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

CRIMINAL APPEAL NO. AAU 0140 of 2015
[In the High Court at Suva Case No. HAC 157 of 2012]

BETWEEN	**:**	**MANOJ KUMAR**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
	:	**Bandara, JA**
	:	**Rajasinghe, JA**
Counsel	**:**	**Mr. J. Reddy for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	**:**	**12 May 2021**
Date of Judgment	**:**	**27 May 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been indicted in the High Court at Suva with two counts of rape contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009 committed at Davuilevu in the Eastern Division on 18 October 2010.

[2] At the end of the summing-up, the assessors unanimously had opined that the appellant was guilty of both counts of rape. The learned trial Judge had agreed with the assessors, convicted the appellant as charged and sentenced him to imprisonment of 12 years each, both sentences to run concurrently, with a non-parole period of 10 years.

[3] The appellant's appeal against conviction had been timely. Six grounds of appeal against conviction and one ground of appeal against sentence had been canvased by his learned counsel on behalf of the appellant at the leave to appeal stage, with the single Judge refusing leave on all grounds of appeal on 07 February 2017. The grounds of appeal placed before the single learned Judge read as follows:

> *'**Ground 1** – The Learned Trial Judge erred in law and in fact when he misdirected the assessors that 'it is desirable that you reach unanimous opinion; that is, an opinion on which you all agree however the final decision of facts rest with me' causing substantial miscarriage of justice to your appellant.*
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> ***Ground 2** – The Learned Trial Judge erred in law and in fact when he misdirected that assessors that 'demeanour in Court is not necessarily a clue to the truth of the witness's account' causing substantial prejudice to the appellant.*
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> ***Ground 3** – The Learned Trial Judge erred in law and in fact by convicting your appellant for the offence despite no medical evidence to prove of the same.*
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> ***Ground 4** – The Learned Judge has failed to direct the Assessors in respect of the defence of alibi, that the prosecution must disprove the defence of alibi and even if the assessors concluded that the defence was false, that does not by itself entitle them to convict the appellant.*
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> ***Ground 5** – The Learned Trial Judge erred in law and in fact when he failed to direct the assessors what weight to be attached to prior inconsistent evidence of the complainant.*
>
> ***Ground 6** – The Learned Trial Judge erred in law and in fact when he misdirected the assessors on the burden of prove (sic) in respect of consent, when he said that; 'the prosecution does not have to prove that the complainant communicated her lack of consent by resisting the accused physically or by shouting at him'.*
>
> ***Ground 7** – The Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence which conflicts with the provision of section 27 of the Prison and Correction Service Act 2006.'*

[4] The appellant in person has filed a renewal application on 01 May 2017 with 04 fresh appeal grounds against conviction (07-10) and 05 fresh grounds of appeal against sentence (11-15) (original single ground against sentence not being renewed) and his

new lawyers Jiten Reddy Lawyers had filed written submissions on all grounds of appeal. The state has filed fresh written submissions in respect of new grounds of appeal for the full court hearing. Mr. J. Reddy appearing for the appellant relied on his written submissions and did not make oral submissions.

[5] The new grounds are as follows:

> ***'Ground 7***
>
> *That the Learned Trial Judge erred in law and in fact when he did not provide adequate or proper direction of the principle of early complaint, causing prejudice to the appellant.*
>
> ***Ground 8***
>
> *That the Learned Trial Judge erred in law and in fact when he did not give a fair and balance summing up. The summing up lacks objectivity of fairness.*
>
> ***Ground 9***
>
> *That the Learned Trial Judge erred in law and in fact when he failed to adequately and properly put the defence case to the assessors.*
>
> ***Ground 10***
>
> *That the Learned Trial Judge erred in law and fact when he directed the assessors about the victim's reluctance to report the incident due to shame, coupled with cultural taboos existing in her society, causing the probability of the assessors to be swayed by emotions.*
>
> ***Sentence***
>
> ***Ground 11***
>
> *That the Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion when he failed to provide separate discount for pervious good character of the appellant.*
>
> ***Ground 12***
>
> *That the Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion when he considered significant degree of planning as an aggravating feature without any shred of evidence to support planning.*
>
> ***Ground 13***
>
> *That the Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion when he considered the complainant was*

traumatised and disgusted with the repeated acts by the appellant to enhance the sentence.

Ground 14

That the Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion when he guided himself with irrelevant factors to enhance the sentence.

Ground 15

That the sentence is harsh and excessive in all the circumstances of the matter.'

[6] Given that the appellant had been sentenced on 22 October 2015, the delay in filing fresh grounds of appeal is over 01 year and 06 months. Therefore, this court would now follow ***Nasila*** guidelines regarding the fresh ground of appeal and see whether enlargement of time should be granted to urge them before this Court.

[7] In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) faced with a similar situation the Court of Appeal stated:

'[14] Therefore, in my view, the most reasonable and fair way to address this issue is to act on the premise that the new grounds of appeal against conviction submitted by the LAC should be considered subject to the guidelines applicable to an application for enlargement of time to file an application for leave to appeal, for they come up for consideration of this court for the first time after the appellant's conviction. This should be the test when the full court has to consider fresh grounds of appeal after the leave stage. In other words, the appellant has to get through the threshold of extension of time (leave to appeal would automatically be granted if enlargement of time is granted) before this court could consider his appeal proper as far as the two fresh grounds are concerned.'

*'[15] 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 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.'*

[8] Thus, the factors to be considered in the matter of enlargement of time 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] 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 (vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100).

[10] It is clear that the delay is very substantial and the appellant has not explained the delay. As far as the prejudice is concerned, there will be undue hardship on the victim to relive her story again in court if there is to be fresh proceedings. Nevertheless, if there is a **real prospect of success** in the belated grounds of appeal in terms of merits this court would be inclined to grant extension of time (vide ***Nasila).*** The respondent had not specifically averred any prejudice that would be caused to the state by an enlargement of time.

[11] However, as a word of caution and advice I must state that the learned counsel and appellants in person should not abuse or overstretch this court's approach taken in ***Nasila*** designed in the interest of justice to mitigate any hardship and prejudice caused to the appellant as a result of the counsel or the appellant in person, more often than not, not having in possession of the complete appeal record at the leave stage, to a point where the whole purpose of leave to appeal process would look like an exercise in futility.

[12] In that regard the following observations of Lord Bingham, Lord Chief Justice in **Cox & Thomas** [1999] 2 CAR 6 on seeking to advance fresh grounds of appeal post single judge leave to appeal ruling are relevant:

'The purpose of the leave requirement in our judgment, like any other leave requirement, is to act as a filter: to weed out appeals that would have no reasonable prospects of success if leave were to be granted, and enable the court to concentrate its judicial resources on cases that have something in them.'

[13] Further, in **R v James & Ors** [2018] WLR (D) 134; [2918] EWCA Crim 285 England and Wales Court of Appeal (Criminal Division) (Feb 8, 2018) remarked at paragraph (38) (ii) that consideration of the application for leave by the single learned Judge is an important stage in the process and should not be 'bypassed' solely on the basis that lawyers instructed post-conviction would have done or argued things differently from the trial lawyers. Fresh grounds advanced by fresh counsel must be particularly cogent.

Facts in brief

[14] The single learned Judge had helpfully summarized the evidence as follows:

'[2] ....The appellant is the victim's father-in-law. When the alleged incidents arose, the victim was living with her in-laws. The victim's evidence was that on 18 October 2010, the appellant took his wife to a medical clinic. After a while the appellant returned home without his wife. He offered to massage the victim, saying she looked sick. He grabbed her by her hands and took her to his bedroom. He had sexual intercourse with her. She did not consent.

[3] The second incident arose ten days later, on 28 October 2010. At around 9 am, the appellant called his wife to come to his work place to assist him. She left home at about 11 am. Around 12.30 pm, the appellant came home alone. The victim was at home. The appellant's elderly father-in-law was also at home. The appellant accompanied his father-in-law to a neighbour's house. After a while, the appellant returned home alone and went and had his shower. The victim was in her bedroom. The appellant entered her bedroom and closed the door. He prevented the victim from leaving the room when she tried to leave. He pushed her on the bed and had sexual intercourse with her. The victim said she was in pain and in tears. Evidence was led from the victim's mother who said that on one occasion before the alleged incidents, the appellant brought the victim to her home and massaged the victim saying she was in pain.

[4] The appellant gave evidence. He said that at the time of the first alleged incident he was at his work place. On that day, he returned home at about

10 pm. On the date of the second alleged incident, he was in his office but returned home at about 2.45 pm to repair his vehicle with the assistance of his neighbour, Raj Dev. Raj Dev was called by the defence, but his evidence was that he did not meet the appellant on 28 October 2010. The appellant's son gave evidence. His evidence was that he was having matrimonial problems with the victim because she did not want to live with her in-laws but with her parents.'

[15] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA; 171AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

01st ground of appeal

[16] The appellant's contention is that the learned trial Judge misdirected on the role of the assessors when he informed them that he was the final finder of the facts and led the assessors to believe that their opinion was of no significance and their role was inferior. The impugned direction is contained in paragraph 06 of the summing-up:

'[6] It is also important to note that, in forming your opinion on the charge against the accused, it is desirable that you reach a unanimous opinion; that is, an opinion on which you all agree, whether he is guilty or not guilty. However, the final decision of facts rests with me. I am not bound to conform to your opinion. However, in arriving at my judgment, I shall place much reliance upon your opinion.'

[17] The direction to the assessors that the learned trial Judge is the ultimate fact finder is correct and conforms to section 237(2) of the Criminal Procedure Act, 2009. Section 237(2) states that *'the judge shall then give judgment, but in doing so shall not be*

bound to conform to the opinions of the assessors' though the learned trial Judges do give appropriate weight to the opinion of the assessors as they represent the community [it may be noted for the record that section 237 was amended by Criminal Procedure (Amendment) Act 2021/Act No.02 of 2021 (12 February 2021)].

[18] It is trite law that in Fiji the assessors are not the sole judges of facts. The learned Judge is the sole judge and ultimate finder of fact (and law) in respect of guilt or otherwise of the accused, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Prasad v The Queen** [1980] FJUKPC 1; [1980] UKPC 37 (17 November 1980), **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015], **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)]

[19] Therefore, this ground has no reasonable prospect of success and leave to appeal is therefore refused.

02nd ground of appeal

[20] The appellant's contention is that the learned trial Judge misdirected by informing the assessors that the demeanour of witnesses in court is not necessarily a clue to the truth of witness's account. Learned counsel for the appellant submits that the demeanour of a witness is an important matter for the assessors to consider when evaluating a witness's credibility (vide **Natakuru v State** unreported [2006] FJCA 36; AAU0093J of 2015 (14 July 2006). The impugned paragraph in the summing-up is as follows:

> *'[14] The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every person has his own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.'*

[21] Paragraph 14 has to be read with the preceding paragraph:

> *'[13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? Were they argumentative? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting. Consider also the likelihood or probability of the witness's account.'*

[22] Considering paragraphs 13 and 14 cumulatively, I fully agree with the single learned Judge when he said as follows in respect of this ground:

> *'[9] .....At no stage, the trial judge suggested that demeanour was irrelevant when evaluating a witness's credibility. What the trial judge said to the assessors is that they should not evaluate credibility based on demeanour only. They should also consider the court environment that can be daunting for some witnesses and the nature of the evidence the witnesses had to give. In my judgment, the direction on the demeanour was perfectly correct.'*

[23] Therefore, this ground has no reasonable prospect of success and leave to appeal is therefore refused.

03rd ground of appeal

[24] There was no medical evidence led at the trial by the prosecution and it was not required to do so by law. The complainant was a married woman. Section 129 of the Criminal Procedure Act, 2009 has done away with the requirement of corroboration in sexual offences. The appellant raised no issue with the learned trial Judge regarding the non-availability of medical evidence. What the medical evidence would have revealed, if available, is only speculative. The learned trial Judge made no error in convicting the appellant without medical evidence.

[25] Therefore, this ground has no merits at all and leave to appeal should be refused.

04th ground of appeal

[26] The appellant's contention is that the direction on *alibi* at paragraph 92 was inadequate. Learned counsel for the appellant submits that when an accused raises an *alibi* as his defense, the learned trial Judge should inform the assessors that the prosecution must disapprove the *alibi* beyond reasonable doubt and that even if they conclude that the *alibi* was false, that does not itself entitled to convict the accused. The relevant portions at paragraphs 92 and 94 are as follows:

> *'[92] The accused had relied on a specific defence called alibi in his answer to the two rape counts. What he says is that he was not at his home at the time the complainant says he committed acts of rape, but was at his work place. It is up to the prosecution to disprove the alibi, and not for the accused to prove. He is under no legal requirement to prove anything. He could have even remained silent. If you find his evidence; that he was at his work place, is credible, then you must find him not guilty of the two counts, as the prosecution had failed to prove identity of the rapist*
>
> *'[94] Even if you reject his and his witness's evidence that does not mean the prosecution case is automatically proved. The prosecution must establish his identity and presence by their own evidence. Then only, if you find element of identity is established by the prosecution beyond reasonable doubt, in addition to other elements of the offence of rape in the two counts you can find the accused guilty to these two counts of rape. If you entertain any reasonable doubt about any of the elements then you must find the accused not guilty to both charges.'*

[27] In **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) the Court of Appeal said of the required direction in cases where there is a defense of *alibi* in the following words which were reiterated in **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020):

> *'[29] When an accused relies on alibi as his defence, in addition to the general direction of the burden of proof, the jury (in Fiji the assessors) should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (**R v Anderson** [1991] Crim. LR 361, CA; **R v Baillie** [1995] 2 Cr App R 31; **R v Lesley** [1996] 1 Cr App R 39;'*

[28] The learned trial Judge made it very clear to the assessors that it is up to the prosecution to disprove the *alibi*, and not for the accused to prove and even if they reject the appellant's evidence or his *alibi*, they could convict him only if the prosecution had established his identity beyond reasonable doubt.

[29] Therefore, this ground has no merits and leave to appeal is therefore refused.

05th ground of appeal

[30] The appellant's contention is that the learned trial Judge had failed to direct on the weight to be given to the inconsistencies in the complainant's evidence. However, he has not pointed out what these inconsistences are. The learned trial Judge dealt with the inconsistencies and how the assessors should evaluate them in detail at paragraphs [66]-[68] of the summing-up as follows:

> *'[66] There is another aspect; I would want to address you on the issue of consistency. You will recall that during cross examination, repeatedly she was asked whether she had mentioned that particular item of evidence which she placed before you, to police in making her statement. She admitted some of these incidents she said in her evidence are not in her statement. Her explanation is this is the first time she filed a report and it was the duty of the police to record everything important. She said she said it all, she had read the statement and found they were not there. There is no evidence of the police officer who recorded her statement before us.*
>
> *[67] You will also recall that the complainant has given evidence before us for three days and a great volume of evidence is placed before us. You might consider whether it is possible to record her response to all the questions raised by the accused in cross examination, when her statement is taken down by a police officer. <u>If you think the explanation is acceptable and her evidence is consistent on material points, you may decide her evidence is credible on this aspect. If you do not accept her explanation you may decide against her evidence on this aspect and continue to consider her evidence for its truthfulness on other aspects.</u>*
>
> *[68] The third aspect to consider under consistency is whether the complainant's evidence is consistent with her own evidence during cross examination and also with her mother's evidence. Her mother said her daughter was massaged by the accused using coconut oil. The complainant did not mention of using any substance. The complainant did not mention that her mother accompanied her to retrieve her belongings.*

Her mother said she also went in. Whether these inconsistencies are significant ones which would render her truthfulness doubtful you will have to decide.'

[31] The learned trial Judge's conclusion on the aspect of inconsistency is at paragraph 13 of the judgment:

'[13] Her evidence is consistent and there were no inconsistencies with her statement to Police. And therefore it is my considered view that her evidence should be regarded as consistent narration of her version of sequence of events.'

[32] It appears from the summing-up that there had not been any inconsistences but only some omissions in the evidence of the complainant. The Court of Appeal decision in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) deals with both:

*'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280)'*

[33] The appellant has not pointed out, nor has the summing-up revealed any inconsistencies or omissions that would shake the basic version of the complainant's evidence.

[34] Therefore, this ground has no merits and leave to appeal is accordingly refused.

06th ground of appeal

[35] The appellant contends that the learned trial Judge misdirected the assessors at paragraph 74 of the summing-up by stating that the prosecution does not have to prove that the complainant communicated her lack of consent by resisting the accused physically or by shouting at him:

> *'[74] The prosecution does not have to prove that the complainant communicated her lack of consent by resisting the accused physically or by shouting at him. It is not the experience of the Courts that victims of rape always have injuries to show for it. There is no classic reaction to a demand for unwanted sexual activity. Some people with physical self-confidence will protest loud and long, some will fight, and others will freeze as the realisation dawns that they are in a situation which they cannot control. Freezing is not the same thing as consent freely given. These are some of the concerns which you may utilize to assess her evidence under consideration of probability. She says she resisted the aggression of the accused in her own way, but the accused who easily overpowered her. I have already dealt with some evidence under recent complaint which could also be used under this assessment.'*

[36] In terms of section 206(1) of the Crimes Act, 2009 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. Section 206(2)(d) of the Crimes Act, 2009 stipulates that a person's consent to an act is not freely and voluntarily given if it is obtained by exercise of authority.

[37] The appellant was the complainant's father-in-law and at the time of the alleged incidents she was living in his house. The appellant was obviously in a position of authority given his age and the relationship he had with the complainant. The complainant's evidence was that both incidents had happened when she was alone at home with the appellant. On the first occasion, the appellant had taken the complainant into his bedroom on the pretext of massaging her. On the second occasion, the appellant had prevented the complainant from leaving her bedroom. According to the complainant, she was in pain and tears when the appellant had sexual intercourse with her. In those circumstances, there was nothing wrong in the

learned trial Judge informing the assessors that the prosecution did not have to prove that the complainant communicated her lack of consent by resisting the appellant physically or by shouting at him.

[38] In any event, the consent or lack of it was not a trial issue at all. The appellant's defence was one of *alibi*.

[39] Therefore, there is no reasonable prospect of success in this ground of appeal and leave to appeal is therefore refused.

07th ground of appeal

[40] The appellant's complaint appears to direct at the relative delay of the complainant reporting the matter to her husband on 31 October 2010. A formal complaint with the police had been lodged on 02 November 2010. The prosecution had not relied on any recent complaint evidence. At paragraphs 15, 16 and 53-56 of the summing-up the learned trial Judge had addressed the assessors on the issue of delay and drawn their attention specifically to her reasons for the delay at paragraphs 57-60 and 76. The learned trial Judge had placed before the assessors the challenge to her evidence based on this alleged delay at paragraphs 61-64. Thus, the learned trial Judge had thoroughly ventilated the issue of delay in the summing-up. In addition, the learned Judge had given due consideration to the concerns about delay at paragraph 12 of the judgment and concluded that the reasons for not disclosing the incidents to any person were acceptable and convincing.

[41] In effect the learned trial Judge in his summing-up and the judgment had run the *"the totality of circumstances test"* with regard to the delay as set out in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) as to how to deal with a belated complaint:

> **'***[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in* ***Tuyford*** *186, N.W. 2d at 548 it was decided that:-*

> *'The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.'*

[42] I am in full agreement with the conclusion of the Learned High Court Judge and therefore, there is no real prospect of success in this ground of appeal and enlargement of time is refused.

08th ground of appeal

[43] The appellant argues that the summing-up was not fair and balanced and lacked objectivity.

[44] The learned counsel for the appellant has not submitted any instances in support of this criticism. I have examined the summing-up and am convinced that it is as fair, well-balanced and objective as it could be in the facts and circumstances of the case.

[45] This ground of appeal has no real prospect of success and is devoid of any merits and enlargement of time is refused.

09th ground of appeal

[46] The appellant complains that the learned trial Judge had not put the defence case to the assessors adequately and properly but not cited or given examples as to what aspects of his case had been omitted or disregarded by the learned trial Judge.

[47] This complaint has no basis at all. The learned trial Judge had addressed the assessors on the appellant's case in detail at paragraphs 48, 61, 87-89 and 92-94 of the summing-up. The learned trial Judge also had addressed himself on the appellant's

defence at paragraphs 10, 11, 15 and rejected his evidence at paragraphs 17 of the judgment.

[48] Therefore, there is no real prospect of success and enlargement of time is refused.

10th ground of appeal

[49] The appellant argues that the learned trial Judge had erred in law in directing the assessors about the reluctance of the complainant to report the incidents due to shame, coupled with cultural taboos existing in her society probably swaying the opinion of the assessors.

[50] This matter has already been addressed to a great extent under the 07th ground of appeal. I have examined the whole of the summing-up and in particular paragraphs 15, 16 and 53-56 where the learned trial Judge had addressed the assessors on the issue of delay and drawn their attention specifically to her reasons for the delay at paragraphs 57-60 and 76. At paragraphs 61-64 the learned trial Judge had placed before the assessors the challenge to her evidence based on this delay. I do not find anything that the learned trial Judge had said evoking the sympathy of the assessors.

[51] On the contrary the learned trial Judge at paragraphs 35, 72 and 77 of the summing-up had specifically directed the assessors to disregard emotions and sympathy for the complainant:

> *'[35] You should dismiss all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion has any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinion.'*
>
> *'[72] In assessing the complainant's truthfulness on her evidence on the issue of probability, I think I must caution you on one point. The failed attempted suicide by the complainant, less than two months from her marriage, might generate sympathy towards her in your mind. It is a natural emotion. But what you must guard against is not to have that sympathy to influence your decision in assessing her evidence for its truthfulness. However, it is legitimate to use this evidence, adduced by*

the accused, in assessing her evidence, by utilising it to have an idea of her personality and her character on an approach based on common-sense. That might become relevant in deciding the course of action adopted by the complainant in the situations she said she was in.

[77] Why her marriage has failed and whether the conduct of her husband or the complainant is responsible for that are irrelevant considerations to the matter before us. I repeat here that the references to attempted suicide and to her unhappy marriage which are made here, are should not be made to evoke sympathy with the complainant, but only be used to examine her conduct during the relevant period in its proper setting.'

[52] Therefore, there is no real prospect of success in this complaint and enlargement of time is refused.

[53] The guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal untimely preferred against sentence to be considered arguable there must be a real prospect of its success in appeal**. The aforesaid guidelines are as follows:

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

11th ground of appeal

[54] The appellant argues that the learned trial Judge had committed a sentencing error by failing to provide a separate discount for previous good character of the appellant.

[55] The learned trial Judge had taken into account his previous good character as part of mitigation and given a discount of 02 years. There is no requirement for a learned trial Judge to give a separate deduction for previous good character.

[56] There is no sentencing error; no real prospect of success in this ground. Enlargement of time is refused.

12th ground of appeal

[57] The appellant complains that the learned trial Judge had erred in considering significant degree of planning as an aggravating factor (one out of eleven) to enhance the sentence by 05 years.

[58] Considering the totality of evidence, I have no doubt that the appellant had noticeably planed both instances of rape as opposed to them being mere incidental or opportunistic acts.

[59] At the top of the non-exhaustive list of aggravating factors set out in **Ram v State** [2015] FJSC 26; CAV12.2015 (23 October 2015) in rape cases (and sexual abuse cases in general) is whether the crime had been planned, or whether it was incidental or opportunistic.

[60] The rest of the aggravating features identified are whether there had been a breach of trust, whether committed alone, whether alcohol or drugs had been used to condition the victim, whether the victim was disabled, mentally or physically, or was especially vulnerable as a child, whether the impact on the victim had been severe, traumatic, or continuing, whether actual violence had been inflicted, whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections, whether the method of penetration was dangerous or especially abhorrent, whether there had been a forced entry to a residence where the victim was present, whether the incident was sustained over a long period such as several hours, whether the incident had been especially degrading or humiliating, whether a plea of guilty was tendered, how early had it been given with no discount for plea after victim

had to go into the witness box and be cross-examined and little discount, if at start of trial, time spent in custody on remand, extent of remorse and an evaluation of its genuineness and if other counts or if serving another sentence, totality of appropriate sentence (see para [26] of ***Ram***).

[61] There is no sentencing error; no real prospect of success in this ground. Enlargement of time is refused.

13th ground of appeal

[62] The appellant submits that the learned trial Judge had erred in principle and in the exercise of his sentencing discretion when he considered (as one out of eleven aggravating factors) that the complainant had been traumatised and disgusted with the repeated acts of the appellant in enhancing the sentence.

[63] Whether the incident had been especially degrading or humiliating was one of the aggravating features recognised in ***Ram***. It appears that the complainant's evidence had revealed that she was 'disgusted' and 'traumatised' by the appellant's acts of sexual abuse (see paragraph 12 of the judgment as well). Given the evidence at the trial, the learned trial Judge was entitled to treat them as aggravating features.

[64] There is no sentencing error; no real prospect of success in this ground. Enlargement of time is refused.

14th ground of appeal

[65] Though the learned counsel for the appellant has submitted that the learned trial Judge had erred in principle and in the exercise of his sentencing discretion when he guided himself with irrelevant factors to enhance the sentence, he had not identified a single such 'irrelevant factor' in his written submissions.

[66] There is no sentencing error; no real prospect of success in this ground. Enlargement of time is refused.

15th ground of appeal

[67] The appellant argues that the sentence is harsh and excessive but not buttressed that contention with any submissions.

[68] In **Kasim v State** [1994] FJCA 25; Aau0021j.93s (27 May 1994) the Court of Appeal stated on the sentence for adult rape as follows:

> *'While it is undoubted that the gravity of rape cases will differ widely depending on all the circumstances, we think the time has come for this Court to give a clear guidance to the Courts in Fiji generally on this matter. We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.*

[69] The Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) had taken the tariff for adult rape to be between 07 and 15 years of imprisonment.

[70] Sentencing is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and arriving at a sentence that fits the crime. Recognising the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that

the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[71] Considering the facts and circumstances of the case the appellant's sentence of 12 years of imprisonment is not excessive and harsh at all.

[72] There is no sentencing error; no real prospect of success in this ground. Enlargement of time is refused.

Bandara, JA

[73] I have read the draft judgment of Prematilaka, JA and agree with his reasoning and conclusions.

Rajasinghe, JA

[74] I agree with the reasons and conclusions in the draft judgment of Prematilaka, JA.

Orders

1. Leave to appeal on grounds 01-06 refused.
2. Enlargement of time on grounds 07-15 refused.
3. Appeal against conviction dismissed.
4. Appeal against sentence dismissed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL