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

CRIMINAL APPEAL NO.AAU 0009 of 2019
[In the High Court at Lautoka Case No. HAC 94 of 2015]

BETWEEN	:	**EDWIN ALVIN KUMAR**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**28 October 2021**
Date of Ruling	:	**29 October 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with one count of rape ccontrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and one count of sexual assault contrary to section 210 (1) of the Crimes Act, 2009 committed at Nadi in the Western Division on 06 May, 2015.

[2] The information read as follows:

'First Count
Statement of Offence

RAPE*: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

Edwin Alvin Kumar *on the 6th day of May, 2015, at Nadi in the Western Division, penetrated the vagina of* ***Sofiya Begum*** *with his penis without her the consent of the said* ***Sofiya Begum***.

Second Count
Statement of Offence

SEXUAL ASSAULT*: Contrary to Section 210 (1) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

Edwin Alvin Kimar *on the 6th day of May, 2015, at Nadi in the Western Division, indecently assaulted* ***Sofiya Begum*** *by licking and sucking the vagina of the said* ***Sofiya Begum****.'*

[3] At the end of the summing-up, the assessors by a majority had opined that the appellant was not guilty of both counts. A single assessor had found him guilty of both counts. The learned trial judge had disagreed with the majority opinion of 'not guilty', convicted the appellant of both counts and sentenced him on 20 April 2018 to 06 years, 07 months and 20 days of imprisonment with a non- parole period of 06 years for rape and 03 years of imprisonment for sexual assault; both sentences to run concurrently.

[4] The appellant had appealed in person against conviction out of time (16 January 2019). Thereafter, he had filed amended grounds of appeal from time to time. The Legal Aid Commission had sought enlargement of time to appeal accompanied by an affidavit, amended grounds of appeal and written submission on 28 May 2021. The state had tendered its written submissions on 20 July 2021.

[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 (nearly 08 months) is substantial. The appellant had stated that his trial counsel had informed him that she would file his appeal papers but he later came to know that she was no longer in practice as she had joined a university. Thereafter, with the assistance of some inmates he managed to file his appeal belatedly. I have no material before me to substantiate his explanation. Thus, his explanation for the delay cannot be accepted. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and 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 ground of appeal urged on behalf of the appellant against conviction is as follows:

> *'**Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in fact and in law in overturning the majority opinion on both counts without fully and properly carrying out an independent assessment and in failing to do so failed to give cogent reasons thus rendering the conviction unsafe.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law in allowing the conviction on a defective charge of Rape under Section 207 (1) and (2) (b) of the Crimes Act*

2009 when the facts relied upon by the State in its case and by the Judge in his Judgment did not support the charge thus causing a prejudice to the appellant and causing a grave miscarriage of justice.

Ground 3

THAT the Learned Trial Judge erred in law in not allowing the appellant his right to an election on the count of Sexual Assault.'

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

'[3] You are complainant's former husband. On the 5th of May, 2015, you visited complainant around midnight notwithstanding her protest while she was alone with the daughters. When the complainant went to the bedroom to make two daughters sleep, you entered the bedroom despite her protest. While she was making daughters sleep, you started touching her. Then you pushed her and told her to lie down on the bed. When she fell on the bed, you came on her and started pulling her nightie up and pantie down. Then you dragged her to the kitchen and pushed her hard down on the mattress. You started kissing her tummy and told her to suck your penis. Then you started licking her vagina.

[4] You made her turn and told her to do "sit ups" on his penis. Then you made her lie down on the mattress and started having sexual intercourse with her without her consent. You ejaculated inside her vagina. When he was doing all these things she was feeling the pain in her vagina. When she was crying you threatened her and told, 'don't go to Police and report. If you will go to Police, I will take out one of your eyes and kill you.'

[10] The appellant had opted to give evidence and called one witness. The defence case had been one of denial in that the appellant did not commit any of the alleged sexual acts. His version had been that the allegation against him was fabricated to hurt him because the complainant was jealous of him and was angry because he refused to stay with her permanently at her house in Waimalika.

01st ground of appeal

[11] The trial judge had overturned the assessors' majority opinion of not guilty which he was entitled in law to do. 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).

[12] However, when the trial judge disagrees with the majority of assessors he 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) and **Fraser v State** [2021]; AAU 128.2014 (5 May 2021)].

[13] At a trial by the judge assisted by assessors the test for approaching a ground of appeal the gist of which is that the verdict is '*unreasonable or cannot be supported having regard to the evidence'* has been formulated as follows. The complaint that the trial judge has failed to give cogent reasons alone would not affect the verdict unless it is unreasonable or cannot be supported having regard to the evidence.

[14] Where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an

appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. *"Must have had a doubt"* is another way of saying that it was *"not reasonably open"* to the jury to be satisfied beyond reasonable doubt of the commission of the offence. (see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493).

[15] When the above test is recalibrated to a situation where the trial judge disagrees with the assessors or the trail is by the judge alone it may be restated as follows. The question for an appellate court would be whether or not upon the whole of the evidence acting rationally it was open to the trial judge to be satisfied of guilt beyond reasonable doubt against the assessors' opinion; whether or not the trial judge must, as distinct from might, have entertained a reasonable doubt about the accused's guilt; whether or not it was 'not reasonably open' to the trial judge to be satisfied beyond reasonable doubt of the commission of the offence.

[16] When the appellant's submissions as a whole is considered, it is clear that the gist of it is to question whether the trial judge had failed to consider the issue of consent in the judgment. The aspects highlighted are (i) why did the complainant fail to inform her mother that the appellant was coming home in the afternoon? (in other words did the complainant willingly welcome his visit and did not want the mother to know that ?) (ii) was it a coincidence that the mother went out of the house before the appellant's arrival? (implying that the complainant may have informed the mother of the visit after a long separation and the mother left home to allow the complainant and the appellant to spend time alone) (iii) why did the complainant not complain to the mother of rape as soon as the mother was back home without waiting till 10.00 am and the appellant had left home? (iv) was the mother angry with the complainant for her having invited the appellant home and her anger was not against the appellant?

[17] The problem with this line of submission is that the appellant never ran his case on the basis that the sexual intercourse was consensual. He defended himself on a total denial of any sexual encounter and fabrication. On the evidence of the complainant there was clear evidence on lack of consent. Recent complaint evidence from her mother, the complainant's distressed condition, her reporting to the police on the same day and medical evidence on the injuries seen on her body (that they were self-inflicted was not put to the doctor) bolster the complainant's evidence on lack of consent. In the light of the fact that it was never the appellant's position that he had sexual intercourse with her consent it was not required on the part of the trial judge to probe the issue of consent any further.

[18] Nevertheless, the trial judge had indeed considered some of the aspects (such as the alleged delay in the complaint to the mother and her anger) raised by the appellant at paragraphs 09-12 of the judgment.

[19] The appellant also complains that the trial judge had failed to fully analyse the medical evidence where the doctor had said that in an un-cooperating rape victim, if the penetration was forced and painful, she would expect some redness, bruising, soreness, abrasions or laceration on the genitalia even after 14 hours of the incident (the medical examination had been conducted within 14 hours) and that she saw no bruising, soreness on the complainant. This argument once again goes to question as to whether the sexual intercourse was consensual.

[20] However, it is clear that the doctor had made the above statement under cross-examination by using the word 'generally'. In other words, it is not essential that such an un-cooperating rape victim would always show redness, bruising, soreness, abrasions or laceration on the genitalia. The trial judge had examined this position at paragraphs 17 and 18 of the judgment and with the medical evidence on bruises, laceration and swelling on other parts of the complainant's body as stated at paragraphs 14- and 15 of the judgment the trial judge need not have gone any deeper into the appellant's complaint.

[21] Therefore, the trial judge had satisfactorily discharged his burden in disagreeing with the assessors and convicting the appellant of both counts according to law. He had embarked on an independent assessment and evaluation of the evidence and given 'cogent reasons' based on the weight of the evidence for differing from the opinion of the assessors and the reasons are, in my view, capable of withstanding critical examination in the light of the whole of the evidence presented at the trial. The verdict entered by the trial judge, in my opinion, cannot be said to be 'unreasonable' or it cannot be argued that the verdict is not supported having regard to the evidence.

[22] Therefore, I do not think that this ground of appeal has a real prospect of success in appeal.

02nd ground of appeal

[23] The appellant argues that the charge of rape is defective in that he was charged under section 207(1) and (2)(b) of the Crimes Act, 2009 which refers to penetration with a thing or part of a persons' body that is not a penis whereas the prosecution case was based on penile penetration.

[24] It appears that this ground is solely based on a typographical error in the judgment and sentence order where it had stated section 207(1) and (2)(b) instead of section 207(1) and (2)(a) of the Crimes Act, 2009. However, the information signed by the DPP and served on the appellant clearly mentions section 207(1) and (2)(a) of the Crimes Act, 2009 as part of the statement of the offence and then particularised the offence as penile penetration.

[25] This ground of appeal is misconceived.

03rd ground of appeal

[26] The appellant takes up the position that he was not given the election as to whether he wished to be tried in the High Court or the Magistrates court regarding the charge of sexual assault.

[27] The proceedings against the appellant had commenced at Nadi Magistrates court where he had been charged only with rape (an indictable offence) on 28 May 2015. The matter had been then transferred to the High Court where the DPP filed the information dated 22 June 2015 against the appellant based on rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 and sexual assault contrary to section 210(1) and (2) of the Crimes Act, 2009.

[28] The appellant argues that the learned High Court judge did not give him the election as to which court he wished to be tried on the charge of sexual assault which is an indictable offence triable summarily.

[29] This basis of this argument appears to be section 4(1)(b) of the Criminal Procedure Act, 2009 which states that *'any indictable offence triable summarily under the Crimes Decree 2009 shall be tried by the High Court or a Magistrates Court**,** at the election of the accused person.* However, the legislature does not specifically state that it is statutory obligation on the part of the judge or the Magistrate to put to an accused or offer the accused the option to such election though one might argue that in the case of an unrepresented accused the judge or the Magistrate may do so in the interest of justice.

[30] Be that as it may, however, the more important question is whether the election to be tried is available to an accused indicted in the High Court or it is only available to an accused charged before the Magistrates court.

[31] The comma after *'...Magistrates court…'* and placing '*at the election of the accused person'* at the end of section 4(1)(b) suggest that in both the High Court and the Magistrates court the election is available to an accused. However, the definition of 'indictable offence triable summarily' in section 2 of Part I of the Criminal Procedure Act, 2009 may suggest otherwise. It is as follows:

> *'indictable offence triable summarily" means any offence stated in the Crimes Decree 2009 or any other law prescribing offences to be an indictable offence triable summarily, and which shall be triable —*
>
> *(a) in the High Court in accordance with the provisions of this Decree; or*

(b) at the election of the accused person, in a Magistrates Court in accordance with the provisions of this Decree;

[32] There is no reference to an election as far as the High Court is concerned under (a) which means that an 'indictable offence triable summarily' shall be triable in the High Court whereas under (b) an 'indictable offence triable summarily' shall be triable in a Magistrates court at the accused's election. This may suggest that the election is required only if the accused is to be tried for an 'indictable offence triable summarily' in the Magistrates court. In other words, an accused has no right or option to elect his forum when he is facing an indictment in the High Court but if he is arraigned in the Magistrates court for an 'indictable offence triable summarily' he has an election to be tried in the Magistrates court or in the High Court. However, the appellant might also argue that all what the definition states is that unlike in the case of an indictable offence or summary offence both of which are defined separately under Part I, when it comes to an 'indictable offence triable summarily' an accused has an option to take either in the High Court or in the Magistrates court to be tried in either of the courts.

[33] Section 35(2) of the Criminal Procedure Act, 2009 states that:

'2) All criminal cases to be heard by the High Court shall be —

(a) instituted before a Magistrates Court in accordance with this Decree; and

(b) transferred to the High Court in accordance with this Decree if the offence is –

(i) an indictable offence; or

(ii) an indictable offence triable summarily, and the accused has indicated to the Magistrates Court that he or she wishes to be tried in the High Court.'

[34] Thus, section 35(2)(b)(i) and (ii) states that *an indictable offence* must be transferred to the High Court and an indictable offence triable summarily too should be transferred to the High Court when the accused has indicated to the Magistrates Court that he or she wishes to be tried in the High Court. This may once again suggest that

the election is available only in the Magistrates court as far as an indictable offence triable summarily is concerned.

[35] In **Batikalou v State** [2015] FJCA 2; AAU31.2011 (2 January 2015) the appellant had been produced in the Magistrates court. The Magistrate having observed that the appellant was charged with indictable offences, had transferred the case to the High Court in terms of section 35 (2) (b) (ii) of the Criminal Procedure Decree 2009. The appellant had pleaded guilty to the charge of robbery and sentenced to a term of 8 years imprisonment with a non-parole term of 7 years. The appellate counsel had submitted that although the charge was an indictable offence triable summarily, the appellant was not given the statutory option or an inquiry was not made with regard to the wish of the appellant whether he would prefer to be tried in the Magistrate Court or the High Court.

[36] In ***Batikalou*** the Court of Appeal stated *inter alia:*

> *'[12] "Indictable offence triable summarily" means any offence stated in the Crimes Decree 2009 or any other law prescribing an offences to be an indictable offence triable summarily, and which shall be triable – (a) in the High Court in accordance with the provisions of this Decree; or (b) at the election of the accused person, in a Magistrate Court in accordance with the provisions of this Decree; (section 2 (a) and (b) of the Criminal Procedure Decree 2009).*
>
> *[13] Indictable offences are tried in the High Court. However, indictable offences triable summarily, shall be tried by the High Court or Magistrate Court at the election of the accused person (section 4 (1) (b)). Such cases should be transferred to the High Court only if the accused has indicated to the Magistrate Court that he or she wishes to be tried in the High Court (section 35 (2) (b) (II) of the Criminal Procedure Decree 2009).*
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> *[17] The learned counsel for the respondent humbly admitted to the failures on the part of the learned Magistrate and the High Court Judge to offer the statutory option to the appellant.*
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> *[29] There are a series of cases in which the Fiji courts have also adopted the strict view applied in cases such as R v Haye (supra). In Aca Koroi v The State [2013] FJHC 306; HAM 186 of 2012S (21 June 2013), the proceedings before the Magistrate Court was declared a nullity due to the failure of the Magistrate to provide the option available under section 4 (1) (b) of the Criminal Procedure Decree 2009. Again in The State v Ilaitia*

> *Ravuwai (2014 FJHC 487; HAC 118 of 2014S; 3 July 2014) the proceedings before the Magistrate Court were declared a nullity and the case was remitted to the Magistrate Court for election to be put to the accused in conformity with section 4 (1) (b) of the Criminal Procedure Decree 2009.*
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> *[30] It is not disputed that the appellant was deprived of a statutory requirement.* ***The appellant possessed a legal right to choose to be tried either in the Magistrate's Court or the High Court, a right given by law****. Can this right arbitrarily be taken away? The intention of the relevant sections in the Criminal Procedure Decree 2009 is clear and unambiguous. And when the law is clear and unambiguous as this, it is not the role of the judge to make or even modify the law but rather to apply it as it is.'*

[37] Mr. Burney expressed reservations about the statement at paragraph [30] of ***Batikalou*** that '…*The appellant possessed a legal right to choose to be tried* ***either in the Magistrate's Court or the High Court****, a right given by law..'.* The state counsel in ***Batikalou*** seems to have conceded that point before the Court of Appeal. However, if ***Batikalou*** is still an authority on this point, there is merit in the appellant's argument in this case.

[38] However, Mr. Burney submitted that section 191 of the Criminal Procedure Act, 2009 empowers a magistrate to transfer any charges or proceedings to the High Court. He also submitted that in terms of section 198(2), in the information, the Director of Public Prosecutions may charge an accused with **any offence**, either in addition to or in substitution for the offence in respect of which the accused person has been transferred to the High Court for trial. His argument is that 'any offence' includes an indictable offence triable summarily and therefore, an accused facing an indictment which includes an indictable offence triable summarily or containing solely an indictable offence triable summarily has no right to election under section 4(1(b) of the Criminal Procedure Act.

[39] I find that section 59 of the Criminal Procedure Act is also relevant in this regard:

> *'59.—(1)* ***Any offence*** *may be charged together in the same charge or information if the offences charged are—*
>
> *(a) founded on the same facts or form; or*

(b) are part of a series of offences of the same or a similar nature.

(2) Where more than one offence is charged in a charge or information, a description of each offence shall be set out in a separate paragraph of the charge or information, and each paragraph shall be called a count.'

[40] Thus, an information may contain not only indictable offense but also indictable offences triable summarily and summary offences.

[41] Mr. Burney has also submitted that public interest and efficient administration of justice achieved by joinder of charges upon a single trial into all offences would be lost if the appellant's contention is upheld. In other words, if the appellant had been given the election and he had elected to be tried in the Magistrates Court on the sexual assault charge there would have been two parallel trials in the High Court (rape) and the Magistrates court (sexual assault) where the same evidence would be led; one before the High Court judge with assessors and the other before the Magistrate. I do not think that the legislature would have intended such an outcome and no interpretation that would lead to absurdity should be adopted.

[42] Therefore, the above discussion shows that there is a need to revisit the correctness of the decision in ***Batikalou*** particularly as far as the statement at paragraph [30] that '*…The appellant possessed a legal right to choose to be tried either in the Magistrate's Court or the High Court, a right given by law..'* is concerned.

[43] However, I am mindful that in so far as the rape conviction is concerned this matter has little relevance and it affects only the verdict on sexual abuse.

[44] However, given the legal importance of the matter argued I am inclined to grant enlargement of time on the third ground of appeal to enable the full court to revisit ***Batikalou*** and qualify the law stated therein on the issue raised for future guidance when an accused is before High Court.

Order

1. Enlargement of time to appeal against conviction is allowed only on the 03rd ground of appeal.

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