, as recently as in June 2019, in the case of ***Nasila v the State*** [2019] FJCA 84; AAU0004.2011: (06 June 2019) in dealing with a similar application for enlargement of time, where it was held that the new grounds should be considered subject to the guidelines applicable for enlargement of time to file an application for leave to appeal.

[16] The appellant, by way of an affidavit sworn by him dated 18 May 2016 explained the delay. The delay was by about two months from the orders of the conviction and the sentence of the High Court to the filing of his handwritten initial notice of appeal dated 18 June 2014. The appellant stated that he was not able to get the transcript of

the court proceedings, copies of the summing-up and other relevant documents for the purpose of preparing a timely appeal. He further stated that other reasons such as his transfer among the places of his imprisonment, too, contributed to not being able to file a timely appeal.

[17] While most of the reasons assigned for the failure to file a timely appeal are seen to have been attributed to common occurrences, the extent of the difficulty in filing a timely appeal needs to be appreciated taking into account the relatively short delay of little over two months occasioned from a person who had been imprisoned.

[18] In **Fisher v State** [2016] FJCA 57; AAU132.2014 (28 April 2016), the issues of delay; and, how such delays should be addressed in dealing with an application for enlargement of time to appeal by an imprisoned convict, were considered. It was observed in that decision that:

> *[12] The Supreme Court has acknowledged that incarcerated appellants who are unrepresented do face difficulties in the preparation of their appeals. However, those difficulties do not justify setting aside the requirements of the Act and the Rules:* ***Raitamata –v- The State****, CAV 2 of 2007; 25 February 2008 and* ***Sheik Mohammed –v- The State****, CAV 2 of 2013; 27 February 2014. The explanation for the delay will not by itself ordinarily lead to the conclusion that an enlargement of time should be granted. It is usually necessary to consider whether the appeal has sufficient merit to excuse the Appellant's non-compliance with the Rules. It is necessary for the Appellant to show that his appeal grounds have sufficient merit to (a) excuse the delay and (b) be considered by the Court of Appeal.*

(Underlined for emphasis)

[19] The courts have, therefore, consistently taken the view that, even though the delay could be excused, that by itself would not allow the defaulting appellant to get leave to appeal out of time as a matter of course. The appellant, instead, will certainly have to show that the grounds of appeal, in respect of which, leave is sought to appeal out of time, bear sufficient merit.

[20] I will now turn to consider the evidence led before the trial court in order to consider whether the grounds urged in support of the renewal application for leave to appeal bear merit.

[21] All three grounds, in my view, are intrinsically connected to the questions of fact, which were primarily within the domain of the assessors. In this case, they revolved around the credibility of the complainant, who became a victim of sexual offences as alleged by the prosecution; and, the probability of the complainant's story, in order to consider whether her testimony was credible to find the appellant guilty of the charges.

[22] The complainant was a sixteen-year-old girl, who was the youngest in the family of seven siblings and was still studying in a school at the time of the incident on 18 January 2013. After having lunch in the City of Suva with the parents around 1.00 p.m., she got permission to visit an internet café. The complainant was permitted to go to the internet café, but she was asked to return home before 3.00 p.m.

[23] The appellant, 23, who had been known to the complainant, was at the internet café. He engaged the complainant online and posted messages of endearment. The complainant, though appeared uninterested initially, appeared to have got closer through their online chatting. The appellant emerged and showed-up his presence in person at the café to the complainant and persuaded her to accompany the appellant to the Flea Market and from there to the Marella House at the latter's request. The appellant then, on the way, took her to Sunset Motel to drop-off a plastic bag, which the appellant was carrying.

[24] At the motel, the complainant was forced an alcoholic drink on her, which she drank at the insistence of the appellant. The appellant later left her at the motel stating that he was going to collect his marks from Marella House, where an education office was located. On his return little later, the complainant said that she wanted to go home, to which the appellant responded negatively. The appellant, instead, went inside the motel saying that he was going to have a bath and accompanied the complainant in.

[25] As the appellant came out of the bathroom, the complainant stepped inside, at which point of time, the appellant pushed the complainant into a small passage between the

bathroom and the toilet and closed the door. The appellant, thereafter, pulled down her dress and fondled the breasts. He, thereafter, forcibly inserted his penis into the mouth and got her to suck. The appellant, being so forceful, then inserted his penis into the vagina as she felt weak. The complainant said that she did not consent to what the appellant did on her.

[26] The complainant, admittedly, did not make any complaint then and there. On her way back home to Cunningham, too, she had not disclosed the incident even though she had met acquaintances at the bus station. The complainant did not disclose the incident even to the parents although she was confronted as to why she got late to return. Her late return home earned her the punishment of being beaten with a belt by the father. She, however, told the incident to the father only on following Sunday revealing the appellant as the person who committed rape on her inside a bathroom at the motel.

[27] At the trial, the prosecution placed the evidence of Mr Sireli Tamanitoakula, the father of the complainant, who testified consistently as to the facts preceding the incident and, on the narration [of the incident], by the complainant on Sunday.

[28] Dr Ms Elvira Ongbit, who examined the complainant on 22 January 2013 upon being produced by police, found fresh hymenal laceration at 6 0'clock position. The age of the laceration was computed as having caused around 18 January 2013.

[29] The police presented evidence on the conduct of the investigation on receipt of the complaint from the complainant and testified on the recording of the statement of the appellant under caution.

[30] The appellant testified on his own behalf and called Special Constable Sakaraia in his defence. The appellant admitted in evidence that he had accompanied the complainant to the Flea Market on the day of the incident and then to the Sunset Motel where he left the complaint until he returned from Marella House after collecting marks [of an examination]. It was appellant's evidence that he had only kissed the complainant on her lips on his return as she was found standing near the bathroom.

[31] The appellant did not say that he had consensual intercourse with the complainant and denied the complainant's position of raping her. Instead, it was the appellant's position that even though he had wanted to have sex with the complainant, she refused because of her menstruation. The appellant said that, after their visit to the motel, he took the complainant to drop-off for a bus where he met Sakaraia, a police officer, to whom the appearance of the complainant appeared normal.

[32] Police officer Sakaraia gave evidence in defence of the appellant at the trial stating that he had met the appellant with a girl around 4.00 p.m. on 18 January 2013 whom he noticed to be normal.

First Ground of Appeal

[33] The complaint of the appellant is that, the complainant on her late return home, had lied to the parents. The explanation proffered by the complainant was that she did not have the courage to tell the parents what had happened on her that afternoon. It was contended on behalf of the appellant that, the act of lying on the part of the complainant, affected the credibility so as to displace her testimony in court.

[34] Learned counsel for the appellant further submitted that the finding of a fresh laceration four days after the incident by the medical doctor should have been considered along with the act of lying by the complainant and should have been dealt with in the judgment of the learned judge.

Second and Third Grounds of Appeal.

[35] Learned counsel further submitted in terms of second and the third grounds that, if there was indeed an incident, the complainant did have ample opportunities to raise alarm and seek assistance. It was the learned counsel's position that the learned judge should have considered such attendant circumstances and directed himself rightly on the matter. Learned counsel submitted that the conduct of the complainant, therefore, rendered her testimony less acceptable; hence, less weight should have been accorded to her testimony.

[36] Referring aptly to the transcript of the evidence, it was further submitted that the complainant could have easily escaped when the appellant left her alone at the motel when he departed to collect his marks from Marella House. Moreover, when she met two of her friends at the bus station waiting to take a bus, the complainant had not revealed her ordeal. Nor, had she reported to the Market Police even though she went past it on her way to the bus station.

[37] It is, indeed, necessary to consider the matters complained of by the learned counsel in light of the contents of the summing-up. Indisputably, there were no complaints against the learned trial judge on the basis of any misdirections or non-directions, as such. The complaints on behalf of the appellant, instead, were based on the fact that the learned judge had not considered the matters surrounding the complainant's credibility; and, the probability of her story.

[38] The learned judge, in his summing-up giving general directions, to the assessors said the following:

> *(i) …All matters of facts are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject (**paragraph 01**);*
>
> *(ii) You have to decide what facts are proved and what inferences drawn from those facts (**paragraph 02**);*
>
> *(iii) … [Burden of Proof] means you must be satisfied so that you are sure of the accused's guilt before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty (**paragraph 06**); and,*
>
> *(iv) Your duty is to find the facts based on the evidence, apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotions (**paragraph 11**)*

[39] As regards the evidence, the learned trial judge referred to the following:

> *(i) … Thereafter, Xavier Tikomailomai (aka **Eseroma Vakacegu**) went out to collect his marks sheet from Marella House. But, he came back very quickly. After his arrival, the victim wanted to go home but was not allowed (**paragraph 20**);*

*(ii) ... At the bus stand, though she met two of his friends, she did not tell anybody about the incident. She then got into the Cunningham bus and reach home after six o'clock. Though her parents inquired why she was late, she lied to them as she did not had the courage to tell them what had happened. On Sunday, after she came from church, she told her father about the incident. She did not tell her mother as she is a sickly person. ... (**Paragraph 22**);*

*(iii)Sakaraia gave evidence on behalf of the accused. According to him on 18/01/2013, at about 4.00pm when he was going to Totogo Police Station he met the accused with a girl. The girl seemed to be normal (**paragraph 31**);*

*(iv) She clearly narrated the ordeal she encountered on 18/01/2013. She admitted that she went to Sunset Motel on the request of the accused. But she never consented for sex. She could not escape from the accused when he went to Ministry of Education as he had locked the door. She doesn't know where Totogo Police Station is situated. Also does not know where Wesley Church and the bank are situated. She only informed the incident to her father after she returned from church on Sunday. The doctor had noted fresh hymeneal laceration at 6 o'clock position in her vagina. In her history to the doctor, she had narrated the same. <u>As assessors and judges of facts you have to consider her evidence with great care</u> **(paragraph 32)**.*

[40] Therefore, it would appear that the learned judge had not only referred to the matters of credibility in assessing the evidence of the complainant; but, also had summarized the salient points of the complainant's evidence and cautioned the assessors that her evidence had to be considered with <u>great care</u> in view of the attendant factors that could shake her credibility and the weight of her evidence.

[41] I am, therefore, of the view that the learned judge had reasonably adverted to the relevant principles of law in assessing the credibility of the complainant and referred to the relevant points of her evidence that need be borne in mind in accepting the evidence. The learned judge, in my view, had adequately invested the assessors with required knowledge to deal with the complainant's evidence as primary triers of fact. The case, in the circumstances, did not appear to be one of those cases where the assessors were deprived of the requisite knowledge so as to affect their duty to decide on facts.

[42] As rightly submitted by the learned counsel for the state on the authority of **R v Hopkins-Hudson** [1950] 34 Cr App R 47, it is not the function of a criminal appellate court to substitute its own view of the evidence. This is how their lordships of the English Court of Criminal Appeal held in relation to a matter dealing with the findings on pure questions of facts by a jury:

> *…it has been held from an equally early period in the history of this court that the fact that some members of the court think that they themselves would have returned a different verdict is again no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country. If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this court will not set aside the verdict of guilty, which has been found by the jury.*

[43] Turning to another contemporary jurisdiction, it could be seen that the legal position is the same as was held by the High Court of Australia in **Queen v Baden-Clay** [2016] HCA 35 and relied on by learned counsel for the state. Court, in that case, held that:

> *setting aside of a jury's verdict on the ground that it is 'unreasonable' … is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal, which has not seen or heard the witnesses called at trial.*

[44] The above was a reiteration of the legal position insofar as the matters within a jury is concerned, as ruled in **M v Queen** [1994] 181 CLR 487. This is what court stated:

> *It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.*

[45] The House of Lords, on the other hand, in **Stirland, Appellant v Director of Public Prosecutions** [1944] AC 315, laid down the guideline nearly five decades ago which this court adopted and applied consistently (**Navaki v State** [2019] FJCA 194; AAU0087.2015 (3 October 2019). The House of Lords held in that case:

> *When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should be applied.*
>
> *A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.* ...

[46] Notwithstanding the jury system found elsewhere is remarkably different from an assessor-based system as found in Fiji, the principles laid down above conceptually can be taken into account as the assessors render their opinions as primary triers of fact to help making the verdict by the presiding judge. If inroads are made to the fact-finding arena of the assessors, the overall effect of the concept of trial by peers will, in my view, suffer and run into disarray.

[47] The Fiji Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) held that:

> *Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*
>
> *It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better*

position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.

[48] The above decisions, which demonstrate the correct position of the law, has been followed consistently without a deviation in Fiji. The single Justice of Appeal, in deciding the justifiability of the three appeal grounds to consider the grant of leave to appeal out of time, had this to say in his ruling:

The summing-up indicates that the relevant evidence had been considered. The finding of guilty beyond reasonable doubt would indicate that the learned judge accepted the evidence of the prosecution witnesses. That evidence was capable of establishing guilt beyond reasonable doubt. It is the task of the trial judge to assess the evidence and attach whatever the weight he chooses to that evidence based on such matters as reliability, credibility and logical consistency. It is not for the Court of Appeal to indicate that it would have reached a different conclusion.

[49] Considering the facts, as set-out above, and the forgoing judicial precedents, I am unable to subscribe to the view that the matters complained of by the appellant, which are wholly within the province of the assessors, had not been adequately considered by the learned trial judge when he summed-up the case for the assessors to deliberate and rule on the issue of guilt or otherwise of the appellant. In pronouncing the judgment on 07 March 2014, the learned judge indubitably had directed himself with his directions on the questions of law and the facts, as he ought to have, in the discharge of his functions as a judge having overall control over the trial.

[50] When all three grounds of appeal are considered, they aim at inviting this court to substitute its own decision in place of the decision of the assessors and the learned trial judge, which is not permissible to do in the exercise of the appellate functions of this court as empowered by the Court of Act, 1949, (Cap 12). I do not think that I should endeavour any further stressing the point in light of the long-standing judicial approach in its favour. Facts, circumstances and the evidence in this case are not in appellant's favour for this court to make a deviation.

[51] I associate myself with the conclusion of the single Justice of Appeal in refusing the application for leave to appeal out of time on the above premise considering the nature of the grounds urged by the appellant to pursue an appeal against the conviction. I would state that the full court comes to the same conclusion in refusing leave to appeal out of time raised in this renewal application.

[52] I, therefore, hold that there is no merit in all three grounds for them to be considered as viable grounds to be urged in an appeal against the conviction in this case. I, accordingly, reject all three grounds of appeal and dismiss the renewal application for enlargement of time to appeal.

Orders are:

(i) The renewal application for enlargement of time for leave to appeal out of time against the conviction, is dismissed; and,

(ii) The conviction of the appellant on counts (1), (2) and (3) shall stand.

Hon. Mr. Justice S Gamalath
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr. Justice C Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice P Nawana
JUSTICE OF APPEAL