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

CRIMINAL APPEAL NO.AAU 0033 of 2014
[In the High Court at Suva Case No. HAC 63 of 2012]

BETWEEN : KITIONE KAMIKAMICA

Appellant

AND : THE STATE

Respondent

Coram : Basnayake , JA
Prematilaka, JA
Bandara, JA

Counsel : Mr T. Lee for the Appellant
: Mr Y. Prasad for the Respondent

Date of Hearing : 08 April 2021

Date of Judgment : 03 June 2021

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning conclusion and orders of Prematilaka, JA.

Prematilaka, JA

[2] I have had the benefit of reading in draft the judgment of my brother Bandar, JA and while agreeing with his conclusion that a conviction for attempted rape should be entered against the appellant instead of rape, I shall pen down my reasons for doing so. The sentence imposed on the appellant should accordingly be varied and I think that given that the appellant has already served imprisonment since 16 April 2014, he has already served a sentence over 07 years that fits the attempted rape of the 09 year old victim and accordingly the appellant should be released forthwith.

[3] I find that Bandara, JA has adequately summarized the evidence in the case. However, I shall refer to them briefly as required to support my reasoning.

[4] The first matter I would like to highlight is that as stated by the single Judge the learned trial judge had misdirected himself by stating at paragraph 4 of the judgment that evidence of the victim's cousin Tarusila and her mother corroborated her evidence. Tarusila and the victim's mother had narrated in court what the victim had told them in 2013 about the incident that had happened in 2012 inside the toilet. Apart from the question whether what the victim had told Tarusila and her mother could be treated as recent complaint evidence, the misdirection is, even if it is treated as recent complaint evidence, whether it could corroborate her evidence.

[5] The Court of Appeal in **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017) has dealt with the law relating to recent complaint evidence as follows.

> *'[28] As a general rule, a prior consistent statement of a witness is inadmissible evidence. However, there are many exceptions to this rule. One of the exceptions to the rule is in sexual cases. In sexual cases, the evidence a recent complaint of the sexual assault made to another person by the complainant is allowed to show the consistency of the conduct of the complainant and to negative consent (Peniasi Senikarawa v The State unreported Cr App No AAU0005 of 2004S; 24 march 2006). The relevance of the evidence was explained by the Supreme Court in Anand Abhay Raj v The State unreported Cr App No CAV0003 of 2014; 20 August 2014 at [38]:*

> *The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.*
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> *[29] At trial, the complainant gave evidence that she told her boyfriend that the appellant had raped her shortly after the alleged incident. The complainant's boyfriend gave evidence and confirmed that the complainant made a complaint to him that the appellant had raped her. In paragraph 38 of the summing up, the learned trial judge told the assessors that the evidence of the boyfriend cannot be used to prove the truth of the alleged rape but as evidence of the consistency of the complainant's conduct with the story she told in the witness box. The direction is correct in law. This ground fails.*

[6] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court had earlier set down the law regarding recent complaint evidence as follows.

> *'[33] In any case evidence of recent complaint was never capable of corroborating the complainant's account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App. 12 of 1989; **Jones v. The Queen** [1997] HCA 12; (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S, 24th November 2006.*
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> *[37] 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: **Kory White v. The Queen** [1999] 1 AC 210 at p215H. This was done here.*

[7] Therefore, it is clear that the trial judge's impugned statement at paragraph 4 of the judgment that the evidence of the victim's cousin Tarusila and her mother corroborated her evidence is erroneous and he had misdirected himself. However, the trial judge had not directed the assessors on the same lines but not advised them either as to how they should evaluate that evidence and what inference the assessors could draw from the evidence of cousin Tarusila and mother Dova Kuli which amounts to a non-direction.

[8] Secondly, the trial judge had not brought to the notice of the assessors particularly at paragraph 9 of the summing-up or addressed himself in the judgment the evidence of the victim that the appellant spat on her vagina and unsuccessfully tried to insert his penis into

the vagina. Nor had the judge addressed the assessors and himself on the evidence that another person called Netani also did the 'same thing' to her later.

[9] Regarding the above instances of misdirection and non-direction the proper test for the appellate court is laid down in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) where this court is expected to consider, disregarding the misdirection or with a proper direction as to what a reasonable assessors would have done in order to determine whether a substantial miscarriage of justice had occurred.

> *'[55] The approach that should be followed in deciding whether to apply the* ***proviso to section 23*** *(1) of the* Court of Appeal Act *was explained by the Court of Appeal in* ***R v. Haddy*** [1944] 1 KB 442. *The decision is authority for the proposition that* ***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****. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.*
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> *[56] This test has been adopted and applied by the Court of Appeal in Fiji in* ***R –v- Ramswani Pillai*** *(unreported criminal appeal No. 11 of 1952; 25 August 1952);* ***R –v- Labalaba*** *(1946 – 1955) 4 FLR 28 and* ***Pillay –v- R*** *(1981) 27 FLR 202. In* ***Pillay –v- R*** *(supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in* ***R – v- Weir*** [1955] NZLR 711 *at page 713:*
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> > *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt.* ***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."***
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> *[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.*
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> > *In* ***Vuki –v- The State*** *(unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*
> >
> > *"The application of the* ***proviso to section 23*** *(1) ___ of necessity, must be a very fact and circumstance – specific exercise."*

[10] Thus, in applying the test in **Aziz v State** (supra) this court has to examine the totality of evidence and if the court 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 then the court has to conclude that there is no substantial miscarriage of justice.

[11] The victim had said in her evidence that the appellant who was her uncle's son pulled her into the toilet, locked the door, took off her clothes, sat on the top of the toilet pan and asked her to sit on top of him. Only one of her sisters, Lisa was at home. The victim did not sit on top of him and the appellant then spread her skirt on the floor and inserted his penis into her vagina while she was lying on the floor of the toilet and she shouted in pain. She had further said that the appellant then spat on her vagina and tried to insert his penis unsuccessfully. After that he got dressed, flushed the toilet and left after opening the door. She came out of the toilet crying. She had told what the appellant had done to her cousin Tarusila and her mom, of course nearly a year later. She had been scared to tell this to mom earlier. Under cross-examination the victim had said that first the appellant (Kiti) and then another person called Netani also did 'it'. It is not clear when Netani did 'it' to her.

[12] Lisa Debra, the victim's sister who was at home, being sick, had told in her evidence that Kiti (the appellant) came and dragged Joana (victim) to the toilet and closed the door. After a while toilet was flushed and the appellant had come out followed by the victim who was crying.

[13] Tarusila Kevetibau had said that in January 2013 the victim had told her that she went to the toilet with the appellant and took her clothes off as requested by the appellant and he then sat on the pan and asked her to sit on him. The victim had said that thereafter, she lay on the floor and the appellant came on top of her.

[14] Sova Kuli, the mother had stated in her evidence that Tarusila brought the victim to her and when inquired, her daughter had told her all what she said in court including the fact that after an unsuccessful attempt the appellant had penetrated her. She had further stated in cross-examination that she later got to know that first the appellant had sexually abused

the victim and then Natani had done it. Again, there is no clarity as to when Natani had abused the victim.

[15] The appellant in his cautioned interview had admitted that he went to the toilet and called her inside. Once inside, she cried and he had put her outside of the toilet. He had said that he did not know why she cried. By this admission the appellant had firmly put himself at the crime scene though denying doing anything else.

[16] Dr. Ananda Maharaj had examined the victim on 03 January 2013 and the victim's hymen was not intact but the doctor found no injuries. Give the lapse of time since the alleged incident in early 2012 the medical findings have to be treated as inconclusive. In any event, given the fact another person called Natani also had allegedly sexually abused the victim after what the appellant done to her, the absence of virginity cannot be unmistakably attributed to the appellant.

[17] At the end the prosecution case, as the state had not led any evidence on the second count the High Court judge had correctly acquitted the appellant of that count. His acquittal on count 02 has no bearing on the case against him on count 01. The appellant remained silent when called for a defense on the first count. Nor did he call any witnesses.

[18] I have examined the totality of evidence and am not satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty of rape as there might have been a doubt about the element of penetration. It may be that in the first instance the appellant did penetrate, slightly though, the victim's vagina which caused her pain and cry. Or, it may also be possible that in the first instance there was no penetration and he spat on her vagina and tried unsuccessfully for the second time to penetrate her. It is possible, that given the victim's tender age of 09 years she would not have been able to feel or describe exactly whether the appellant's penis penetrated the vagina or not.

[19] However, I have no doubt of anything else in the evidence of the victim as her version is supported in material particulars by her sister Lisa Debra and the appellant's own admission. I do not believe the appellant when he said in his interview that he did not know why the victim cried inside the toilet. He had not even explained why he took her inside the toilet, as according to him he had gone to the toilet to relive himself.

[20] On the facts available, the trial judge should have left the possibility of a verdict of attempted rape with the assessors and he himself should have considered it. Had the trial judge done so, I have no doubt in our mind that the assessors would have advised that the appellant was guilty of attempted rape. On the totality of evidence, it was open for the assessors to have done so. Therefore, there may have been a substantial miscarriage of justice in terms of the conviction for rape. However, the evidence available clearly establishes an act of attempted rape beyond reasonable doubt.

[21] In **State v Rainima** [1994] FJCA 28; AAU0002u.1994s (12 August 1994) where there had been unequivocal evidence in the form of a confessional statement coupled with the accused's own sworn testimony that he wanted to have sexual intercourse but could not do so and the trial judge had failed to direct the assessors on attempted rape, the Court of Appeal held

> *'We have no hesitation in holding that in the light of the unequivocal evidence before the Court, the learned trial judge erred in law in not directing the Assessors that there was ample evidence before them based on the Respondent's own admission to constitute the offence of attempted rape even though the Respondent was not charged with attempt. His failure to put the issue of attempt to the Assessors has, in our view, resulted in a miscarriage of justice. Had he done so we have no doubts in our mind that the Assessors would have advised him that the Respondent was guilty of attempted rape.*
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> *We, therefore, allow the appeal, set aside the order of acquittal and direct a judgment and verdict of conviction of the Respondent of attempt to commit rape contrary to Section 151 of the Penal Code to be entered, as authorised by Section 170 of the Criminal Procedure Code and Section 23(2)(b) of the Court of Appeal Act (Amendment) Decree, 1990.'*

[22] The next question is whether a new trial is to be ordered under section 23(2) (a) of the Court of Appeal in view of the instances of misdirection and non-direction as discussed above or convict the appellant for attempted rape in terms of section 24 (2) of the Court of Appeal Act.

[23] I have advised myself on the guidance provided in **Laojindamanee v State** [2016] FJCA 137; AAU0044.2013 (30 September 2016) and **Togava v State** (Majority Judgment) [1990] FJCA 6; AAU0006u.90s (10 October 1990) in this regard.

[24] In **Laojindamanee v State** [2016] FJCA 137; AAU0044.2013 (30 September 2016) the Court of Appeal laid down some guidance for a retrial to be ordered as follows.

> *'[103] The power to order a retrial is granted by section 23 (2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require. In Au Pui-kuen v Attorney-General of Hong Kong [1980] AC 351, the Privy Council said that the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Azamatula v State unreported Cr App No AAU0060 of 2006S: 14 November 2008).*

[25] Section 23(2) (a) of the Court of Appeal Act, Cap. 12 provides as follows:

> *"Subject to the provision of this Act, the Court of Appeal shall, if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial."*

[26] In **Togava v State** (Majority Judgment) [1990] FJCA 6; AAU0006u.90s (10 October 1990) the Court of Appeal held that

> *'We are of the opinion that instead of directing a verdict of acquittal to be entered in favour of the Appellants the interests of justice require that a retrial be ordered in this case. We say so having regard to the totality of the evidence presented before the High Court. We are unable to say what view the assessors might have taken in respect of each Appellant had they (the assessors) been properly directed on all relevant matters. .....*

As we propose to order a retrial we have, in fairness to the Appellants, deliberately refrained from referring to pieces of evidence which could be regarded as strongly supportive of the prosecution case. We have however in exercising our discretion to order a new trial considered and balanced a number of factors some of which were for and some against the Appellants.'

[27] I have considered the fact that the offence had been committed in the year 2014 and the appellant has already served a sentence over 07 years of imprisonment. I have also considered the hardship the victim would suffer having to relive her story once again after such a long time. Therefore, acting in terms of section 24 (2) of the Court of Appeal Act, I decide not to order a retrial but to convict the appellant for attempted rape under section 208 of the Crimes Act, 2009 [see for e.g. **Mohammed v R** [1975] FJLawRp 7; [1975] 21 FLR 32 (20 March 1975)]

[28] The next question is to decide the sentence to be imposed on the appellant on attempted rape.

[29] **Aunima v State** [2001] FJLawRp 50; [2001] 1 FLR 213 (27 June 2001) had laid down the sentencing tariff for attempted rape as ranging from 12 months and to 05 years of imprisonment under section 151 of the Penal Code where the offender was statutorily liable to imprisonment for seven years with or without corporal punishment. Currently attempted rape is set out in section 208 of the Crimes Act, 2009 where the maximum statutory sentence is imprisonment up to 10 years. Despite the increase in the sentence for attempted rape under the Crimes Act, 2009 it appears that still the sentencing tariff for attempted rape is taken to be from 12 months and to 05 years of imprisonment.

[30] It must be remembered that in **Aunima v State** (supra) the sentencing tariff for attempted rape was set to be from 12 months to 05 years in the context of the maximum sentence under section 151 of the Penal Code being 07 years and the victim appearing to have been an adult. However, under section 208 of the Crimes Act, 2009 the maximum sentence is 10 years and the matter under appeal here is a case of attempted rape of a child of 09 years old.

[31] It appears to me that given the judicial thinking and allied developments in all fronts that have taken place in the last decade or so in the sphere of sentencing tariffs regarding rape of juveniles as articulated in **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)] and **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018), there is a need to revisit the sentencing tariff for attempted rape set under section 151 of the Penal Code (as ranging from 12 months and to 05 years of imprisonment) and reconsider whether it is appropriate in the current context for child or juvenile attempted rape under 208 of the Crimes Act, 2009. This is matter for the state to consider and seek, if necessary, guidelines from the appellate courts in another instance as to sentencing tariff for child and juvenile attempted rape under the Crimes Act, 2009.

[32] As far as this appeal is concerned, I am of the view that the sentence the appellant has already served over 07 years is fitting for the offence of attempted rape. Therefore, I would quash the sentence passed at the trial (i.e. 13 years with a non-parole period of 11 years) and pass a sentence that would run from 16 April 2014 to the date of delivery of the judgment in substitution therefore.

Bandara, JA

[33] The Appellant was charged before the High Court at Suva under two counts, one of Rape and the other being Sexual Assault.

The Information against the Appellant read as follows:

First Count

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

KITIONE KAMIKAMICA between the 23rd day of January 2012 and the 27th day of April 2012, at Nausori Village, in the Central Division, had carnal knowledge of **JVV**, a child under the age of 13 years.

Second Count

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) and (2) of the Crimes Act No. 44 of 2009.

Particulars of Offence

KITIONE KAMIKAMICA, between the 23rd day of January 2012 and the 27th day of April 2012, at Nausori Village, in the Central Division, unlawfully and indecently assaulted **JVV** by licking her vagina.

[34] At the end of the prosecution case court found that Appellant had no case to answer on count 2 and he was acquitted of the same. At the end of the summing-up the three assessors unanimously expressed the opinion that the Appellant was guilty of the first count of rape.

[35] The learned trial judge having concurred with the assessors opinion convicted the Appellant on count one and sentenced him to a term of 13 years imprisonment with a non-parole period of 11 years.

Factual Background

[36] The learned trial Judge in his summing up has placed before the assessors the following summary of evidence which reflects an accurate factual background of the case.

[1] Obviously the chief witness in the prosecution's case was the victim herself, JVV. She was only 9 years old when the incident she told us of took place. She said sometime during the first term of 2012, it was a Sunday, Mum had gone to church with her brother and sisters. She was at home with one of her sisters Laisa, who was sick. Kiti was also told to go to church but he didn't. When Mum left he came and pulled her by the hand

to the toilet which was inside the house at the back. He locked the door by means of a nail catch on top of the door. He then took off her clothes, closed the seat of the toilet and sat on it, telling her to sit on him. She said that he was wearing his "church clothes". She didn't sit on him, but he then spread her skirt on the floor and she lay on the skirt. By this stage Kiti had taken his clothes off and he inserted his penis into her vagina. She shouted because it was painful. He then dressed, flushed the toilet, and left the toilet telling her to have a bath. She then left the toilet crying. She told us that she told Tarusila about it and Tarusila took her to her mother and told her. She went to the hospital for a medical check-up. She identified the accused in court as the Kiti that had done this to her.

[2] In cross examination she admitted that she didn't run to her relatives who were living in two houses nearby, but said in re-examination that she was scared. She denied that she was confusing Kiti with Netani.

[3] The second prosecution witness was JVV's sister Laisa. She remembers the day that she was home sick. Kiti came and dragged JVV into the toilet and closed the door. After a while he flushed the toilet and came out followed by JVV's, who was crying

[4] JVV's cousin, Tarusila, told us that JVV told her about the incident in January 2013. She related the story told by JVV, about sitting on the toilet, about lying on the floor and they then went and told Joana's mum about it.

[37] Dr. Maharaj the medical expert who examined the victim on 3rd January 2013, had testified that his medical findings were *'hymen not intact but no injuries. Anal opening and skin normal. Professional opinion: hymen not intact but could not say when.*

[38] The accused chose to exercise his right to remain silent at the trial.

The initiation of the appellate procedure:

[39] The Appellant filed a timely leave to appeal application against "conviction only" before the Court of Appeal and advanced the following 9 grounds of appeal:

1) *The Learned Trial Judge erred in law and in fact when he failed to direct the assessors on the use of recent complaint evidence to assess the credibility of the Complainant.*

2) *The Learned Trial Judge erred in law and in fact when he did not direct and/or guide the Assessors on the cross examination of the victim by the Appellant resulting in a substantial miscarriage of justice.*

3) *The Learned Trial Judge erred in law and in fact by misdirecting himself in holding/finding that the evidence of the complainant is independently corraborated by her cousin Tarusila and her mother whom the Complainant told about the incident almost one year later.*

4) *The Learned Trial Judge erred in law and in fact in not taking into consideration the evidence of the Medical Practitioner who stated in court that upon examination the Doctor did not find any of the following:*
   a. *No injuries of the vagina*
   b. *No injuries on the anus.*

5) *The Learned Trial Judge did not take into consideration the evidence of the Medical Practitioner that there could be a possibility that since no injuries were found during the Complainant's examination, there is a possibility that no injury was caused to her by the Appellant.*

6) *The Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting himself that the Prosecution evidence before the Court proved beyond reasonable doubt that there were serious doubts in the Prosecution case and*

as such the benefit of doubt ought to have been given to the Appellant. [Full particulars will be given upon receipt of the Court Record]

7) *That the Learned Trial Judge erred in law and in fact in commenting on the evidence raising a new theory on the facts, uncanvassed during the course of the trial whereby the defence has had no opportunity of commenting upon it. [Full particulars will be given upon receipt of the Court Record]*

8) *That the Learned Trial Judge erred in law and in fact in not directing himself to refer any Summing Up the possible defense on evidence and in failing to do so, there was a substantial miscarriage of Justice. [Full particulars will be given upon receipt of the Court Record]*

9) *That the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/referring/directing/putting/considering himself the Appelllant's case to the Prosecution and Defence evidence. [Full particulars will be given upon receipt of the Court Record]*

[40] On the 15th July 2016 single Judge of Appeal having heard the application granted leave only on above appeal ground 3.

Consideration of ground of appeal number. 3 on which leave has been granted by the single Judge of Appeal

"The Learned Trial Judge erred in law and in fact by misdirecting himself in holding/finding that the evidence of the complainant is independently corraborated by her cousin Tarusila and her mother whom the Complainant told about the incident almost one year later."

On the above ground of appeal the single judge of appeal had made the following comments:

Misdirection on Tarusila's evidence:

In paragraph (4) of his judgment, the trial judge said that the victim's evidence was corroborated by her cousin Tarusila and her mother. This is rather unfortunate comment by the trial judge for two reasons. Firstly, the trial judge was not required by the law to look for corroboration in sexual cases. Secondly, the trial judge misdirected by saying complaint evidence corroborated the victim's evidence. ***Senikarawa v State*** *unreported Cr App No AAU0005/04S: 24 March 2006).*

[41] This ground of appeal revolves around the contents of the 4th paragraph of the judgment wherein it is stated that,

"The evidence of her cousin Tarusila and her mother corroborated her evidence completely not that corroboration is needed but it reinforced the weight of her evidence."

[42] In terms of section 129 of the Criminal Procedure Act 2009, there is no requirement of corroboration in sexual cases. Section reads as:

"129 - when any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the Judge or Magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration."

In ***Bijendra v State [2014] FJCA 180; AAU 56/13 (26 November 2014)*** the Court of appeal has held, *that victim's evidence alone is sufficient to prove a charge of rape. A submission that in absence of medical officer's evidence implicating appellant, judge should have given a direction on corroboration has no merit as no corroboration is required.*

[43] The impugned paragraph of the judgment by no means, is an indication that the learned High Court Judge had looked for corroboration of the victim's evidence. By mentioning the impugned paragraph of the judgment the learned High Court Judge had not acted contrary to the provisions of section 129 of the Criminal Procedure Act 2009. By the

impugned paragraph the learned trial judge had not looked for corroboration of victim's evidence nor had he said that such corroboration was necessary.

[44] The learned High Court Judge in his judgment stated that the evidence of the victim's cousin Tarusila and her mother corroborated her evidence completely which is erroneous and a misdirection. However, he did not misdirect himself by holding that "corroboration" is not a necessary requirement. What the learned High Court Judge had indicated in the impugned paragraph of the judgment is, that though corroboration is not a requirement that should be sought, if it is available anyway, it would reinforce the weight of the evidence of the victim which to my mind is an accurate statement, being a matter that goes to the assessment of the credibility of the victim witness.

[45] Through corroboration is not a requirement that should be sought of an offence of sexual nature if corroboration is available that factor would enhance the credibility of the victim. The corroboration which is anyway there could enhance the credibility of the victim. The use of available corroboration for such purpose is not a violation of Section 129 of the Criminal Procedure Act 2009.

[46] The learned High Court Judge's viewing of corroboration in that context does not amount to making a misdirection on himself.

The Renewal Application

[47] On the 8th of July 2019 in terms of Section 35 (3) of the Court of Appeal Act (Cap 12) the Appellant has filed a renewal application to appeal against his conviction advancing two amended grounds of Appeal.

[48] On 8th of July 2019, the Appellant through his counsel renewed his application to appeal against his conviction by virtue of Section 35 (3) of Court of appeal Act, before this full court, advancing two completely new grounds of appeal against the conviction. The

Respondent, in its written submissions has objected to the new grounds of appeal (against the conviction) being entertainment at this stage. However, it has not failed to respond to the new grounds of appeal.

[49] The new grounds of appeal against conviction advanced by the Appellant should be considered subject to the guidelines applicable to an application for enlargement of time, to file an application for leave to appeal. For the determination of an application for extension of time within which an application for leave to appeal may be filed, guidance should be sought through the rulings made in the following judgments.

"*In **Rasku v State**: CAV0009, 0013 of 2009, 24 April 2013, Supreme Court held that:*

*(i) The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application. As the Judicial Committee of the Privy Council emphasized in **Ratnam v Cumarasamy** [1964] 3 All ER 933 at 935 at 935: The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.*

*(ii) In **Kumar** (supra) the Supreme Court held that: Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*

1. *The reason for the failure to file within time;*
2. *The length of the delay;*
3. *Whether there is a ground of merit justifying the appellate court's consideration;*
4. *Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
5. *If time is enlarged, will the Respondent be unfairly prejudiced?*

(iii) *In **Rasaku** (supra) 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 endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court."*

[50] There is no affidavit filed by the Appellant giving reasons as to why the new grounds of appeal were not taken up on the 5th July 2016 before the single judge of appeal at the leave hearing. The two new grounds of appeal against the conviction are late by nearly 3 years and therefore the delay is prima facie substantial and unacceptable.

[51] Now I advert to the question, whether among the new grounds of appeal filed there is a meritorious ground of appeal or a ground of appeal that will probably succeed.

The new ground of appeal number 1 on conviction:

[52] *"That the learned trial judge erred in law and fact by lacking to provide an adequate and proper summing up, in particular to the following."*

(a) The learned trial judge's direction on the charges against the appellant at paragraph 17 of the summing up lacked fairness and objectivity by focusing only on the more serious offence of rape.

(b) The learned trial Judges direction to look to the caution interview for some evidence of the accused's response to the allegation of rape was erroneous in law and fact thereby causing a grave miscarriage of justice.

(c) The learned trial Judge direction to the assessors to note that the appellant admits calling JV into the toilet but does not know why and that he denies doing anything

lacked fairness, objectivity and balance and was prejudicial to the appellant because it seemed the assessors may feel bound to follow the views expressed by the judge.

(d) The learned trial Judge erred in law by not adequately and properly giving a warning or caution to the assessors as to the reliability of the evidence given by the complainant.

Consideration new ground of appeal number 1 on conviction:

[53] Paragraph 17 of the learned trial judge's summing up will have to be taken into consideration in relation to the above ground of appeal which reads as;

"There being no evidence in the defence case, you can look to the caution interview for some evidence of the accused's response to the allegation of rape. In looking at the record of interview you must decide if the answers were his answers and if they were then they are answers for you to accept or reject as evidence in the normal way. You will note that he admits calling Joana into the toilet but does not know why, and then he denies doing anything to her. It is for you to decide whether you believe his evidence or not."

[54] In assessing this ground of appeal the parameters established by the following authorities, in relation to the principles on directions to the assessors should be taken into consideration.

[55] **Archibold** states (at pages 2393) that *"A Judge is entitled to make comments as to the way the evidence to be approached, particularly in areas where there is a danger of a jury coming to an unjustified conclusion without an appropriate warning; ....., however any comment must be uncontroversial:*

***Ram v State**: AAU0087.2010 (02 October 2015): 2015] FJCA 131 where the Court of Appeal held:-*

"A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly and defects he sees in either case. But that must be done in a way that is fair,

objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced. If all the issues are put in a manner favorable to one party and unfavorable to the other, the assessors may feel bound to follow the view expressed by the Judge."

[56] The new ground 1 (a) is focused on the paragraph 17 of the summing up. The learned trial Judge had merely directed the assessors to consider the fact that the Appellant had admitted having called the victim to the toilet, but had not stated as to why he took her there. Also the fact that he had denied having done anything to her in the toilet. Judge had drawn the attention of the assessors to the above two positions taken up by the appellant, and had told them that it is for them to believe the position taken up by the Appellant or not. The learned trial Judge had not in any manner asked the assessors to believe the version put forward by the defence, nor had he asked them to disbelieve it. The said direction of the learned trial judge fall in line with the observations made in the following judgments conforming to the recognized principles of fairness and objectivity.

[57] *In* ***Tamaibeka v State*** *Criminal Appeal No. AAU0015 of 1997S: 08 January 1999 [1999] FJCA 1* the Court of Appeal observed that,

"A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced."

[58] *In* ***Ram v State [2012] FJSC 12; CAV0001.2011 (9 May 2012):*** *the Supreme Court observed that, 'A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirely of the evidence led at the trial including the agreed facts, and so does the decision of the Court of appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating of a*

supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case.

In ***RPS v The Queen [2000] HCA 3; (2000) 199 CLR 620, 637:*** it was held that; *"it is as well to say something more general about the difficult task trial judges have in giving juries proper instructions. The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes."*

[59] The directions set out in paragraph 17 do indicate that the caution interview of the appellant was partly exculpatory in nature and it was led in evidence by the prosecution.

[60] In terms of the directions on paragraph 17, there was nothing to prevent the assessors from considering, to find the appellant guilty for a less serious offence.

[61] Moreover, there is no legal bar for the prosecution to use the accused's version to find support for its case, once it discharges its burden of proving it's case beyond reasonable doubt by its own evidence. In *"Pearce [1979] 69 Cr App R 36:* it was held that; *the Court of Appeal could see no reason for casting doubt on the well-established practice, on the part of the prosecution, to admit in evidence all unwritten, and most written, statements made by an accused person to the police, whether they contain admissions or whether they contain denials of guilt.. If it is a mixed statement, i.e. a statement containing both inculpatory and exculpatory parts.. the whole statement is admissible."*

[62] The answers in the caution interview of the appellant was exculpatory in nature and the learned trial judge had given adequate directions on it, in his summing-up.

[63] By giving the following directions to the assessors in paragraph 7 the learned trial judge had adequately dealt with the issue of burden of proof and standard of proof.

"the burden of proving the case against this accused is on the Prosecution and how do they do that? By making you sure of it. Nothing less will do. This is what is sometimes called proof of beyond reasonable doubt. If you have any doubt then that must be given to the accused and you will find him not guilty – that doubt must be a reasonable one however, not just some fanciful doubt. The appellant does not have to prove anything to you. If however you are sure that the appellant raped JVV, once in January 2010 and once in early 2012, then you will find him guilty of the charges he faces.

[64] Having regard to the above, I hold that the new ground of appeal 01 is devoid of merit.

Enlargement of time is refused on the new ground of appeal 01 against conviction.

New Ground of appeal 2:

"That the conviction against the Appellant by the learned Trial Judge was unreasonable and cannot be supported having regard to the totality of the evidence thereby causing a miscarriage of justice in fact and law, in particular, to the following:-

(a) The learned Judge erred in law by failing to give cogent reasons as to why the Court accepted that State had proven beyond reasonable doubt that complainant was raped by the Appellant in the toilet that day.

(b) The learned Judge erred in law by the inconsistent verdicts whereby the Appellant was convicted for one Offence and acquitted for the other and that the inconsistency showed that the direction was not fair, objective and balanced.

(c) The learned Trial Judge had erred by convicting the Appellant without independently assessing the evidence in particular to:-

(i) The belatedness of the complaint; and

(ii) The mistaken identity of the perpetrator.

[65] At paragraph 3 of the judgment the learned trial judge amply sets out reasons why he found the appellant guilty in the following terms finding the evidence of the victim credible. *"The evidence of the rape came from the victim 9 years old at the time, and now 11 years old. She told the Court in halting but convincing fashion of what you did to her in the toilet in those early days of 2012. Although she is still young and shy, her evidence was hesitant, spontaneous and believable. The Court believed her evidence."*

[66] In relation to the above ground of appeal, the observation made in the following authorities are worth taking into consideration.

In ***Ram v State*** *(supra)* it was held that: *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirely of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case."*

[67] In ***Kumar v State: [2018] FJCA136;*** *AAU 103.2016 (30 August 2018) it was held: "Furthermore there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under* ***section 237(3) of the Criminal Procedure Act 2009****. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so."*

[68] In ***Salauca v State [2020] FJCA 39***; *AAU086.2018 (20 April 2020), Court of Appeal enunciated and reiterated the role of assessors and judge in a trial as follows:*

"In Fiji, the assessors and judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts (vide Rokonabete v The State [2006] FJCA 85; AAU 0048.2005S (22 March 2006) and Naisua v State [2016] FJCA 24; AAU0088.2011 AAU0096.2011 AAU0057.2011(26 February 2016). Therefore, what matters ultimately is whether the trial judge is satisfied with the evidence of the prosecution witnesses.

[69] In relation to the issue that has been raised regarding the belatedness it is relevant to note the observations made in ***Ramasima v State*** *[2020] FJCA 22 AAU 157.2014 (27 February 2020)* stating that,

(i) *Delay in the legal sense is not a numerical concept that can be mathematically counted. The legal concept of delay and whether there is delay in the first complaint depends very much on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. Neither can a universal formula be invented to measure delay.*

(ii) In **Jonkers v Police (1996) 67 SASR 401 Matheson J** said the following:

"The authorities establish that a complaint can be recent and admissible, although it may not have been made at the first opportunity which presented itself. What is the first reasonable opportunity will depend on the circumstances including the character of the complainant and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained did not do so."

[70] As regards the issue of mistaken identity, it clearly appears from the trial court proceedings that the appellant's identity had never been put into dispute throughout the trial. However the following direction given in paragraph 18 of the summing up is an adequate and appropriate direction on the issue, *"I wish to say a little about the mystery man Netani, a person Mr. Savou is making a lot of. Well, Madam & Gentlemen it is Kitione who is on*

trial and not Netani. We don't have any evidence about Netani apart from Joana agreeing that she told Ana that it was Netani who did this. Why she said that it is for you to decide. Was she confused? Did she misunderstand? There is certainly no evidence from anybody that Netani was there at the house that day. I remind you to judge this case on the evidence that is before you."

Enlargement of time is refused on the new ground of appeal 2 against conviction.

[71] The fact that the appellant took the victim to the toilet is an unchallenged fact at the trial proceedings. The victim had testified stating the following: "*He pulled me inside the toilet..... he spread my skirt on the floor, I was lying on the floor on skirt and he lay on top of him ..... he inserted his penis into my vagina. I shouted because it was painful. He spat on my vagina and trying to insert his penis unsuccessfully. After that he dressed* .....

When the above testimony of the victim taken together with the medical expert's opinion, it appears that the most appropriate charge the appellant would have been convicted was attempted rape, more so, when the issue whether an insertion took place was in doubt.

Section 24 (2) of the Court of Appeal Act is to the effect that, "*Where the appellant has been convicted of an offence, and the judge could on the information have found him guilty of some other offence, and on the findings of the judge it appears to the Court of Appeal that the judge must have satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.*"

[72] Acting under the above said provision, whilst dismissing the appeal I substitute the verdict found by the high court judge with a verdict of Appellant guilty of the offence of attempt

to commit rape in terms of Section of the 208 of the crimes Act 2009 and sentence the Appellant as indicated in the Orders.

Order of the Court

1. Conviction of rape is quashed.
2. Appellant is convicted of attempted rape contrary to section 208 of the Crimes Act, 2009.
3. A judgment and verdict of conviction of the appellant of attempt to commit rape contrary to section 208 of the Crimes Act, 2009 is entered.
4. Sentence passed at the trial is quashed.
5. In substitution, appellant is sentenced to an imprisonment from 14 April 2014 to the date of the judgment. (03 June 2021).
6. Appellant is to be released forthwith.

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Hon Justice E. Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....

Hon Justice C. Prematilaka
JUSTICE OF APPEAL

.....

Hon Justice W. Bandara
JUSTICE OF APPEAL