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

CRIMINAL APPEAL NO.AAU 18 of 2019
[In the High Court at Lautoka Case No. HAC 74 of 2014]

BETWEEN	**:**	**TAWAKE WAQABACA WAQALEVU**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Mr. M. Fesaitu for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	**:**	**20 September 2021**
Date of Ruling	**:**	**24 September 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with one count of rape contrary to section 207 (1) and (2) (b) and 207 (3) of the Crimes Act, 2009, committed against a child of 06 years old at Naivuvuni, Rakiraki in the Western Division on 02 June 2014.

[2] The information read as follows:

*'**Statement of Offence***

> ***RAPE**: Contrary to Section 207 (1) and (2) (b) and Section 207 (3) of the Crimes Act of 2009.*

Particulars of Offence

> ***Tawake Waqabaca Waqalevu*** *on the 2nd day of June, 2014 at Naivuvuni, Rakiraki in the Western Division, penetrated the vagina of AD with his finger, and at the relevant time the said AD was under the age of 13 years.'*

[3] The appellant had been tried *in absentia*. At the end of the summing-up the assessors had in unanimity opined that the appellant was guilty as charged. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 20 April 2018 to an imprisonment of 13 years with a non-parole period of 10 years.

[4] The appellant had appealed in person against conviction and sentence out of time (19 December 2018). He sought to abandon the sentence appeal by filing From 3 in terms of Rule 39 of the Court of Appeal Rules on 28 September 2020. Thereafter, the Legal Aid Commission had filed a notice of motion seeking enlargement of time, amended notice of appeal against conviction and the appellant's affidavit along with written submission on 24 November 2020. The state had tendered its written submissions on 26 January 2021. Both counsel participated at the hearing *via* Skype.

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

[6] 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)].

[7] The delay of the appeal (being almost 07 months late) is substantial. The appellant had been arrested in November 2018 and taken to Tavueni Prison where he had been assisted by inmates to prepare appeal papers. The appellant cannot put forward his arrest in November 2018 as an excuse for the delay because he on his own motion either absconded or elected to be tried in his absence. Thus, his explanation for the delay is totally unacceptable. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] The grounds of appeal urged on behalf of the appellant are as follows:

> *'**Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in facts having not adequately directed the assessors on the burden of proof when considering the prosecution's case.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and facts in not directing the assessors to disregard inadmissible evidence of the complainant's testimony of her stating of what the Appellant and her grandmother had informed her grandfather when her mother had gone to call the police.'*

[9] The trial judge in his judgment had summarized the evidence against the appellant as follows:

> *5. Prosecution called five witnesses and based their case substantially on the evidence of AD, the Complainant. Prosecution also relies on recent complaint evidence of complainant's mother, Noma Sera Rokodike, and medical evidence to prove the consistency of the Complainant.*

6. *The Complainant was 6 years old at the time of the offence and did not have the necessary mental capacity to consent to the alleged sexual act. It is the burden of the Prosecution to prove beyond a reasonable doubt that the Accused Tawake Waqabaca Waqalevu had penetrated the vagina of AD with his finger.*

7. *The Accused is Complainant's uncle. Complainant's mother Noma Sera Rokodike said that the Accused Waqa is her cousin from her father's side. Waqa had visited Complainant's house on 2nd of June, 2014, after his last visit in 2011. The Complainant referred to the person who penetrated her as uncle Waqa who had visited her house on 2nd of June, 2014. The police investigating officer Bawaqa said that the name of the Accused is Tawake Waqabaca Waqalevu who is also known by his short name as Waqa. The Prosecution proved the identity of the Accused beyond reasonable doubt.*

8. *The Complainant made a prompt complaint to her mother Noma Sera Rokodike soon after the incident. The Complainant said that, on her way back from the river, the Accused made her lay down on the grass, covered her mouth and put his one finger in her vagina. She said that it was painful. She was scared. She was just crying. When her siblings, Inise and Joeli, asked her what happened, she didn't tell them anything. Then she ran to her mother and told that uncle Waqa did to her what adults do.*

9. *Complainant's mother Noma Sera Rokodike gave evidence and confirmed that her daughter AD came running after her bath and she was standing at the doorstep and crying. She asked her, what's wrong? Complainant said, 'Waqa did something to me that only adult people do'. Then she asked AD, what did Waqa do? AD said 'he kissed me, put his tongue in my mouth and put his finger inside my vagina'.*

11. *Doctor Alumita Serutabua had examined the Complainant soon after the alleged incident and found a bruising over labia minora, the smaller inner folds of the vulva. Doctor opined that this bruising may be due to the offender touching or fingering her vagina during the act. Doctor's medical finding is consistent with the evidence of the Complainant.*

01st ground of appeal

[10] The complaint is directed at paragraph 49 of the summing-up:

> *'49. If you accept the Prosecution's version of events, and you are satisfied that the Accused had penetrated the vagina of the Complainant with his finger and the Prosecution has proved the case beyond reasonable doubt, so that you are sure of Accused's guilt you must find him guilty.'*

[11] The counsel for the appellant submits that since the appellant was tried *in absentia* the trial judge should have told assessors that if they were not to believe the prosecution version the benefit of the doubt should be given to the appellant.

[12] I see the following directions on the burden of proof and standard of proof and matters related to proof in the summing-up:

> *7. On the matter of proof, I must direct you as a matter of law, that the Accused person is innocent until he is proven guilty. The burden of proving his guilt rests on the Prosecution and never shifts.*
>
> *8. The standard of proof is that of proof beyond reasonable doubt. This means that, before you can find the Accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.*
>
> *13. The Accused person does not stand trial in this case. The trial is conducted in the absence of the Accused. In other words, he is tried in absentia. He is also not defended by a legal practitioner. Although the Accused is not here to defend his case, and is unrepresented, he is entitled to all the rights of an accused to a fair trial that are enshrined in the Constitution. You have to bear in mind that the evidence adduced for the Prosecution is not subjected to cross examination and therefore its credibility is not tested. Therefore you have to be fully satisfied that the evidence is credible and believable despite this frailty.*
>
> *42. Ladies and gentleman assessor, the Accused is charged with one count of Rape. Before you could find the Accused guilty, you must be satisfied beyond reasonable doubt that the Accused Tawake Waqabaca Waqalevu had penetrated the vagina of the Complainant AD with his finger.*
>
> *48. The Accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty. The burden to prove the charge beyond a reasonable doubt is on the Prosecution. The absence of the Accused at the trial does not make that burden a lesser one. As I have said, you must not make a negative inference and hold against the Accused merely because he is not here to defend his case.*

[13] In the light of above directions and considering the totality of the summing-up, I see no merit or any real prospect of success in the appellant's argument under the first

ground of appeal. There is no incantation to be uttered in every summing-up. The directions on burden and standard of proof are quite sufficient.

02nd ground of appeal

[14] The appellant's criticism arises from part of what is stated at paragraph 34 of the summing-up to the effect *'....When her mother went to call the police, her grandma and uncle Waqa told grandfather to tell her that when the police come she should not tell them what happened.'*

> *34. AD is the next witness for Prosecution. She is the Complainant in this case. She was 10 years old at the time of giving evidence. In 2014, she was in Class 2. On the 2nd day of June, 2014, she went to school with her brothers and sister and returned home after 3.00 p.m. When she arrived home her grandfather, father, grandmother, mother, and uncle Waqa were home. At around 5.00 p.m., her mother told them to go for a bath at neighbour's place. Then her grandmother told them to go with uncle Waqa to the river to have a bath. She went to the river with her siblings, Inise, Ilaijah, Joeli and uncle Waqa. She came back from river with uncle Waqa and her younger brother Elijah, while her sister Inise and Joeli were still bathing. As they were coming, uncle Waqa told her younger brother Elijah to take his stick house and make it run. After that Waqa made her lay down and covered her mouth and put his one finger in her vagina. It was painful. She was scared. He put his tongue in her mouth. When Inise and Joeli came, they asked her what happened. She didn't tell them anything. She was just crying. Then she ran to her mother and told her that uncle Waqa did to her what adults do. <u>When her mother went to call the police, her grandma and uncle Waqa told grandfather to tell her that when the police come she should not tell them what happened.</u>*

[15] The basis of the complaint is that the impugned evidence of the victim was hearsay as the grandfather and grandmother were not called to give evidence and the trial judge should have directed the assessors to disregard it.

[16] The evidence in question is something that the victim had heard with her own ears; not something that she was told by someone. She had not uttered the impugned item of evidence as told to her by someone. Therefore, it is not hearsay evidence. The only issue is whether what she claimed to have heard could be believed; not whether it was

admissible. The trial judge had given ample directions on the credibility of the victim's evidence as follows:

> *'45. You have to be satisfied that the evidence Complainant gave is truthful and believable. If you are satisfied that she told the truth, then you can safely act upon her evidence in coming to your conclusion. No corroboration is required from an independent source.'*

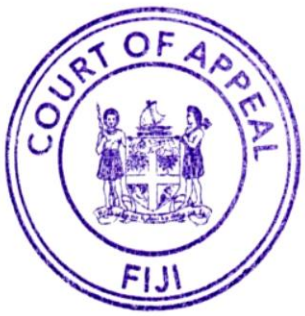
[17] There was no necessity at all for the trial judge to have given any warning to disregard the impugned piece of evidence.

[18] Thus, this ground of appeal not only does not have any merits but also has no real prospect of success.

[19] In fact, having examined the summing-up and the judgment, I determine that not only the grounds of appeal raised but also the appeal as a whole is frivolous and should be dismissed.

Order

1. Appeal (bearing No. AAU 18 of 2019) dismissed in terms of section 35(2) of the Court of Appeal Act.



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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL