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

CRIMINAL APPEAL NO.AAU 97 of 2017
[In the Magistrates Court at Nausori Case No. 276 of 2019]

BETWEEN : VATILIAI BALEIKUMI

*Appellant*

AND : STATE

*Respondent*

Coram : Prematilaka, JA

Counsel : Ms. S. Ratu for the Appellant
: Mr. Y. Prasad for the Respondent

Date of Hearing : 13 November 2020

Date of Ruling : 17 November 2020

# RULING

[1] The appellant had been arraigned in the Magistrates Court of Nausori on a single count of rape contrary to section 149 and 150 of the Penal Code committed 31 May 2009 at Nausori in the Central Division.

[2] The charge read as follows.

*Statement of Offence*

***RAPE:*** *Contrary to Section 149 and 150 of the Penal Code, Cap 17*

*Particulars of the Offence*

***VATILIAI BALEIKUMU*** *on the 31st day of May 2009, at Nausori in the Central Division had unlawful carnal knowledge of a girl namely* ***MEREANI VEISAU*** *without her consent.*

[3] After the trial was concluded on 16 September 2014 the judgment was delivered by the learned Magistrate on 10 March 2016 and the appellant was convicted as charged. On 18 July 2016 he had been sentenced to 10 years of imprisonment subject to a non-parole period of 09 years.

[4] The appellant in person had handed over an untimely notice of appeal/an application for leave to appeal against conviction and sentence on 24 May 2017 to the Correction Centre (received by the CA registry on 26 June 2017). The delay is about 09 months and one week. The Legal Aid Commission had sought an enlargement of time to appeal only against conviction supplemented by written submissions on 16 July 2020. The state had responded by its written submission on 27 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

> *'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] 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 in filing the notice of appeal is 09 months and 01 week which is 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 has stated in his affidavit that he had no intention to appeal but changed his mind after an inmate in the prison informed him that he should appeal and, that inmate had assisted him to prepare the appeal. Therefore, the delay is purely due to the appellant's lack of desire to appeal.

[17] Therefore, the appellant's reason for the delay amounts to no explanation of the delay.

*Merits of the appeal*

[18] 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."*

[19] 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.

[20] Grounds of appeal against conviction urged on behalf of the appellant are as follows.

> *(i) THE verdict is unreasonable and not supported by the totality of the evidence.*
>
> *(ii) THE learned trial Magistrate misdirected himself in finding that there is recent complaint.*
>
> *(iii) THE learned Magistrate misdirected himself in finding AT the sentence imposed on the appellant is harsh and excessive.*

[21] The Magistrate had summarised the evidence of the complainant as follows in the judgment.

> *5. The next witness called was the complainant. She clearly recalls the 31st May 2009 at 6 am she was at the Nausori bus stand. She wanted to relieve herself so she went to the ladies public restroom. While she was there concluding her business a man entered the lavatory. She asked him what he wanted. He replied that he wanted to have sex with her. She refused stating that she was still schooling at the time. He offered her $5.00. She then informed him that her parents were outside but he replied that no one was out there. He then pulled her into the bathroom. He threatened her and she was very scared. He then forced her into a kneeling position. He pulled down her pants. He then put his penis into her anus. He then penetrated his penis into her vagina. After this ordeal he told her to stand up. He forced her to kiss him and then he lifted one of her legs and penetrated her vagina again. He then kissed her breasts.*

*She felt almost unconscious. He then left her there. After gathering her clothes she went and reported the matter to police.*

*6. She stated that she never gave consent to having sex. She was taken to the hospital for a medical examination. She could remember his face. She identified him in the dock. She felt worthless after the incident and dropped out of school.*

*7. In cross examination when she was asked that she gave permission for the intercourse she replied in the negative. When asked if she was drunk she replied that she was a little drunk. When put to her that he did not threaten she replied that he did.*

[22] In addition DC 2813 Veremi of Nasori Police Station had testified that he received a report of a complaint of rape on 31 May 2009 and went to crime scene and get the appellant identified. According to the judgment the complainant had gone to the police station (situated close to the ladies public restroom) immediately after the incident.

[23] The appellant had remained silent and his first witness had confirmed having seen a girl going to the ladies lavatory and after 10-15 minutes the appellant had also been seen going inside it. The appellant's cross-examination had suggested that he was taking up the position that it was consensual sex.

***01st ground of appeal***

[24] The appellant's argument is that from the complainant's evidence, particularly due to lack of resistance by her against the appellant pulling her trousers down and then the appellant's sexual act, there is a reasonable doubt whether sexual intercourse was without consent as alleged by the complainant. He relies on **Kaivum v State** [2013] FJCA 146; AAU 71 of 2012 (14 March 2013).

[25] I think this argument flows from a misunderstanding of the concept of 'consent' under section 206 and 207 of the Crimes Act, 2009. Offering resistance is not an essential part of lack of consent while evidence of resistance would make it easy for the prosecution to demonstrate lack of consent in any given situation. Absence of resistance would not necessarily suggest consent. In **Nawaitabu v State** [2020] FJCA 53; AAU007.2019 (15 May 2020) I considered the term 'without consent' in section 207(2)(a) of the Crimes Act in the backdrop of a similar argument as follows.

*'[10] Under the first ground of appeal the appellant argues that the prosecution had not adduced evidence from GN and MN that the appellant had committed the acts complained of by force, threats, intimidation or bodily harm to cause fear in them. In other words according to the appellant there was no evidence to say that the consent was not given freely and voluntarily due to the absence of the factors outlined in section 206(2) of the Crimes Act.*

*[11] This argument presupposes that there is a burden on the prosecution to prove the absence of all factors set out under section 206(2) to prove lack of consent or to negate the element of consent required in the offence of rape. In my view, this is a wrong construction of the law. All what the prosecution has to prove is absence of consent on the part of the victim. This is denoted by the phrase 'without the other person's consent' in section 207(2)(a) of the Crimes Act.*

*'[12] Section 206 states that*

*'In this Part —*

*(1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.'*

*(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained —*

*(a)... ... ... ... ... ...*

*[13] Thus 'without consent' could be either patent lack of consent or consent (even if present outwardly) not given freely and voluntarily by a person, with the necessary mental capacity to give the consent. The prosecution may prove either of them or both. For example there can be initial physical resistance and subsequent submission in the same transaction due to any of the reasons set out in section 206(2) or some other reason inconsistent with the consent.*

*[14] However, the prosecution does not have to rule out one or more or all instances outlined under section 206(2) to prove the element of 'without consent' in a charge of rape. Sub-section (2) only elaborates without limiting sub-section (1) instances where consent is not regarded as freely and voluntarily given. Neither does sub-section (2) override sub-section (1). This is the same with submission without physical resistance which alone would not amount to consent.*

[26] According to the Magistrate the complainant had given clear evidence as to the appellant having had sexual intercourse without her consent and he had threatened her and she had been very scared. In **Kaiyum v State** (supra) the Court of Appeal had said in the context of a trial by assessors and judge in the High Court that when a verdict is

challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him.

[27] Similarly, at a trial by assessors and judge in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated in appeal as to what approach the appellate court should take when it is complained that the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

> *"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."*
>
> *"..... 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."*

[28] I do not see any reason why the same tests should not be applied to a trial by a judge or Magistrate alone when the verdict is challenged on the basis that it is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

[29] When the above tests are applied to the facts of this case (as the appellant argues that the verdict is unreasonable and cannot be supported by evidence), I have no doubt that there was evidence before the Magistrate on which the appellant could have been reasonably convicted. Having considered the evidence against the appellant as a whole, it

cannot be said that the verdict is unreasonable and there was clearly evidence on which the verdict could be based.

[30] There is no real prospect of success in appeal on this ground of appeal.

***02nd ground of appeal***

[31] The appellant submits that the Magistrate had misdirected himself in finding that there is recent complaint evidence.

[32] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court set down the law regarding recent complaint evidence as follows.

> *'[33] In any case evidence of recent complaint was never capable of corroborating the complainant's account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App. 12 of 1989; **Jones v. The Queen** [1997] HCA 12; (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S, 24th November 2006.*
>
> *[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint: **Kory White v. The Queen** [1999] 1 AC 210 at p215H. This was done here.*
>
> *[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.*
>
> *[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.'*

[33] There is clear evidence that as soon as the sexual assault on the complainant was over, she had literally walked across the road and reported the incident to the police. One police officer had testified to the complainant's reporting. Her complaint could not have been more prompt. In this instance her prompt complaint strongly enhances the credibility of her allegation. The appellant had been arrested at or about the crime scene

and his line of cross-examination had suggested only a defence of consensual intercourse.

[34] There does not appear to be anything objectionable in the Magistrate treating the complainant's reporting to the police as a recent complaint in the light of principles set down in **Raj v State** (supra). The appellant has not cited any law or authority to say that such a prompt complaint made to the police by a victim cannot be treated as recent complaint evidence.

[35] A *'fresh complaint'* may be given in evidence, *not* as evidence of the facts complained of, but as evidence of the consistency of the conduct of the complainant with the story told by her in the witness box and as negativing consent [see **R v Norton** [1910] 2 KB 496; (1910) 5 CrAppR 7; **R v Whitehead** [1929] 1 KB 99; (1930) 21 CrAppR 23]. However, the fact that no *'fresh complaint'* was made is *not* evidence of consent.

[36] Evidence of a *'fresh complaint'* is admissible whether or not consent is an issue, provided it relates to an offence of a sexual nature and to constitute a 'fresh complaint' a complainant does not necessarily have to 'complain', but may simply say what occurred (see **R v Robertson**, Ex parte Attorney – General [1991] 1 QdR 262; (1990) 45 ACrimR 408]. Where the complainant goes into the witness box and tells her story, evidence of a complaint made by her can be given although she cannot herself remember what she said [see **R v Brave – Jones** [1966] QdR 296].

[37] In ***Lovell's case*** ([1924] 17 CAR 163 at paged 166 – 167) Lord Chief Justice Hewart said as follows (see also **R v Valentine** [1996] 2 CrAppR 213 Roch LJ, delivering the judgment of the Court of Appeal at pages 220 – 221)

> *'In the case of Lillyman ([1896] 2 QB 167), it was laid down that, "Upon the trial of an indictment of rape, or other kindred offence against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as negativing consent on her part. [...]"' (emphasis added)'*

[38] Therefore, the second ground of appeal has no real prospect of success in appeal.

*03rd ground of appeal*

[39] The appellant complains that the Magistrate was wrong to have referred to the defence witnesses as having bolstered the state's evidence on the basis that they had put the appellant at the scene.

[40] This has to be viewed in the context where the appellant had not given evidence and admitted his presence at the scene but he had only suggested in cross-examination that the complainant gave permission for him to have sexual intercourse. The Magistrate had stated what is complained of in those circumstances. As stated by the Magistrate the defence witnesses had clearly corroborated the complaint's version in so far as the appellant's presence at the crime scene was concerned.

[41] Therefore, the third ground of appeal has no real prospect of success in appeal

***Prejudice to the respondent***

[42] The respondent has not made any submission on this aspect in its written submissions.

[43] Before parting with the ruling, I wish to highlight some unsatisfactory features in the conduct of this case in the Magistrates court. The offence had taken place in May 2009 and the trial had been concluded in September 2014 within a day. The Magistrate had delivered the judgment only in March 2016. The appellant had been sentenced in July 2016. Thus, from the conclusion of the trial to the delivery of the judgment it had taken 02 years and 06 months, which by any standards is unacceptable and unsatisfactory. This type of a long delay in pronouncing the judgment and sentencing the accused after concluding the trial reflects negatively on the judicial system, lead to erosion of public confidence and should not be repeated.

**Order**

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

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

COURT OF APPEAL FIJI