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

CRIMINAL APPEAL NO.AAU 129 of 2019
[In the High Court at Lautoka Case No. HAC 112 of 2014]

BETWEEN	:	**SIMIONE TUI**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Appellant in person**	
	:	**Ms. P. Madanavosa for the Respondent**	
Date of Hearing	:	**28 January 2021**	
Date of Ruling	:	**29 January 2021**	

RULING

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

[2] The information read as follows.

'*COUNT 1*

Statement of Offence

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

Particulars of Offence

SIMIONE TUI *on 17th day of August 2014 at Sigatoka in the Western Division had carnal knowledge with a woman namely* ***RADILAITE MARAMA,*** *without her consent.*

[3] According to the judgment, the only issue at the trial was whether the act of sexual intercourse was consensual or not.

> '3. *Prosecution adduced evidence only of the Complainant. At the end of the Prosecution case, Accused elected to give evidence and called Mr. Nagata to support his version.*
>
> 4. *There is no dispute as to the identity of the Accused. Sexual intercourse with the Complainant was also admitted by the Accused.*
>
> 5. *Prosecution says that Accused forced the Complainant and the sexual intercourse took place without complainant's consent. Accused denies the allegation. He says that the sexual intercourse took place with her consent. Conflict is dramatic and turns on one word against the other.'*

[4] The facts of the case had been summarized by the trial judge in the sentencing order as follows.

> *The Accused and the Complainant were known to each other as they worked together at the River View Motel. The Complainant was employed as a barmaid and the Accused as a security guard.*
>
> *They were consuming alcohol with others after a night shift in a room of the same motel. At dawn, only the Accused and the Complainant remained in the room. Accused made an unwelcome demand for sexual intercourse. The Complainant managed to escape the room thwarting his first attempt.*
>
> *Thereafter, the Complainant went to another room to have a bath before going to Lautoka to see her boyfriend. The Accused entered the room through a rear window whilst she was still having her bath. When she came out of the bathroom, she saw the Accused in the room. She agreed to have a conversation with him due to fear.*
>
> *The Accused insisted on them having sexual intercourse. She refused saying that she had her menstruation and also she, after an operation, was under medical caution not to have sexual intercourse.*
>
> *The Accused put his hands on her shoulders and forced her onto bed. She felt his penis inside her and felt scared and helpless. She then passed out. She went and reported the matter to police on the same day triggering police investigations. At the interview under caution, Accused admitted having had sexual intercourse with the Complainant.*

[5] At the end of the summing-up on 11 August 2016 the assessors had unanimously opined that the appellant was not guilty of rape. The learned trial judge had disagreed with the unanimous opinion of the assessors in his judgment delivered on 15 August 2016, convicted the appellant on the count of rape and sentenced him on 23 August 2016 to 07 years and 07 months of imprisonment with a non-parole period of 05 years.

[6] The CA registry had received on 15 August 2019the appellant's untimely 'notice of additional grounds of appeal' containing 03 appeal grounds against conviction (preferred in person) signed on 13 August 2019. Although the appellant had stated in his affidavit dated 21 July 2020 that he had handed over his timely notice of appeal to the Correction Centre at Lautoka, no such document had been received by the CA registry. Therefore, the appellant's appeal has to be treated as having been filed out of time and delay is therefore, almost 03 years. The appellant had filed another additional ground of appeal on 14 July 2020 and an application for enlargement of time by way of an affidavit on 21 July 2020. His written submissions had been received on 26 August 2020. The state had tendered its written submissions on 06 November 2020. The appellant without obtaining permission or direction from this court had filed three more grounds of appeal on 14 January 2021 on which the state counsel made oral submissions at the leave to appeal hearing.

[7] At the hearing the appellant relied on his written submissions filed on 26 August 2020 and in the interest of justice this court decided to consider his additional grounds of appeal tendered on 14 July 2020 and 14 January 2021 as well.

[8] 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

[9] 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?

[10] ***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."*

[11] The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

> *'(a)……..*
>
> *(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.*
>
> *(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.*
>
> *(d) 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.*
>
> *(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'*

[12] Sundaresh Menon JC also observed

> '27……… *It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.*'

[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……*'

Length of delay

[14] As already stated the delay is almost 03 years and very substantial.

[15] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 03 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

> '*In* ***Julien Miller v The State*** *AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave.*'

[16] However, I also 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.'

Reasons for the delay

[17] The appellant's only explanation for the delay is that he had handed over a timely appeal to Lautoka Correction Centre to be forwarded to the Court of Appeal. However, I do not find any reference to original grounds of appeal said to have been handed over to the Correction Centre in his amended grounds of appeal filed by him on 15 August 2019. Nor is there any other material to substantiate the appellant's claim. It is also surprising that the appellant had not even inquired from the CA registry of the progress of his appeal for 03 years since his alleged original appeal. Thus, the appellant has not satisfied this court that he has a satisfactory explanation for the delay.

Merits of the appeal

[18] In **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

> *"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."*

[19] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well in order to consider whether despite the very substantial delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.

[20] Grounds of appeal urged on behalf of the appellant are as follows.

Grounds filed on 15 August 2019.

1. That the Learned Trial Judge erred in law when his Lordship's reasons for overturning the unanimous not guilty opinion of the assessors was not cogent, thereby amounting to a miscarriage of justice in the circumstances of the case and to the Appellant.

2. That the Learned Trial Judge erred in law when his Lordship's did not make an independent assessment of the evidence before disagreeing with the unanimous not guilty opinion of the assessors and thus the conviction is unsafe and not supported by evidence giving rise to a miscarriage of justice in the circumstances of the case.

3. That the Learned Trial Judge erred in law when he did not direct the assessors and himself to take into account the totality of the evidence in deciding on the issue of consent. Failure to do so was a serious non direction amounting to a miscarriage of justice.

Grounds filed on 15 August 2019.

4. That the learned judge erred in law when he shifts the burden of proof to the appellant by requiring the appellant to prove his innocence in the judgment through his honesty.

Grounds filed on 14 January 2021.

5. That the Learned Trial Judge erred in law paragraph 79 of the summing up, when he deliberately directed the assessors to look for any reasonable doubt created by the defence.

6. Failure by the State to call the materials witness in the name of one Ana who insisted the complainant to make a report of rape.

7. The Appellant states that the Learned Judge erred in law, when he failed to direct himself of the issue of consent, in light of the evidence adduced and the sworn evidence of the Appellant.

01st, 02nd, 03rd** and **07th grounds of appeal

[21] The gist of the appellant's complaint is based on the trial judge's duty when he disagrees with the assessors and overturns their decision.

[22] I undertook some analysis of past several decisions of the Supreme Court and the Court of Appeal to arrive at some common principles regarding the duty of trial judges when they agree and disagree with the assessors in **Manan v State** [2020] FJCA 157; AAU0110.2017 (3 September 2020) and **Waininima v State** [2020] FJCA 159; AAU0142 of 2017 (10 September 2020), **State v Mow** [2020] FJCA 199; AAU0024.2018 (12 October 2020) and a few other rulings. I do not intend the repeat the same exercise here. However, my conclusions were subsequently summarized in **Raj v State** [2020] FJCA 254; AAU008.2018 (16 December 2020) as follows.

[12] There still appears to be some gray areas flowing from the past judicial pronouncements as to what exactly the trial judge's scope of duty is when he agrees as well as disagrees with the majority of assessors.

[13] What could be ascertained as common ground is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in a judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and preferably reasons for his agreement with the assessors in a concise written judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that a judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter ([vide ***Mohammed v State*** *[2014] FJSC 2; CAV02.2013 (27 February 2014),* ***Kaiyum v State*** *[2014] FJCA 35; AAU0071.2012 (14 March 2014),* ***Chandra v State*** *[2015] FJSC 32; CAV21.2015 (10 December 2015) and* ***Kumar v State*** *[2018] FJCA 136; AAU103.2016 (30 August 2018)].*

[14] On the other hand when the trial judge disagrees with the majority of assessors the trial judge should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide ***Lautabui v State*** *[2009] FJSC 7; CAV0024.2008 (6 February 2009),* ***Ram v State*** *[2012] FJSC 12; CAV0001.2011 (9 May 2012),* ***Chandra v State*** *[2015] FJSC 32; CAV21.2015 (10 December 2015),* ***Baleilevuka v State*** *[2019] FJCA 209; AAU58.2015 (3 October 2019) and* ***Singh v State*** *[2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]*

[15] In my view, in both situations, a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

[16] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, 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 ***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] and* ***Rokopeta v State*** *[2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).*

[23] When the trial judge's well-compiled and well-written judgment is considered, it is clear that he had given his mind to all the evidence of the case very carefully in relation to the issue of consent and treated the complainant as a truthful witness and believed her in respect of her evidence that sexual intercourse was without her consent. Accordingly, the judge had been satisfied that the prosecution had proved the guilt of the appellant beyond reasonable doubt. He had also stated in persuasive words why he was rejecting the appellant's version of events.

[24] In the course of the judgment the trial judge had embarked on an independent assessment and evaluation of the evidence and given 'cogent reasons' founded on the weight of the evidence reflecting his views as to the credibility of witnesses for differing from the opinion of the assessors and his reasons, in my view, are quite capable of withstanding critical examination in the light of the whole of the evidence presented in the trial. Therefore, viewed in the light of the past decisions on this area of law, I am of the view that the learned trial judge's reasons in the judgment had measured up to the required standard when he overturned the assessors' opinion in respect of the count of rape.

[25] This being a case of 'word against word', as stated by the trial judge, the assessors' opinion of not guilty in respect of the rape charge would obviously have been based on disbelieving the complainant's evidence of lack of consent or at least them not being sure of the aspect of want of consent, for the act of sexual intercourse was not disputed by the appellant. The trial judge had given very convincing reasons why he thought that the complainant's version was credible as opposed to or contrary to what the assessors had thought.

[26] The trial judge had clearly placed the appellant's version before the assessors at paragraphs 47-64 and at paragraphs 46 and 80-81 correctly directed the assessors in terms of how they should consider the appellant's evidence. These directions are substantially in line with the prescribed directions when there is a 'word against word'

conflict between prosecution and defence as expressed in **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017)

[27] When the assessors had expressed their opinion *inter alia* considering those directions that the appellant was not guilty of rape charge it was incumbent upon the trial judge to have analyzed and evaluated both versions and set down his own reasons why he was deciding that the acts of sexual intercourse between the appellant and the complainant had been against the consent of the complainant. The trial judge had satisfactorily discharged that burden in the judgment.

[28] Therefore, I do not believe that the appellant has a real prospect of success with the above grounds of appeal.

04th and 05th grounds of appeal

[29] The appellant argues that the trial judge had shifted the burden of proof to the appellant requiring him to prove his innocence. He cites paragraph 79 of the summing-up as evidence of that error of law.

[30] Paragraph 79 of the summing-up is as follows

> *'79. It is up to you to decide whether you could accept the version of the Defence and it is sufficient to establish a reasonable doubt in the Prosecution case.'*

[31] However, paragraph 79 cannot and should not be taken in isolation. When the whole of the summing-up is examined it is clear that at paragraphs 7, 8, 46 and 79 -82 the trial judge had correctly stated where the burden of proof laid and I not think that he had in any way shifted the burden of proof of his innocence to the appellant.

[32] Therefore, there is no real prospect of success of this ground of appeal.

06th ground of appeal

[33] The appellant also complains of the prosecution not having called Ana with whom the complainant had gone to the police station. It is an undeniable part of the prosecutorial discretion to decide what witnesses would be called to prove its case. This discretion lies with the prosecutor and cannot be interfered with by the trial judge. If the appellant had thought that Ana was such a vital witness for his case he had every opportunity of calling her as a defence witness.

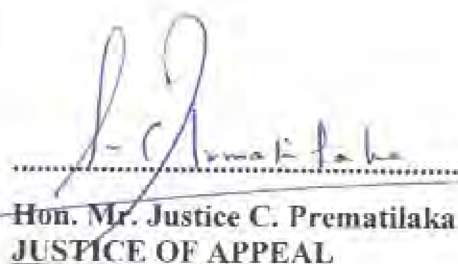
[34] Therefore, there is no real prospect of success of this ground of appeal.

Prejudice to the respondent.

[35] The respondent had not pleaded any prejudice by an extension of time. However, given that the incident had happened in the year 2014 any fresh litigation is likely to cause undue hardship to the complainant.

Order

1. Enlargement of time to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL