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

CRIMINAL APPEAL NO.AAU 042 of 2016
[High Court Criminal Case No. HAC 022 of 2014 LAB]

BETWEEN : EPELI BURETA

Appellant

AND : THE STATE

Respondent

Coram : Prematilaka, JA

Counsel : Ms. S. Ratu for the Appellant
: Mr. R. Kumar for the Respondent

Date of Hearing : 01 April 2020

Date of Ruling : 21 April 2020

RULING

[1] The appellant had been charged in the High Court of Labasa on one count of rape contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act No.44 of 2009 and one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act No.44 of 2009. The charges were as follows.

FIRST COUNT
Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Decree No. 44 of 2009

Particulars of Offence

EPELI BURETA *on the 8th day of February 2014 at NasaqaVillage, Macuata in the Northern Division penetrated the vagina of K. D a girl aged 10 years with his finger.*

SECOND COUNT
Statement of Offence

SEXUAL ASSAULT: *Contrary to section 210 (1) (a) Crimes Decree No. 44 of 2009*

Particulars of Offence

EPELI BURETA *on the 8th day of February 2014 at Nasaqa Village, Macuata in the Northern Division unlawfully and indecently assaulted K. D.*

[2] After full trial, the assessors had expressed a unanimous opinion of guilty on 12 May 2015. The Learned High Court Judge in the judgment delivered on the same day had agreed with the assessors and convicted the appellant of both counts. He was sentenced on 15 May 2015 to 13 years of imprisonment on count 01 and 06 years of imprisonment on count 02; both to run concurrently with a non-parole period of 11 years.

[3] The appellant had filed 'a notice of appeal on enlargement of time' 21 April 2016 against conviction only. Later, Legal Aid Commission appearing for him had tendered an amended notice of appeal on 18 March 2019 containing three proposed grounds of appeal against conviction accompanied by notice of motion, written submissions and the appellant's affidavit explaining the delay. The State had tendered its written submissions on 10 January 2020.

[4] The learned trial judge had narrated the evidence for the prosecution and defence as follows in his summing-up.

> ***'F. THE PROSECUTION'S CASE***
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> *17. The prosecution's case were as follows. On 8 February 2014, the female complainant (PW1) was 10 years old. The accused (DW1) was 19 years old, at the time. There was a nine year gap between the two. The complainant resided with her parents, and five other siblings in a village in Macuata. The accused also resided in the same village. Their houses are about 5 minutes walk from*

each other. The complainant and the accused, being neighbours, were known to each other. On 8 February 2014, in the early evening, the accused offered pork curry to PW1's mother. Her mother asked PW1's younger brother to go with the accused to get the food, but he declined. Consequently, the complainant accompanied the accused to his home to get the pork curry.

18. The two got the pork curry and came back to PW1's mother. However, on the way, the accused took the complainant to a spot near a pine tree beside the village church. He told the complainant to remove her clothes, and to lie on the ground. He wanted to have sex with the complainant. The complainant lay on the ground. According to the prosecution, the accused took the complainant's skirt and panty off. She was naked. He then took off his ¾ lee trousers. According to the prosecution, he then inserted a finger into the complainant's vagina. The complainant cried as it was painful. He then put his penis on the complainant's vagina, and tried to insert the same into her vagina. He was unsuccessful. The two were disturbed, when they heard PW1's mother calling for her.

19. The accused put on his clothes and ran to PW1's mother. The complainant also dressed up, and later went to the road. A while later, the complainant met her mother. Her mother asked her what happened. She told her mother what Epeli did. The matter was reported to police. An investigation was carried out. The accused was later charged with rape and sexual assault. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

20. On 11 May 2015, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charges. In other words, he denied the allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, the accused choose to give sworn evidence and call no witness, in his defence. That was his rights.

21. When he gave sworn evidence, the accused confirmed his denial on oath. He admitted, he was with the complainant, at the material time. He admitted, the complainant was a child at the time. Note in paragraph 2 of the Agreed Facts, he admitted the complainant was 10 years old at the time. He admitted he was 19 years old at the time. He admitted, he intended to have sexual intercourse with the complainant that night. He admitted that, at the material time, the complainant child was lying naked on the ground, and his exposed naked penis was in front of her. He denied poking the complainants' vagina, or attempting to have sex with her, at the material time.

[5] The delay in filing the notice of appeal/application for leave to appeal is about 09 months and 22 days. 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.'*

The length of the delay

[8] As already pointed out the delay is about 09 months and 22 days which is substantial. Such a delay is not to be disregarded lightly. The appellant had legal representation in the High Court. The length of the delay is unreasonable.

The reason for the failure to file within time

[9] The appellant has explained in his affidavit is that when he was sentenced he was at Labasa Correction Center and was satisfied with the sentence. By implication the appellant admits that he had no serious issues with the conviction. According to him he was under the impression that he could appeal against conviction, only if he was dissatisfied with the sentence. Later his family had agreed to retain a private lawyer to

pursue his appeal against conviction and he had declined the help offered by some inmates at the Corrections Center to draft an appeal. In December 2015 he had been transferred to Suva Corrections Center and his family had informed him that they were unable to engage the services of a private lawyer. Thereafter, an inmate had drafted his application for leave to appeal out of time which was tendered to the Court of Appeal registry on 22 April 2016. Legal Aid Commission had appeared for the first time on 02 October 2017 and filed amended papers on behalf of the appellant only on 18 March 2019 *i.e.* after more than 02 years and 05 months.

[10] I do not think that there had been a genuine desire or effort on the part of the appellant to lodge an appeal against conviction from the beginning. Had he felt seriously aggrieved by the conviction he could have expressed his intention to canvass it even in person well before he did in 2016. The explanation given by the appellant cannot be regarded as a justifiable reason for the delay.

[11] It is pertinent to reiterate the sentiments of Pathik J in **Khan v State** [2009] FJCA 17; AAU0046.2008 (13 October 2009) that *'There are Rules governing time to appeal. The appellant thinks that he can appeal anything he likes. ..... The court cannot entertain this kind of application'*. I also associate myself with 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.'*

[12] This court would 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 frivolous and vexatious 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.

[13] However, 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."*

Merits of the appeal

[14] 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.....'*

Grounds of appeal

(i) *'The Learned Trial Judge erred in law and in fact when he directed the assessors about the elements of the offence of Sexual Assault by giving examples which were similar to the facts of the case against the appellant resulting in a substantial prejudice to the appellant.'*

(ii) *'The Learned Trial Judge erred in law and in fact when he gave the direction to the assessors at the end of the Prosecution case that there was a prima facie case found against the Appellant which was prejudicial to the principle of being innocent until proven guilty more so because the Appellant at that stage was yet to present his defence.'*

(iii) *'The Learned Trial Judge erred in law when he failed to adequately and fairly comment on the issue of the medical report to the assessors.'*

First ground of appeal

[15] The appellant's complaint is based on paragraph 15 of the summing-up. It is as follows.

> *'15. The assault must not only be unlawful, it must also be "indecent". An action is indecent if right – thinking members of society regard it as indecent. For example, a 19 year old, bringing his naked penis into contact with a 10 year old female's vagina, would be regarded as indecent by right-thinking members of society.*

[16] The appellant admits that the example given by the learned trial judge was borne out by the actual facts of the case but argues that it may have had the effect of bolstering the prosecution case, lacked fairness and objectivity and was unfair to the appellant. He relies on paragraph 17 of the decision in **Ram v State** [2015] FJCA 131; AAU0087 of 2010 (2 October 2015)

> *'[17] While I accept that strangulation or throttling is a form of an assault and is an unlawful act, the trial judge's use of an example of a jealous husband throttling his wife after planning it, in my judgment lacked objectivity and fairness required for a fair trial. The directions on the example could have been perceived by the assessors as bolstering the prosecution case and not highlighting the deficiencies in the evidence led by the prosecution. The trial judge was required to give a balanced view of the example to explain the elements of murder. The choice and the manner in which the trial judge used the example to explain the elements of murder gave an impression that the appellant was guilty of murder. In this regard, the summing up was unfair to the appellant. This ground succeeds.*

[17] However, the above paragraph in ***Ram*** cannot be considered in isolation. What prompted the court to make the above observations is found in paragraphs 15 and 16 which shows that there had not been unequivocal evidence to support the trial judge's example.

> *'[15] The trial judge's directions on the elements of murder are correct. Also, there is nothing wrong to use examples to explain the elements of an offence to lay assessors. At trial, there was no direct evidence that the appellant had strangled the victim to death. The only incriminating evidence against the appellant was Ema's testimony, who said that after she had cut off the victim's nipples and right hand under duress, she left the victim alone with the appellant. The prosecution case was that the appellant manually strangled the victim to death and disposed her body in the creek when Ema and others left because he was jealous of the victim seeing other men.*

[16] After looking at the overall summing up, there were some obvious deficiencies in the prosecution case. Firstly, the entire prosecution case against the appellant was based on the evidence of Ema, who the defence alleged was an accomplice. Secondly, there was no evidence that the victim was alive after she was assaulted with a bottle, gang raped and parts of her body cut off. Thirdly, there was no evidence to link the appellant to the unlawful act of strangulation that caused the victim's death.

[18] Therefore, in the background of the evidence available the Court of Appeal held in ***Ram*** that the trial judge's directions on the example could have been perceived by the assessors as bolstering the prosecution case.

[19] In contrast, in the present case there had been direct evidence of the complainant to establish charges against the appellant and as admitted by the appellant the example was supported by the actual facts of the case. The appellant himself had admitted in evidence that at the material time, the complainant child was lying naked on the ground, and his exposed naked penis was in front of her. Therefore, the example criticized by the appellant could not have had the effect of bolstering an otherwise weak prosecution case.

[20] In any event, in this regard, the case of **Balekivuya v State**: AAU0081.2011 (26 February 2016); [2016] FJCA 16, is a case in point which I agree with. It was held that:

'Although the practice of using examples that too closely resemble the facts, upon which the prosecution relies is not appropriate, in this case there was nothing added to the prosecution case. There was direct evidence from two witnesses, who had survived the assault as to how Krishneel had met his death. In my judgment, the appellants were not prejudiced by the use of the similar examples in this case. The learned trial judge as the ultimate trier of fact and law had no hesitation in indicating his agreement with the opinions of the assessors after reviewing the evidence. There was no miscarriage of justice and this ground does not succeed.

[21] **Raqio v State** [2017] FJCA 82; AAU0061A.2015 (23 June 2017) Gounder J, dealt with a similar complaint as follows and quoted ***Balekivuya.***

> *'[4] The impugned direction is contained in paragraph 17 of the summing up:*
>
> *An assault is indecent if it is committed in circumstances of indecency. An action is 'indecent' if right-thinking members of society consider it indecent.* ***For example, an older man putting his hand under the skirt of a 13 year old female, wanting to touch her panty.*** *(emphasis added).*
>
> *[5] Counsel for the appellant submits that the trial judge's use of an example of indecent assault based on the facts of the case to explain the element of indecency lacked objectiveness and fairness required in the summing up. It was not in dispute that when the indecent assault charge arose, the appellant was 68 years old and the complainant was 13 years old. The complainant's evidence was that the appellant had put his hand under her skirt. In my judgment, the learned trial judge could have framed his example more objectively, but I am not convinced that the example using facts based on the evidence led at the trial to explain the element of indecency was unfair to cause a miscarriage of justice (Balekivuya v State [2016] FJCA 16; AAU0081.2011 (26 February 2016)....'*

[22] Comments by the Court of Appeal in paragraphs 27 and 29 of the decision in **Tamaibeka and Katonivualiku v the State;** (Unreported Cr. App. No. AAU0015 of 1997S; 08 January 1999) are also relevant in this regard to justify the trial judge's impugned comments.

[23] Thus, this ground of appeal has no real prospect of success in appeal.

Second ground of appeal

[24] The basis of the second ground of appeal flows from what the learned trial judge had supposedly pronounced at the end of the prosecution case regarding a prima facie case being found against the appellant. At this stage I have only the summing-up of the trial judge where in paragraph 20 there is a reference which has given rise to the complaint of the appellant. It is as follows.

'20. On 11 May 2015, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charges. In other words, he denied the allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, the accused choose to give sworn evidence and call no witness, in his defence. That was his right."

[25] ***Raqio*** (supra) contains some relevant pronouncement on this issue.

'[6] In paragraph 25 of the summing up, the learned trial judge informed the assessors that a prima facie case was found against the appellant at the end of the prosecution's case while directing on the options that were available to the appellant after that ruling was made. Counsel for the appellant submits that the disclosure of the no case to answer ruling to the assessors was wholly in appropriate and prejudicial to the appellant. A similar disclosure of the no case to answer ruling was made to the jury by the trial judge in the English case of R v Smith and Doe 85 Cr App R 197 CA. In that case, Watkins LJ said at p 200:

The question as to whether or not there is a sufficiency of evidence is one which is exclusively for the judge following submissions made to him in the absence of the jury. His decision should not be revealed to the jury lest it wrongly influences them. There is a risk that they might convict because they think the judge's view is sufficient indication that the evidence is strong enough for that purpose.

[26] However, in **R v Smith and Doe** 85 Cr App R 197 CA Watkins LJ also said as follows implying that miscarriage of justice had not occurred by disclosing the trial judge's decision to the jury.

'That, however, would not in the circumstances of this case, be a reason standing by itself, having regard to the other directions given to the jury on identification, for declaring that these verdicts are unsafe and unsatisfactory.

[27] ***Raqio*** and ***Smith and Doe*** have to be considered in the background of the settled law in Fiji that the verdict, that is, the decision to convict or acquit in a case is always that of the judge (vide **Joseph v The King** [1948] AC 21and **Ram Dulare & Or v R** [1955] 5 FLR 1). The assessors only give an opinion which the trial judge may or may not accept (vide section 237 (2) of the Criminal Procedure Act). The observations of Watkins LJ in ***Smith and Doe*** are applicable to a system of jury whose members are the ultimate judges of facts as in the UK but in Fiji it is the trial

Judge who is the ultimate authority on facts and law and the assessors only express non-binding opinions.

[28] On the other hand the appellant's evidence itself as summarised in paragraph 21 and 27 of the summing-up by the trial judge negates any adverse impact of the trial judge's impugned comments on the assessors at the end of prosecution case and in the summing-up.

[29] Therefore, I hold that there is no real prospect of success in the appeal as far as the second ground is concerned.

Third ground of appeal

[30] This ground on the trial judge's failure to comment on the issue of the medical report had been framed based on his directions to the assessors in paragraphs 30 and 31 of the summing-up as follows.

> *'30. You will have to consider all the evidence together. The two most important witnesses in this case were the complainant (PW1) and the accused (DW1). They were the only two present at the crime scene, at the material time, and the only two who knew whether or not count no. 1 and/or count no. 2 were committed. Defence, in their submission, said there was no medical evidence to support PW1's complaint that accused inserted his finger into her vagina, at the material time. This may well be true, but not fatal. When you consider what PW1 said, she cried when the accused poked her vagina at the material time, because it was painful. Penetration does not mean the whole finger should go into her vagina.*
>
> *31. Even if the tip of his finger went into her vagina, it is sufficient to prove finger penetration. What inference of fact would you draw from her crying, when poked, and when she said, it was painful. You have heard and watched both witnesses. Who was the more forthright to you? Who was credible to you? Who do you think was telling the truth? If you find the complainant to be the credible witness, then you must find the accused guilty as charged. If it's otherwise, you will have to find the accused not guilty as charged.*

[31] From the entirety of the summing-up it does not appear that the prosecution had led any medical report in evidence. The State submits that, however, the medical report had been provided to the defence. Medical evidence in the form of oral evidence or written report is only of corroborative value. Section 129 of the Criminal Procedure Act has dispensed with the requirement of corroboration of the evidence of victims of sexual offences. Therefore, lack of medical evidence or medical report *per se* cannot harm the prosecution case.

[32] If the appellant thought that the medical report would be of help to his defence he could have summoned the doctor who had examined the victim and led the medical report as part of his case. For reasons best known to him, he had failed to do that. Therefore, the trial judge had sensibly refrained from making any comments on the medical report or medical evidence which was non-existent as far as the evidence before the assessors was concerned.

[33] In any event, no redirections had been sought by the counsel for the appellant on the alleged non-direction in the summing-up. The appellant should be barred from even raising this point of appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].

[34] There is no prospect at all of the appellant succeeding in appeal on this ground of appeal.

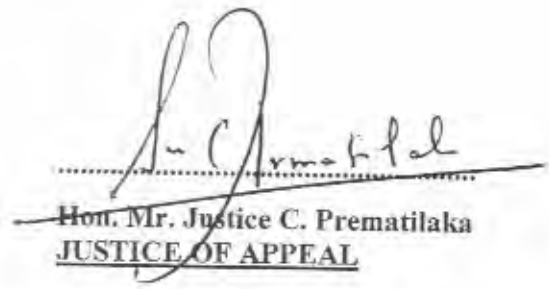
Prejudice to the respondent

[35] The State has submitted that extension of time would not prejudice the respondent.

[36] Accordingly, enlargement of time is refused.

Order

1. Enlargement of time against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL