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

CRIMINAL APPEAL NO.AAU 035 of 2015
[In the High Court at Lautoka Case No. HAC 141 of 2010]

BETWEEN	**:**	**JOSEVA QIOKATA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
	:	**Bandara, JA**
	:	**Wimalasena, JA**
Counsel	**:**	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	**:**	**15 April 2021**
Date of Judgment	**:**	**29 April 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been indicted in the High Court of Suva with one count of rape contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009 committed at Nadi in the Western Division on 09 September 2010.

[2] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of rape. The learned trial judge had agreed with the opinion of the assessors in his judgment, convicted the appellant as charged and sentenced him to imprisonment of 09 years and 10 months with a non-parole period of 08 years.

[3] The appellant's appeal against conviction had been timely. The following grounds of appeal had been canvased by the Legal Aid Commission unsuccessfully at the leave to appeal stage with the single Judge refusing leave on all of them on 24 May 2019.

> *'1. The Learned Judge erred in law when he failed to give a special warning to the assessors in the summing up about the unreliability of the dock identification without laying prior foundation through a photo identification or the identification parade unless with your appellant's objection.*
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> *2. The Learned trial judge erred in law and in fact when he allowed the State to lead the contents of the medical report of the complainant under the headings of history relayed by the patient, professional opinion and the summary and conclusion through the medical doctor called when the complainant had not stated anything in her evidence during the trial in relation to the 3 mentioned heading when is hearsay thus prejudiced the appellant.*
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> *3. The Learned trial judge erred in law and in fact when he failed to consider the fact there was more than reasonable doubt in the prosecution case in relation to Ana Roko's (PW2) evidence.'*

[4] The Legal Aid Commission has since renewed the application for leave to appeal before the full court on 07 April 2020 but come up with totally new grounds of appeal not canvased before the single Judge. They are as follows.

> ***Ground 1***
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> *The Learned Trial Judge erred in law and in fact having directed the assessors and himself at paragraph 58 of the Summing Up causing a substantial miscarriage of justice to the Appellant in that;*
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> > *(i) The direction is inadequate in light of independent evidence; and the assessors being told that corroboration has some independent evidence to support the victim's story of rape.*
> >
> > *(ii) The direction is a misdirection in relation to the independence evidence supporting the victim's story of rape when read in conjunction with the doctor's evidence, the doctor being an independent witness.*
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> ***Ground 2***
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> *The Learned Trial Judge erred in law and in fact by in adequately directing the assessors and himself on how to approach and assess the medical doctor's evidence.*

Ground 3

The Learned Trial Judge erred in law and in fact by in inadequately directing the assessors and himself on recent complaint in that;

i) Not pointing out the inconsistencies in the complaint made to Ana Roko

ii) For the assessors to assess the inconsistencies in determining the conduct of the complainant in the making of the complaint to Ana.

Ground 4

The Appellant is substantially prejudiced in his right to a fair by the learned trial Judge directing the assessors and himself on the procedural requirement for giving notice of alibi as seen paragraph 52 of the Summing Up.

[5] The prosecution case had been primarily based on the evidence of the complainant who was 25 years old at the time of the incident. Married with two children, she had been 04 months pregnant at the time of the incident. On the day in question around 11.30 p.m. the appellant who was from the same settlement had broken open the door of complainant's house in the night, dragged her out and raped her. Soon after the appellant had left her around 5.00 a.m. on the following day the complainant had gone to her cousin's house and informed her of the fact that he raped her and on the same day the matter had been reported to the police.

[6] The complainant's cousin Ana Roko had testified to the recent complaint made by the complainant while the doctor was of the opinion that the medical findings made on 09 September 2010 were consistent with the history given by the complainant.

[7] The appellant had taken up the position in his evidence at the trial that he was at a night club during the period of time relating to the incident. This *alibi* had been taken at the time of the trial without any prior *alibi* notice.

[8] Given that the appellant had been sentenced on 18 March 2015, the delay in respect of new grounds of appeal is over 05 years. Therefore, this court would now follow ***Nasila*** guidelines regarding those grounds of appeal and see whether enlargement of time should be granted to urge them before this Court. 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.'*
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> *'[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.*

[9] 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?

[10] 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)].

[11] It is clear that the delay is very substantial and 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 though the respondent had not averred any prejudice that would be caused by an enlargement of time.

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).***

01st and 02nd grounds of appeal.

[12] The appellant's argument under 01st ground of appeal is partly based on paragraph 58 of the summing-up and in particular its last sentence. It is also submitted by the counsel for the appellant that in the light of paragraph 45 of the summing-up the directions at paragraph 58 amount to misdirection. It has been further submitted in terms of the 02nd ground of appeal that the directions at paragraphs 45 is inadequate as to how the assessors should assess and evaluate medical evidence. The relevant paragraphs are as follows:

> *'45. The Doctor is an independent witness. She had examined the complainant the following day. You have to decide whether that evidence is confirming the evidence of the victim or creating any reasonable doubt in the prosecution case.*
>
> *58. Please remember, there is no rule for you to look for corroboration of the victim's story to bring home an opinion of guilty in a rape case. The case can stand or fall on the testimony of the victim depending on how you are going to look at his evidence. You may, however, consider whether there are items of evidence to support the victim's evidence if you think that it is safe to look for such supporting evidence. Corroboration is, therefore, to have some independent evidence to support the victim's story of rape.'*

[13] Given the position in Fiji that for sexual offences the evidence of the complainant need not be corroborated and no warning to the assessors is required in the absence of corroboration (vide section 129 of the Criminal Procedure Act) I do not see anything objectionable *per se* in paragraph 58 of the summing-up.

[14] The counsel, however, argues that having directed the assessors that they were free to consider whether there was any other evidence supportive of the complainant's narrative yet such evidence corroborative of her account needed to be independent evidence had erred in not specifying what those items of independent evidence could be. The argument goes further and states that when the trial judge had already informed the assessors that the doctor was an independent witness, the assessors

would have assumed that his evidence comprising of medical findings and the history as told by the complainant would provide the kind of corroboration of the complainant's evidence, if they were to look for the same.

[15] The counsel relies on **Prasad v State** [2019] FJSC 3; CAV0024 of 2018 (25 April 2019) in support of his first contention. However, ***Prasad*** affirms the correctness of the last sentence at paragraph 58 of the summing-up that '*Corroboration is, therefore, to have some independent evidence to support the victim's story of rape'.*

[16] The main issue in ***Prasad*** was that the trial judge had identified a witness as a person who corroborated the complainant's account of what the accused had done to her when that witness had only narrated what the complainant herself had told him. In that context, the Supreme Court also stated that the trial judge had to explain what evidence was capable of amounting to corroboration. In other words the assessors should be assisted as to what 'independent' means in the context of the other evidence in the case *i.e.* evidence should be independent of the complainant in the sense that the victim cannot be the ultimate source of such corroborative evidence.

[17] In the instant case the trial judge has not certainly committed a similar error regarding the evidence of the doctor or Ana Roko. However, there was an omission on his part in not identifying what items of evidence, if any, could amount to corroboration of the complainant's evidence and particularly not telling the assessors as to which part of the doctor's evidence could amount to corroboration of which part of the complainant's narrative.

[18] The doctor's evidence that there was tenderness over bilateral flanks and inflammation on labia minora certainly corroborated the complainant's evidence of recent act of sexual intercourse but not her evidence of the identity of the perpetrator.

[19] The doctor had also testified that the complainant had told him as history that she was asleep at home at night the day prior to the day of examination and Jo broke into the house and forced her to have sexual intercourse against her will and also punched on her both flanks about 04 times. The complainant also on her part had said in her

evidence that she told the doctor at the medical examination about what happened to her and that she was punched 04 times on left ribs.

[20] Therefore, in the circumstances the doctor's evidence on the history given by the complainant cannot be ruled out as hearsay [see **Subramaniam v Public Prosecutor** [1956] 1 WLR 965 at 969, **Delailagi v State** [2019] FJCA 186; AAU0060.2015 (03 October 2019) and **Goundar v State** [2020] FJCA 4; AAU29.2015 (27 February 2020)]. However, that evidence cannot amount to corroboration of the complainant's evidence on the identity of the appellant. The history is not evidence of the facts complained of and cannot be regarded as corroboration, but only goes to the consistency of the conduct of the complainant with her evidence given at the trial. The principle on which such evidence is admitted is to support and enhance the credibility of the complainant [vide **Senikarawa v State** AAU0005of 2004S: 24 March 2006 [2006] FJCA 25, **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017) and **Navaki v State** [2019] FJCA 194; AAU0087.2015 (3 October 2019)].

[21] Under the 02nd ground of appeal the appellant's counsel argues that the trial judge should have directed the assessors on the medical evidence particularly how and for what purpose they should use the doctor's evidence regarding the history provided by the complainant. The counsel proceeds on the basis that the doctor's evidence on history may be treated as recent complaint evidence as stated in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)] but the trial judge had not addressed the assessors on the lines required by law on recent complaint evidence.

[22] It is trite law that evidence of recent complaint is not capable of corroborating the complainant's account. At most it is relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such is a matter going to her credibility and reliability as a witness. Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint. However, the complainant need not disclose all of the ingredients of the offence but the complaint must disclose evidence of material and relevant unlawful sexual conduct on the part of the accused [vide **Raj v State** (supra)].

[23] It does not appear that the prosecution had actually treated the doctor's evidence as recent complaint evidence. However, since it had elicited evidence relating to the history provided by the complainant who in her evidence had confirmed disclosing the same to the doctor, the trial judge should have addressed the assessors as to how they should treat such evidence. He had omitted to do that and the fact that the prosecution had not treated that evidence as recent complaint evidence may have led to the omission on the part of the trial judge.

[24] Nevertheless the fact remains that the trial judge had not directed the assessors on the above matters. The trial counsel too had not sought any redirections on these aspects. Therefore, the appellant is liable to be estopped 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)] in the absence of any cogent reasons for the failure of the defence counsel to raise these omissions at the end of the summing-up.

[25] Be that as it may, assuming that the omissions highlighted above may have occasioned a miscarriage of justice, still the matter would not rest there. The appellate court is required to see whether the verdict should be set aside due to the omissions in the summing-up of the trial judge applying the test formulated under section 23(1) of the Court of Appeal Act (similar to section 4(1) of the Criminal Appeal Act, 1907 in U.K.) which is to see whether there has been a substantial miscarriage of justice. The applicable test formulated is as follows:

> *'.....the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict….* [vide **Stirland, Appellant; and Director of Public Prosecutions, Respondent** [1944] A.C 315]
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> '*…if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice...'* [vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)]

> '…..*If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred…."* [vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015]

[26] Having examined the whole of the transcript containing the evidence of the complainant, recent complaint evidence of Ana Roko, evidence of complainant's husband Luke Boseiwaqa and Dr. Tieri Waqaicakau, I am of the view that reasonable assessors, after being properly directed, would without doubt have convicted the appellant or to put it another way with a complete direction the only reasonable and proper verdict would be one of guilty. Therefore, I conclude that is no substantial miscarriage of justice as a result of the omissions in the directions as discussed above and I would be applying the proviso to section 23 of the Court of Appeal Act and dismissing the appeal on these two grounds of appeal. In the circumstances, there is no basis to grant enlargement of time as there is no real prospect of success of the appeal on these grounds of appeal.

03rd ground of appeal

[27] The appellant complains that the trial judge had not adequately addressed the assessors on recent complaint evidence of Ana Roko to the extent that the complainant had only told Ana that she was raped by the appellant whereas Ana had given a detailed description of how the complainant had described the events that had unfolded in that night. The counsel for the appellant has characterized this as an inconsistency or omission on the part of the complainant.

[28] The trial judge had referred to Ana's evidence at paragraphs 36-38 of the summing-up and directed correctly at paragraph 39 as to how her evidence on the recent complaint should be evaluated as per ***Raj*** guidelines. It is clear from the transcript of evidence that the prosecutor had not facilitated the complainant to describe in detail what she told Ana but had questioned Ana directly as to what the complainant told her in the morning. This explains why the complainant had not disclosed anything more than the fact that she told Ana that the appellant raped her but Ana had come out with details of what the complainant had told her. However, it is clear that the complainant had described all the details that Ana had come out with in her evidence as to what the

appellant did to her in the night. Thus, Ana would have obviously heard those details from the complainant.

[29] The appellant's counsel in pursuing this argument went to the extent of submitting that the complainant should have disclosed to Ana all the details including whether it was a penile rape or digital rape. I do not agree. Given the ordeal of sexual abuse the complainant had to undergo at the hands of the appellant for several hours particularly being a woman of 06 months pregnancy it would be preposterous to expect her to have come out with such vivid details of her horrible experience. The complainant need not have disclosed all of the ingredients of the offence but she had disclosed evidence of material and relevant unlawful sexual conduct on the part of the appellant and that is quite sufficient (vide **Raj v State** (supra). The trial judge need not have addressed the assessors any further on the recent complaint evidence *vis-à-vis* Ana Roko. This ground of appeal has no real prospect of success or merits.

04th ground of appeal

[30] The appellant complains that the trial judge should not have in paragraph 52 of the summing-up referred to lack of *alibi* notice and the procedural requirement of giving such notice as prescribed under section 125(2) of the Criminal Procedure Act, 2009 particularly after allowing the appellant to lead evidence on his *alibi* apparently without any objection by the prosecution. This, according to the appellant's counsel had prejudiced the appellant's right to have a fair trial.

[31] It is clear from paragraph 51 of the summing-up that the trial judge had given correct directions on the *alibi* taken up by the appellant as per **Bese v State** [2013] FJCA 76; AAU0067.2011 (10 July 2013), **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020)] which he took up without complying with the statutory requirement of advance notice as required by law. Prior to that, the trial judge had given an exhaustive account of the appellant's evidence comprising of his *alibi* at paragraphs 46-50.

[32] In the circumstances, the mention of section 125 of the Criminal Procedure Act, 2009 along with the fact that the appellant had not given *alibi* notice cannot cause such a prejudice as to deprive the appellant of a fair trial. Requiring the accused to file notice

of *alibi* in advance is to give the prosecution time before trial to take steps, if it so wishes, to check the veracity of *alibi* notice. If true, it may result in the prosecution not putting the accused to trial at all. If not, the prosecution has time to get ready to disprove the *alibi*. Therefore, non-compliance of the statutory period for *alibi* notice is a matter that goes to the weight of an *alibi* and the Supreme Court in **Nute v State** [2014] FJSC 10; CAV0004.2014 (19 August 2014) did not find the following directions by the trial judge objectionable:

> '*Both the 01st and 02nd Accused have raised evidence of alibi that is, that at the time of the offence, they were somewhere else. Ordinarily, accused persons are required to give notice that they will be raising an alibi, to the prosecution within 21 days of the transfer of the case to the High Court. This allows the prosecution to check details of the alibi to be sure that they have not charged the wrong person. It also protects the accused person from allegations of recent fabrication.*
>
> *In this case neither the 01st nor the 02nd Accused gave the prosecution notice of alibi until just before the trial commenced. You are entitled to take into account the late notice of alibi in deciding what weight to give to the alibis raised as well as the explanations of the witnesses as to why they did not give alibi notice earlier. You will recall that the 2nd Accused's witnesses said that they tried to tell the police and DPP about the alibi but they were told to see Sousou's lawyer. You are also entitled to consider these explanations.'*

[33] In **Nute** the trial judge had commented in much stronger terms on the failure to give *alibi* notice and lack of explanation for it. In the instant case, the appellant had not given an *alibi* notice at all. Nor had he offered any explanation for the failure to do. The trial judge had only brought section 125 of the Criminal Procedure Act, 2009 to the attention of the assessors and stated that the appellant had not given *alibi* notice but refrained from commenting that non-compliance with the statutory period for *alibi* notice goes to the weight of an *alibi.* In addition, the appellant's *alibi* had not been rejected for lack of advance notice but done on surer grounds by the assessors and the trial judge in his judgment.

[34] Therefore, this ground of appeal has no real prospect of success or merits.

Bandara, JA

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

Wimalasena, JA

[36] I have read in draft the judgment of Prematilaka, JA and agree with the reasons and conclusions thereof.

Orders

1. Enlargement of time to appeal is refused.
2. Appeal is dismissed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice R. Wimalasena
JUSTICE OF APPEAL