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

CRIMINAL APPEAL NO.AAU 104 of 2017
[In the High Court at Suva Case No. HAC 306 of 2014]

BETWEEN	:	**EPELI WAQANITABUA KELEI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Ratu for the Appellant**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	:	**16 October 2020**
Date of Ruling	:	**19 October 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on two counts of rape contrary to section 207 (1) and (2) (a) and (b) respectively of the Crimes Act, 2009 and a single count of indecent assault contrary to section 212 (1) of the Crimes Act, 2009 committed on 13 November 2014 at Samabula in the Central Division.

[2] The information read as follows.

'FIRST COUNT

Statement of offence

Rape: *Contrary to Section 207 (1) and (2)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

EPELI WAQANITABUA KELEI *on the 13th day of November 2014 at Samabula in the Central Division had carnal knowledge of* ***MAY MAFTUNA****, without her consent.*

SECOND COUNT

Statement of offence

Rape: *Contrary to Section 207 (1) and (2)(b) of the Crimes Decree No. 44 of 2009.*

Particulars of offence (b)

EPELI WAQANITABUA KELEI *on the 13th day of November 2014 at Samabula in the Central Division penetrated the vagina of* ***MAY MAFTUNA****, with his finger, without her consent.*

THIRD COUNT

Statement of offence

Indecent Assault: *Contrary to Section 212 (1) of the Crimes Decree No. 44 of 2009.*

Particulars of offence (b)

EPELI WAQANITABUA KELEI *on the 13th day of November 2014 at Samabula in the Central Division unlawfully and indecently assaulted* ***MAY MAFTUNA****, by kissing her on her lips.*

[3] After the summing-up on 09 June 2016 the assessors had unanimously opined that the appellant was guilty of all the charges and in the judgment delivered on 10 June 2016 the learned trial judge had agreed with them on count 1 and 3 and convicted the appellant as charged and disagreed with the assessors on count 2 and acquitted the appellant of the second count of rape. On 13 June 2016 the appellant had been sentenced to an aggregate sentence of 07 years and 11 months and 24 days with a non-parole period of 05 years, 11 months and 24 days.

[4] The appellant in person had signed an untimely notice of appeal against conviction and sentence on 15 May 2017 (received by the CA registry on 11 July 2017). The delay is about 10 months. Amended grounds of appeal against sentence had been tendered on 27 September 2017. However, he had filed an application in Form 3 to

abandon his sentence appeal on 20 June 2018. The Legal Aid Commission has subsequently filed an application for extension of time to appeal only against conviction and written submissions on 27 July 2020. The state had responded by its written submission on 07 August 2020.

[5] 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, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

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

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

[7] ***Rasaku*** the Supreme Court further held

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> *'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.'*

[8] I think the remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

> *'(a) .....*
>
> *(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.*

(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.

(d) 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.

(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'

[9] Sundaresh Menon JC also observed

'27..... It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.'

[10] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

*'[23] In my view, therefore, the threshold for enlargement of time should logically 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.....'*

Length of delay

[11] As already pointed out the delay is about 10 months and substantial.

[12] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 3 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

> *'In **Julien Miller v The State** AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave. The appellant in that case was 11½ months late and leave was refused.'*

[13] Faced with a delay of 03 years in **Khan v State** [2009] FJCA 17; AAU0046.2008 (13 October 2009) Pathik J observed that *'There are Rules governing time to appeal. The appellant thinks that he can appeal anything he likes. He has been ill-advised by inmate in the prison. The court cannot entertain this kind of application'*

[14] I also wish to reiterate the comments of Byrne J. in **Julien Miller v The State** AAU0076/07 (23 October 2007) that *'that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'*

[15] Therefore, delay alone is sufficient to defeat the appellant's appeal if that is the only consideration.

Reasons for the delay

[16] The appellant had stated in his affidavit that he had prepared appeal papers within time and given to prison authorities to be filed in the CA registry but they had been later found to be misplaced. However, there is nothing more submitted to this court to substantiate the appellant's position.

[17] The appellant had been defended by a counsel at the trial and he could have obtained her assistance to lodge a timely appeal in the same way the LAC had done later.

[18] Therefore, I am not convinced that the appellant has satisfactorily explained the delay.

[19] This court should and will not be hesitant to take a strict view in appropriate cases to ensure that the process of court is not abused and judicial time is not wasted by unmeritorious appeals which are filed belatedly more out of trying the appellant's luck than out of any genuine grievance against the decision of the trial court.

Merits of the appeal

[20] In the **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

> *"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."*

[21] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well in order to consider whether despite the substantial delay and want of an acceptable explanation, still the prospects of his appeal would warrant granting enlargement of time.

[22] Grounds of appeal urged on behalf of the appellant are as follows.

Against Conviction:

Ground 1: The verdict is unreasonable and not supported by the totality of evidence.

Ground 2: The learned trial judge caused the trial to miscarry when the Summing Up lacked fairness and balance.

[23] The trial judge had summarised the evidence for the prosecution and defence as follows in the summing-up.

Case for the prosecution

'31. 'Complainant said that she had her 21st birthday party on 12/11/2014 at her house. She had about 10 nips of Vodka before she left with her friends to go to a night club around 9.30pm. She did not drink much alcohol at the night club. She came back home around 3.00am on the following morning. She

slept in her bedroom with her 1 year old daughter. She woke up around 4.00am to go the bathroom. To reach the bathroom, she had to go pass the living room where her brother William and the accused were sleeping. She walked around the two to reach the bathroom. When she came out of the bathroom, the accused was standing outside the bathroom and then he kissed her. She did not expect this, as he was her cousin and she regarded him as a brother. She pushed him away and asked what's wrong with him. Then she went to her bedroom and went to sleep. She did not raise an alarm because she was shocked and scared.

32. She woke up again when she felt a pain in her vagina. She said the accused's two fingers caused that pain. However, at that point she did not realise that it was the accused. She thought she was dreaming because she did not see anyone inside the room and the mosquito net was still down. She went back to sleep. She woke up again when she felt a heavy weight on her body. When she woke up she saw accused's face and realised that he was having sex with her. His penis was inside her vagina. She kicked him. She said the accused did not ask her at any point prior to that whether he could have sex with her. After she kicked him, it took the accused few seconds to pull out. He got up, stood next to the bedroom door and pulled his zip up. At that time her dress was pulled up to her stomach and she was not wearing her underwear. She said she did not remove her underwear. Then the accused crawled under her bedroom curtain and went to the mattress he was sleeping. She said, there was a solar light hanging in their living room which brightens the living room, her bedroom and her parent's bedroom, throughout. She reported the matter to the police on 14/11/14. It took her about 24 hours to report because she was ashamed, scared and shocked.

Case for the Defence

35. ..... The accused chose to give sworn evidence.

36. Accused said that he was at the complainant's birthday party on 12/11/2014 and he was drinking kava with his relatives before the complainant and her friends left that night and he was still drinking when they returned early morning on 13/11/14.

37. He said while he was sleeping, the complainant kicked him and then she told him to go to her room. He sat for a while and then followed her to her room. He said when he entered the room the complainant was looking at him. Then he got onto the bed and had sexual intercourse with her. According to him, he knew that the complainant was "ok" for him to have sex with her because she did not say anything and because she was moaning. He said the complainant did not tell him to stop or expressed that she did not like what he was doing.'

01st ground of appeal

[24] The defence taken up by the appellant had been 'consent' on the part of the complainant with regard to the first count of rape and total denial regarding the other two counts. The appellant submits that there is a reasonable doubt on 'lack of consent'.

[25] The trial judge had clearly addressed the assessors on the element of lack of consent in paragraphs 24, 25 and 40 of the summing-up. He had placed the two versions of the complainant and the appellant on 'lack of consent' and 'consent' respectively before the assessors in paragraphs 41 and 42 as follows.

> *'41. The prosecution says that the accused inserted his penis inside the complainant's vagina when she was asleep and that the accused never obtain the complainant's consent.*
>
> *42. The defence says that the complainant told the accused to come to her room that morning and then the complainant and the accused had consensual sexual intercourse. According to the defence, that is the reason why the complainant did not inform anyone about the incident soon after though she had the opportunity.'*

[26] Therefore, there were two versions before the assessors and the trial judge on the issue of consent. What is required of a trial judge when there is a 'word against word' conflict between the prosecution and defence had been dealt with in **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017).

[27] ***Liberato** principles* had already dealt with evaluating the evidence of the prosecution and defence and this direction is usually given in cases turning on the conflicting evidence of a prosecution witness and a defence witness. The direction requires that, *"... even if the jury does not positively believe the defence witness and prefers the evidence of the prosecution witness, they should not convict unless satisfied that the prosecution has proved the defendant's guilt beyond reasonable doubt".*

[28] In **Liberato v The Queen** [1985] HCA 66: 159 CLR 507 High Court of Australia held:

> *'1]. When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving.* ***The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue….***'

[29] In **De Silva v The Queen** [2019] HCA 48 (decided 13 December 2019) the position taken up by the majority on the High Court was that a *"Liberato direction"* is used to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that *"… the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt."* As a result, the High Court said that a *"Liberato direction"* need only be given in cases where the trial judge perceives a real risk that the jury might view their role in this way, regardless of whether the accused's version of events is on oath or in the form of answers given in a record of police interview.

[30] ***Prasad*** was a case where (of course, in different circumstances to the current appeal) the appellant took up the consistent position that his indulgence in the act of sexual intercourse with the victim was consensual whereas the complainant's evidence was that the appellant engaged in sexual intercourse with her without her consent and there was seemingly no other credible evidence (though some evidence led at the trial) to buttress the complainant's version the credibility which itself was called into question, the Court of Appeal said as follows.

> *'[44] In my opinion, trial judges dealing with evidence of a case should necessarily leave the assessors with the following directions:*

(i) that the onus of proving each ingredient of a charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

(ii) that in assessing the evidence, the totality of evidence should be taken into account as a whole to determine where the truth lies.

(iii) that in situations where there is evidence adduced on behalf of an accused, it is incumbent on the assessors to examine such evidence carefully to decide, not necessarily whether they believe that evidence or not, but whether such evidence is capable of creating a reasonable doubt in their minds.

(iv) that in other words, if they believe the evidence adduced on behalf of the defense, which means the prosecution has failed to prove the case beyond any reasonable doubt and hence the benefit of the doubt should enure in favor of the accused and he shall therefore be acquitted.

(v) that on the other hand in the scenario of the assessors neither believe the evidence adduced on behalf of the accused nor they disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution's case and the benefit of doubt should then enure in favor of the accused and he should then be acquitted.

(vi) that in a situation where the assessors totally disbelieve the evidence adduced on behalf of the accused, the assessors should still consider whether the prosecution's case can stand on its own merits. Which means whether the case has been proven beyond any reasonable doubt. In another word, the mere fact that the accused's version has been rejected for its veracity, it does not mean the case for the prosecution has been proven beyond any reasonable doubt.

[31] On a perusal of the summing-up, I find that the trial judge had addressed the assessors on the burden of proof and standard of proof as an inalienable obligation of the prosecution in paragraphs 14, 15, 49 and 54 and they should consider not only what he had highlighted but any other evidence the assessors deemed important (*i.e.* the whole of the evidence) in paragraph 5 and 7. He had also addressed the assessors on how they should deal with the appellant's evidence if they believe, neither believe nor disbelieve and do not believe in paragraph 55. Thus, no substantial complaint could

be made regarding the trial judge's summing-up on the *'complainant's version'* against *'appellant's version'* scenario.

[32] In the backdrop of the above directions, the assessors had clearly believed the complainant and found the appellant guilty of rape and therefore, they must have believed her on 'lack of consent' regarding the first count. The assessors had also not thought that the appellant's version even might be true on the issue of consent, for the trial judge gave them the following direction in paragraph 55 of the summing-up.

> *'Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each offence:*
>
> > *(i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.*
> >
> > *(ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.*
> >
> > *(iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty of an offence charged. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.*

[33] The trial judge had adequately performed his role in agreeing with the assessors in the judgment. What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trail judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaivum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014),

Chandra v State [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]

[34] The approach that should be taken by the appellate court in a situation such as this is, in my view, illustrated in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) where the Court of Appeal stated that

> *'That leaves us to consider the evidence, including the statements, in relation to each of the two counts appealed on the ground that it does not support the convictions. How is the Court to approach this?*
>
> *Section 23(1)(a) of the Court of Appeal Act sets out our powers:*
>
> *"23-(1) The Court of Appeal -*
>
> *(a) on any such appeal against conviction shall allow the appeal if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the grounds of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal."*
>
> *The present wording is from the Court of Appeal (Amendment) Decree 1990 but, in this part, follows exactly the wording of the previous section.*
>
> *It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.*
>
> *Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in* ***R v Cooper*** *(1968) 53 Cr. App. R 82.*
>
> *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.

The appeal is dismissed.'

[35] In my view, it was open to the assessors to bring the verdict they brought against the appellant and for the trial judge to agree with them. Having considered the evidence against this appellant as a whole, one cannot say that the verdict was unreasonable. There was clearly evidence on which the verdict could be based. In the circumstances, I do not see any basis for this court to interfere with the verdict on the first count of rape.

[36] Thus, there is no real prospect of success of the appeal as far as this ground of appeal is concerned.

02nd ground of appeal

[37] The appellant complains that the trial judge had not adequately addressed the assessors on the inconsistencies of the complainant's evidence. The alleged inconsistency is given by the trial judge in paragraph 33 as follows.

'33. During cross examination, it was suggested to her that the reason that she did not complain to anyone about the accused kissing her and inserting his fingers inside her vagina was because the accused never did those things to her. She denied. She also denied that she woke the accused up by kicking his legs on her way back from the bathroom, and that she told the accused to come to her room with her. She agreed that it is stated in her statement made to police that she woke up around 4.00am when she felt someone having sex with her, where she said in court that she woke up around 4.00 am to go to the bathroom. She said the accused pulled out, when she pushed and kicked him and at that time he also heard her parent's bed squeak. It was suggested to her that the reason she did not complain to anyone in the house after the accused left her room that morning is because she had consensual sex with the accused. She denied this. She said she told her mother about the incident on 14/11/14.

34. In re-examination she confirmed that it was 4.00am when she went to the bathroom.

[38] Because this was more or less a case of *'word against word'* the trial judge had referred to a inconsistency in the evidence of the appellant too in paragraph 38 of the summing-up where he had told the police that he met the complainant when he went to the toilet which to my mind was a more serious inconsistency than the one the complainant was accused of.

> *'38. During cross examination he denied meeting the complainant after she came back from the bathroom that morning. But he admitted that he told the police that he met the complainant when he went to the toilet. He denied kissing her in the living room. He denied inserting his finger into the complainant's vagina. He said the complainant consented for him to have sexual intercourse with her.*

[39] Thus, the judge had clearly brought to the notice of the assessors the alleged inconsistencies on both sides and directed how they should evaluate inconsistencies in paragraph 49 and 50 of the summing-up.

> *'50. The defence says that there are inconsistencies in the complainant's evidence and the prosecution says that there are inconsistencies in the accused's evidence. In dealing with inconsistencies, first you have to be satisfied that in fact there is an inconsistency. If you are satisfied that there is an inconsistency, then you should consider whether that inconsistency is material and relevant to the case and whether there is any explanation given with regard to the inconsistency. It is for you to decide what weight you would give to the evidence of a witness in view of any inconsistency you find in that evidence.'*

[40] In the judgment too trial judge had given his mind to the alleged inconsistency in the evidence of the complainant and rejected it in the following words.

> *'6. I accept the complainant's evidence given before this court. The account she gave regarding what took place on 13th November 2014 is reliable. I cannot agree with the defence counsel that the complainant is not a reliable witness in view of the inconsistency which was highlighted in her evidence. In her statement recorded by the police it is written that when she realised that the accused is having sexual intercourse with her it was 4.00am. She gave evidence to the effect that it was 4.00am when she went to the bathroom which suggests that the time that the sexual intercourse took place is not 4.00am that morning but at a time later than that. In my view, this inconsistency is not material or significant enough to make the complainant an unreliable witness. I also find that she was not drunk to an extent that her judgment was impaired during the time material to this case though there was evidence that she had consumed alcohol prior to the incidents.*

[41] This stance is consistent with the position of the trial judge at a trial with assessors in Fiji *i.e.* the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Mava v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).

[42] The Court of Appeal remarked in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) on inconsistencies, contradictions and omissions as follows.

> *'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, 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)'*

[43] I do not think that the inconsistency highlighted by the appellant goes to the very root and shake the basic version of the complainant. It is more so, when the all-important "probabilities- factor" echoes in favour of the version narrated by the witnesses. 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 [vide **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280].

[44] On the other hand, the appellant's version that the complainant came to the room which he was sharing with her own brother while he was sleeping, woke him up and called him to her room where she had been sleeping with her child, to have sexual intercourse in the wee hours of the day is riddled with a high degree of improbability.

[45] Therefore, this ground of appeal too has no real prospect of success.

Prejudice to the respondent

[46] I do not see a great deal of prejudice caused to the respondent as a result of an extension of time. However, other factors and most importantly the merits of the appeal do not favour an enlargement of time.

Order

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

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL