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

CRIMINAL APPEAL NO.AAU 091 of 2019
[In the High Court at Suva Case No. HAC 081 of 2016]

BETWEEN : **EMOSI LECAVI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. T. Lee for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **03 December 2020**

Date of Ruling : **04 December 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) of the Crimes Act, 2009 committed at Waikete Village, Nausori in the Central Division. The victim had been 13 and the appellant 69 years of age at the time the offenses were allegedly committed and the appellant was the victim's grandfather or granduncle.

[2] The information read as follows.

*'**COUNT 1***

Statement of Offence

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

Particulars of Offence

EMOSI LECAVI, *between the 1st day of August 2015 and 31st day of August 2015, at Waikete Village, Nausori in the Central Division, had carnal knowledge of* ***KC*** *without her consent.*

COUNT 2

Statement of Offence

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

Particulars of Offence

EMOSI LECAVI, *between the 1st day of October 2015 and 31st day of October 2015, at Waikete Village, Nausori in the Central Division, had carnal knowledge of* ***KC*** *without her consent.*

[3] After the summing-up on 25 May 2018, the assessors had unanimously opined that the appellant was guilty of the charges and in the judgment delivered on 28 May 2018 the learned trial judge had agreed with them and convicted the appellant of rape on both counts. On 30 May 2018 the appellant had been sentenced to 13 years of imprisonment with a non-parole period of 09 years.

[4] The Legal Aid Commission had filed papers seeking enlargement of time, appellant's affidavit and amended grounds of appeal against conviction on 26 July 2019 and written submissions on 16 September 2020. The state had responded by its written submission on 23 October 2020. The delay in filing the appeal is one year and one month.

[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] The delay is 01 year and 01 month which is very substantial. In **Qarasaumaki v State** [2013] FJCA 119; AAU0104.2011 (28 February 2013) even a delay of 3 ½ months had been considered significant.

[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 may be capable of defeating the appellant's appeal if that is the only consideration.

Reasons for the delay

[16] The appellant's excuse for the delay is that despite his trial counsel advising him on appealing he took time to contemplate about his appeal. Thus, the appellant had been solely responsible for the delay and it is hardly an acceptable explanation.

[17] Therefore, I conclude that the appellant has not explained the delay in lodging his belated appeal.

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 guilty verdicts are unreasonable.
(ii) THAT the Learned Trial Judge failed to direct himself and the assessors on recent complaint evidence..

[21] The trial judge had summarised the evidence against the appellant as follows in the sentencing order.

> *'**[4]** It was proved during the trial that, between 1 August 2015 and 31 August 2015, at Waikete Village in Nausori, you raped the complainant, by penetrating her vagina with your penis, without her consent, and at the time you knew or believed that the complainant was not consenting, or you were reckless as to whether or not she was consenting.*
>
> ***[5]** It was further proved during the trial that, between 1 October 2015 and 31 October 2015, at Waikete Village in Nausori, you raped the complainant, by penetrating her vagina with your penis, without her consent, and at the time you knew or believed that the complainant was not consenting, or you were reckless as to whether or not she was consenting.*
>
> ***[6]** You are a grandfather (actually granduncle) of the complainant. The complainant was only 13 years of age at the time you committed the above offences on her (her date of birth is 23 December 2001), and as such, she was a juvenile.*
>
> ***[7]** The complainant testified in Court as to how you showed her $5.00 and lured her close to you and then forcibly had sexual intercourse with her at the pig pen, in August 2015. Similarly, she testified in Court as to how you threatened her and then forcibly had sexual intercourse with her at the pig pen, in October 2015.*

01st ground of appeal

[22] The appellant's complaint is based on the evidence of the complainant that she had felt pain in the act of penetration and asked the appellant to stop and she wanted to go home. The appellant had told her that it was about to finish and carried on with the act of sexual intercourse. The appellant argues that had the trial judge evaluated the evidence independently he would have entertained a reasonable doubt as to whether there was lack of consent.

[23] This argument is built on the assumption that the trial judge had a duty to independently evaluate the evidence in his judgment in agreeing with the assessors. This is a wrong assumption and it is not the law propounded by judicial decisions. 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), **Kaiyum 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)]

[24] On the other hand, the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

[25] On a perusal of the judgment it is clear that the trial judge had performed his task satisfactorily in agreeing with the assessors and in the process had in fact analysed the evidence. However, there was no issue on 'consent' raised at the trial by the appellant and therefore, there was no need for the trial judge to embark on an evaluation of the aspect of 'consent' critically as the victim's evidence was straightforward on the issue of consent.

[26] The appellant had not run his defence on the basis that his sexual intercourse with the victim was consensual. On the contrary, his position had been a total denial of having engaged in sexual intercourse with the complainant but he had remained silent at the trial. Therefore, consent or lack of consent was not a contentious issue at the trial. It is now being taken up simply as an appeal point.

[27] The trial judge had referred to the evidence regarding the two incidents of alleged rape in his judgment as follows.

> *'**[15]** She testified to the events which took place one day in **August 2015,** around 4.00 in the evening. Only her younger sister Vani was at home with her at the time. Her mum, dad, uncle and aunty had gone to the river for fishing. She had been getting ready to go and feed the pigs at the pig pen, when she saw the accused peeping through the window – the window that is at the back of his house. The accused was showing her $5. She had ignored him. Then she went to feed the pigs.*
>
> ***[16]** The complainant had then proceeded to the pig pen. She had poured the pigs' food into the container. She had then seen the accused standing at the opposite side. He was standing about 5 foot-steps in front of her. He was showing her the money. She thought he was wanting to give the money to her. The witness said that the accused was standing straight and was calling her to come to him. He was showing the money and telling her to come and take it from him.*
>
> ***[17]** Thus she had gone and taken the money from him. At that stage the accused had pulled her right hand. The witness described in Court how the accused pulled her hand. It had been painful. The accused had pulled her hand hard and told her "it will be fast". Thereafter, the accused started to touch her body. He had touched her breasts. She felt disgusted and did not like it.*
>
> ***[18]** The accused had then asked her to lie down. She had refused. The accused had then told to lie down because she had taken the money. He had then forced her to lie down. The accused had spoken harshly to her and told her to lie down saying "because no one has come yet to see us". Because the accused had forced her, she had laid down.*
>
> ***[19]** The accused had then tried to open both her thighs. She tried to stand up. But he was pressing on her thighs. Later she testified that the accused's hands were pressing down on her elbows (not on her thighs). While one hand was still pressing her down, the accused had then taken off his other hand and taken off her clothes. The complainant said she was wearing tights inside and a skirt outside at the time. The accused pulled up her skirt and tried to pull down her tights and panty. The witness was pressing both her thighs together as she did not want the accused to take off her tights.*
>
> ***[20]** However, the accused had taken off/pulled down both her tights and her panty. The witness had been pressing both her thighs (together). The accused tried to open (separate) her thighs. The accused had used the same hand that he used to take off her clothes for this purpose. The accused had been telling her to open her thighs because she had taken the money. He had forced her to open her thighs. Then she had opened it.*

[21] *The accused had then moved in front to open the zip of his trousers. He had then put his balls (polo) out. The accused moved closer to her to insert it (his polo) into her private parts. She had told him to stop so that she could get up and go home and for him to take back the money. The accused had told her to hold onto the money "what he will do to me, it will be fast".*

[22] *At that stage, the complainant had felt that the accused had inserted his polo into her private part. She had felt that it went inside and it was very painful. When she felt pain, she had told the accused to stop and that she wants to go home. The accused had said "it is about to finish". The accused kept on inserting his balls into her private part. The accused was pressing her down with one hand and was also trying to pull up her t-shirt using his other hand. The witness had tried to slap away his hand so that he does not pull up her t-shirt.*

[23] *The accused had then told her to get up and that it has finished. He had told her to wear her clothes. She had worn her clothes. The accused had then told her to follow the same path that she used when she came to the pig pen and that he will go back on the path that he came. The accused had also threatened her not to say what happened to anyone. He had said "if I say it to anyone he will chop me with a knife".*

[24] *Thereafter, the complainant testified to the incident which took place one day in* ***October 2015,*** *during the 2nd last week of school. She said she was at home. Both her sisters were also at home at the time. Her older sister, Mereoni had then told her to go and feed the pigs. She says this was in the afternoon, but cannot recall the specific time.*

[25] *The complainant had then filled up the pigs' food and gone to the pig pen to feed the pigs. This was the same pig pen she had referred to earlier in her evidence. On reaching the pig pen, she had poured the pigs' food. Then she saw the accused again. He was standing at the same place he was standing before. She had asked him "what do you want?" The accused had been standing there looking at her. He had told her "bear in mind what I told you".*

[26] *The witness had then turned around to go back home. The accused had then called her again. The accused had said "Either you come or do you want that thing to be done to you?" The complainant had felt scared.*

[27] *The complainant testified that she was standing still. The accused came towards her. He came to her and told her to lie down. She had told him that she wanted to go home. The accused had forced her to wait. She said, "If I go he will chop me with a knife".*

[28] *The accused had then forced her to lie down. She had laid down. He then told her to take off her pants. She did not want to take it off. The accused kept on forcing her to take off her pants. So she took off her pants. Then the accused had taken off her panty. He had opened her thighs and inserted his balls into*

her private parts. The witness had started to feel pain. The accused had been telling her "Close your mouth, it is about to finish".

[29] *After he had finished, they both stood up. The accused was telling her to kiss each other on the mouth. She had felt disgusted and did not want to kiss him. She had turned away from him and worn her clothes. She had then taken the bucket and went home. When she had turned around, the accused had called out to her and told her "Bear in mind, if you do not want to do this I will kill you.*

[28] When one carefully analyses the above evidence in the light of the appellant's complaint on 'consent' and it becomes abundantly clear that the appellant had used money as a bait to get close to the victim, then employed force in penetrating her vagina and finally threatened her with reprisals if she were to divulge his acts of sexual abuse to anyone. There had never been even a hint of consent on the part of the victim at any stage. The entire episode had been craftily planned and executed with lust and coercion by the appellant.

[29] Having considered the evidence against this appellant as a whole, it cannot be said that the verdict was unreasonable or cannot be supported by evidence. There was clearly evidence on which the verdict could be based and therefore, there is no reasonable prospect of success of the appellant's appeal under section 23(1) of the Court of Appeal Act [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)]. The trial judge also could have reasonably convicted the appellant on the evidence before him (vide **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020) and **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013)].

[30] There is no real prospect of success of this ground of appeal at all.

02nd ground of appeal

[31] The appellant argues that the trial judge had failed to direct the assessors on recent complaint evidence. He relies on **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) where 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.'

[32] Therefore, the law on recent complaint evidence is clear. However, the question is whether the prosecution had led any recent complaint evidence at all. There is nothing to indicate in the summing-up or the judgment that the prosecution was relying on any recent complaint evidence to enhance the credibility of the victim.

[33] The trial judge had dealt with the evidence on the first complaint made by the victim in paragraph 79 as follows.

*'**[78]** Although the incident took place in the months of August and October 2015, the very first time the complainant reported the matter to anybody was on 9 January 2016, when she was questioned by her aunty Venina Wati. The complaint to the Police was made only thereafter. You have heard from the complainant the reasons given by her as to the delay in reporting the incident. It is for you to decide whether you accept the explanation offered by the complainant or not*

[34] In the judgment the trial judge had highlighted the evidence on the first complaint as follows.

*'**[32]** It is clear that due to the threats made by the accused, the complainant did not inform anyone about the two incidents soon after the incidents took place. She testified that her older sister had heard about the incident from*

outside, and informed her mother. Her mother had then asked her what happened. The time her mother had asked her, the complainant stated that she had started to cry. Her mother had asked her whether the story (about Emosi and the complainant having sex) is true or whether it's a lie. The witness had told her mother that the story is true. Later her aunty Venina, had also asked her about the incident. The complainant had admitted that the incident was true. Her aunty, Venina had gone and reported the matter to the Police.

[33] *Venina Wati confirmed that on 9 January 2016, she had been at the Nausori Market. She had got to know about what the accused had done to the complainant. When she inquired, the complainant had said that the accused used to show her the money and he followed her to the pig pen. She said that he made her lie down and that he did an unclean act. When asked to be more specific on what the complainant had told her, the witness answered: "That he made her lie down on the soil and he raped her". The complainant had admitted that it was done twice to her.*

[35] Therefore, it is clear that there was no recent complaint evidence at all. In fact the complaint had been belated and the trial judge had accepted the threats issued by the appellant to the victim as the reason for her not to have come out with his sexual abuses before. Therefore, the trial judge was not required to direct the assessors on some hypothetical recent complaint evidence in terms of **Raj v State** (supra).

[36] I also think in the totality of circumstances of the case the explanation given by the victim for the belated complaint is quite reasonable and plausible (see "the totality of circumstances test" as expressed in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018)].

[37] In any event the appellant was defended by two counsel who should have sought redirections in respect of the complaint now being made by the appellant on the summing-up as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018). The failure to seek further directions on the so called recent complaint evidence may be due to the fact that no one and more particularly the appellant's counsel considered at the trial stage that there was recent complaint evidence. Technically, the appellant is not entitled even to raise this ground of appeal in appeal.

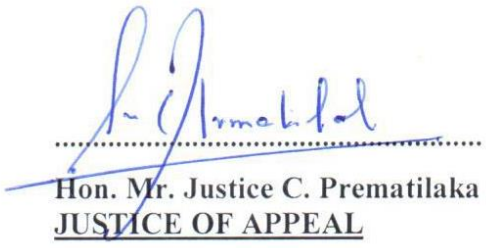
[38] Thus, there is no real prospect of success in appeal as far as this ground of appeal is concerned.

Prejudice to the respondent

[39] I do not see any real prejudice caused to the respondent as a result of an extension of time except the lapse of time. The delay itself is very substantial and the reason for the delay is the appellant's own prevarication whether to appeal or not. The merits of the appeal do not favour an enlargement of time at all.

Order

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



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL