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

CRIMINAL APPEAL NO.AAU 61 of 2016
[High Court Criminal Case No. HAC 91 of 2011]

BETWEEN : SENIRUSI RAUQE

Appellant

AND : THE STATE

Respondent

Coram : Prematilaka, JA

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

Date of Hearing : 31 March 2020

Date of Ruling : 21 April 2020

RULING

[1] The appellant had been charged in the High Court of Lautoka on one count of rape contrary to section 207(2) (a) and of the Crimes Decree No.44 of 2009. The charge was as follows.

'Statement of Offence

RAPE: Contrary to Section 207 (2) (a) of the Crimes Decree No.44 of 2009

Particulars of Offence

SENIRUSI RAUQE, between the 30th of April 2011 and the 1st of May 2011 at Vatutavui, Tavua in the Western Division had carnal knowledge of AS without her consent.'

[2] After full trial, the assessors had expressed a unanimous opinion of not guilty on 18 February 2015. The Learned High Court Judge in the judgment dated 19 February 2015 had disagreed with the assessors and convicted the appellant of the charge of rape. He was sentenced on 27 February 2015 to 13 years of imprisonment with a non-parole period of 11 years.

[3] The appellant had filed a notice of appeal out of time (*i.e.* an application for extension of time to appeal) on 25 April 2016 against conviction and sentence. He had filed written submissions dated 20 June 2016. Later, Legal Aid Commission appearing for him had tendered an amended notice of appeal on 31 December 2019 containing a single ground of appeal only against conviction accompanied by written submissions and the appellant's affidavit explaining the delay. The State had tendered its written submissions on 11 March 2020.

[4] The appellant had filed Form 3 dated 25 March 2020 under Court of Appeal Rule 39 seeking to abandon his appeal against sentence and it was allowed by two judges of this court on 31 March 2020 and his application for enlargement of time was heard on the same day.

[5] The evidence presented by the prosecution and as narrated by the learned High Court judge is briefly as follows.

(i) *The complainant was 14 years old at the time of the incident. On 30.4.2011 around 7.00 p.m. she was sleeping at her house alone. Her mother had gone to the sea. While she was sleeping the appellant had come and undressed her. He had touched her body. She had been asked to touch her penis. Then the appellant had spit on his penis and put the penis into her vagina for about a minute. He had closed her mouth with a pillow as a result she could not scream. She had been held tightly. She had identified the appellant with the aid of the light from his mobile phone. He had smelled of liquor. Thereafter, he had gone away. She had not consented to the act of sexual intercourse. The accused had entered the house through the door. The complainant had told Luke Peniloa (PW3) about what the appellant had done to her. She had been only covering herself with a bed sheet after the incident. She had told her mother (PW4) of what happened when she came back from the sea.*

(ii) *Doctor Yogeshni Chandra, a doctor with 05years' experience, had examined the complainant on 01.05.2011 at 6.35 p.m. at Tavua hospital. The complainant had given a history of being raped by a Fijian male around midnight previous day when she was alone at home. She had appeared distressed. Medical findings had been redness around vulva and hymen being not intact, indicating recent forceful sexual penetration. The findings had been consistent with the history given by the complainant.*

(iii) *Witness Luke Peniloa had come to the village from the sea around 4.00 a.m. on 1.5.2011. The complainant had called him and he had met the appellant at the door of the house of the complainant. When asked, the appellant had told him that he went looking for matches. He had smelled of liquor.*

(iv) *The mother of the complainant had gone to sea leaving the complainant alone at home. When she came back around 4.00 a.m. the complainant had come crying to her. The complainant had only covered herself with a bed sheet. When both of them went home the complainant had told her about the incident. The mother had seen the appellant's flip flop. Next morning she had informed the village headman about the incident and the matter had been reported to the police.*

(v) *According to Joseva Sadulu, the village headman the complainant and her mother had come to his house and the mother had reported that the appellant had forced the complainant to have sex when she was alone at home. When asked, the complainant had confirmed that it was true.*

(vi) *Witness WaisakeTokamalua on 1.5.2011 was returning from the sea around 4.00 a.m. with Samu Kava. When they reached the village he had heard someone screaming while passing the complainant's house. He had gone and stand at one door while Samu was standing at the other door. The accused had come out of the house. He had flashed the torch at him and the appellant had sworn at him asking him to switch off the torch. Then the appellant had gone away. The complainant had been crying and the witness had told her to go to Luke's house. She had been covering herself with a bed sheet.*

[6] The trial judge had summarized the appellant's evidence as follows.

> *'41.The accused gave evidence. He stated that he drank Grog that night and consumed Alcohol. There were no matches. He went to the house of the complainant in search of matches. The door was open. He entered the house. There was no light. He switched on his mobile phone light. He saw the complainant lying on the bed. He woke her up. She got angry and she shouted. Samu and Waisake were outside the house coming back from sea. After a while complainant went to Luke and they came back and talked to him. Luke asked him what he was doing there. He told that he came looking for matches. He denied the allegation when police arrested him."*

42.Under cross examination he admitted entering complainant's house around 4.00 a.m. He denied that he broke into the house. He said that he took off his flip flop and entered the house. He denied that he entered the house to rape the complainant. He was drinking at the father's elder sister's house on rail way beside the house. He asked for matches from the aunt. She refused to give the lighter as he will lose it. He was looking for matches to light a cigarette. He had no idea whether he told police that the aunt refused to give the lighter. He only touched the back of the complainant to wake her up. He had hit a pig owned by complainant's mother with a knife in his farm. He did not tell this to police. He admitted entering the house but denied the allegation.'

[7] The delay in filing the notice of appeal/application for leave to appeal is about 01 year and 02 months. 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

[8] 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?

[9] ***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

[10] As already pointed out the delay is about 01 year and 02 months which is substantial. Such a delay is not to be disregarded lightly even when the appellant had no legal representation after he was sentenced in the High Court. The length of the delay is unreasonable.

The reason for the failure to file within time

[11] The reason given by the appellant in his affidavit is that when he was sentenced he was at Natabua Correction Center and had submitted an application to the Correction Center for legal aid to prosecute his appeal. Shortly afterwards, he had been transferred to Suva Correction Center and he had lost track of the application for legal aid. A few weeks later he had been taken to Naboro Maximum Corrections Center. Again he had been transferred to Naboro Minimum Corrections Center where one of the inmates had helped him draft the initial notice of leave appeal out of time. Finally, legal aid had been approved and the Legal Aid Commission had filed proper papers for seeking enlargement of time to file an application for leave to appeal. This sequence of events beyond the appellant's control can be regarded as a justifiable reason for the delay.

[12] The reasons given for the delay of 03 years in **Khan v State** [2009] FJCA 17; AAU0046.2008 (13 October 2009) and the observations of Pathik J, 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'* can be distinguished from the facts of this case. However, I 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.'* This court would not be hesitant to take similar views in appropriate cases to ensure that the process of court is not abused and judicial time is not wasted by frivolous and vexatious appeals.

Merits of the appeal

[13] 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 ... ...'*

Single ground of appeal

> *'The Learned trial judge erred in law and in fact when he convicted the appellant without adequately assessing the totality of evidence.'*

[14] It is clear that the sole ground of appeal is so broadly formulated that neither the respondent nor the court would have been in a position to understand what the real complaint of the appellant was. The Court of Appeal in **Gonevou v State** [2020] FJCA 21; AAU068.2015 (27 February 2020) reiterated the requirement of raising precise and specific grounds of appeal and frowned upon the practice of counsel and litigants in drafting omnibus, all-encompassing and unfocused grounds of appeal. The Court of Appeal said

> *'[10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.'*

[15] However, the counsel for the appellant in written submissions had brought up two distinct complaints under the sole ground of appeal as follows.

(i) The learned trial judge has failed to give sufficient weight to the evidence of the appellant in the summing-up.

(ii) The trial judge should have given Turnbull guidelines to the assessors regardless of the fact that the identity of the appellant was not in issue.

[16] The counsel for the appellant had elaborated the first point highlighting that the trial judge had devoted paragraphs 27-37 (10) for the prosecution evidence and only paragraphs 41- 44 (04) for the defence case. The counsel cites **R v Lawerance** [1981] 1 ALL ER 974 at 977 to buttress her argument. However, I am afraid that the observations in ***Lawerance*** would not help the appellant's argument. It was held in ***Lawerance*** *inter alia* that the summing-up

> *'should also include a succinct but important summary of the evidence of facts as to which a decision is required, a correct but concise summary of the evidence and argument of both sides.'*

[17] I have examined the summing-up and find that this is what exactly the trial judge had done in paragraphs 27-37 summarising the evidence of 06 witnesses called on behalf of the prosecution. He had then gone through the same exercise from paragraphs 41-44 where he had to deal with only the evidence of the appellant, for the appellant called no other witnesses. Nothing more could have been said of the appellant's evidence. There is no complaint by the appellant that the trial judge had missed out any important evidence relevant to his defence or exaggerated the prosecution evidence. Further, despite the alleged imbalanced summing-up the assessors had expressed an opinion of not guilty of the appellant which shows that the assessors had not felt any inadequacy in the summing-up as far as the appellant was concerned.

[18] The objective nature and well-balanced quality of a summing-up should not be measured by the number of paragraphs devoted to the prosecution and defence cases. It goes without saying that no hard and fast rule could be laid down as to the space that should be allocated in a summing-up to the cases for the prosecution and defence. It invariably varies from case to case.

[19] Therefore, there is no prospect of success at all of this ground of appeal.

[20] Coming to the second contention based on Turnbull guidelines, I cannot see why those guidelines needed to be given in the face of the evidence in this case. As admitted by the counsel for the appellant in the written submissions the identity of the appellant was not in issue. The prosecution evidence establishes his identity beyond reasonable doubt and the appellant's evidence in fact lends support to vital points in the evidence of the prosecution case. The appellant admits having been inside the room where the complainant was sleeping at the material time.

[21] There is no substance at all of this argument and it had no prospect of success in appeal.

[22] Before parting with the aspect of merits of the appeal, I must place on record the sentiments expressed by Pathik J, in ***Khan*** (supra) and as far as this appeal is concerned I can only concur with them.

> *'[18] (a) The grounds advanced by the appellant are completely without merit. In fact I find that this is a frivolous and vexatious application. Further the application is an abuse of the process of the court.*
>
> *(b) ..... It is a case which I should have summarily dismissed.'*

Prejudice to the respondent

[23] Respondent has not submitted any prejudice that could be caused to its case if extension of time is granted.

[24] Accordingly, enlargement of time is refused.

Order

1. Enlargement of time against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL