

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

CRIMINAL APPEAL NO.AAU 0047 of 2018
[In the High Court at Suva Case No. HAC 116 of 2016S]

BETWEEN : **ADRIU ROGOMURI** *Appellant*

AND : **STATE** *Respondent*

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. Y. Prasad for the Respondent**

Date of Hearing : **05 February 2021**

Date of Ruling : **08 February 2021**

RULING

[1] The appellant (with 04 others) had been indicted in the High Court of Suva on one count of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 committed in Nausori, in the Central Division between 01 November 2015 and 31 November 2015.

[2] The count against the appellant in the information read as follows.

‘Third Count

(Representative Count)

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crime Act 2009.*

Particulars of Offence

ADRIU ROGOMURI between the 1st day of November 2015 and 31st day of November 2015, in Nausori, in the Central Division, penetrated the anus of W. W who is a child under the age of 13 years old, with his penis.

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

'2. The male complainant (PW1) was 12 years old at the time of the offences. Ilisoni Tiko was 39 years old and single. Adriu Rogomuri was 35 years old, married with a young daughter. Epineri Saurara was 52 years, married with four children. In count no. 1, Ilisoni Tiko enticed PW1 to his village kitchen and thereafter forcefully sodomised him. In count no. 2, Adriu Rogomuri enticed PW1 to near his pig pen and thereafter forcefully sodomised him. In count no. 3, while PW1 was in Bu Tere's house, Epineri Saurara forcefully sodomised him. The complainant was a 12 year old child at the time, and was thus incapable of giving his consent to the above. Further, the accused were deemed in law to know that PW1 was incapable of giving his consent to the incidents mentioned above. All the accused were PW1's uncle. They all lived in the same village or near to PW1's residence.'

- [4] At the end of the summing-up on 06 November 2017 the assessors had unanimously opined that the appellant was guilty of the charge. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on the same day, convicted the appellant and sentenced him on 07 November 2017 to 14 years of imprisonment with a non-parole period of 12 years.
- [5] The appellant had filed an untimely notice of appeal on 17 May 2018 against conviction and sentence which was out of time by 05 months and 10 days. He had also filed in person a notice of leave to appeal out of time on 25 January 2019 where he had explained the reasons for the delay. The Legal Aid Commission had filed a notice of motion seeking extension of time, amended grounds of appeal, affidavit and written submissions on behalf of the appellant on 28 July 2020. The state had tendered its written submissions on 26 November 2020.
- [6] 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

[7] 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?

[8] **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.'

[9] 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.'

[10] 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.’

[11] 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

[12] As already stated the delay is 05 months and 10 days and substantial.

[13] 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.’

[14] 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

- [15] The appellant's excuse for the delay in his affidavit is that he did not have the benefit of trial documents and his private counsel who defended him at the trial to draft appeal grounds. Later, with the assistance of some fellow inmates he had filed his appeal in person in May 2018. However, what he had stated in his explanation filed in this court in January 2019 is that due to his lack of knowledge he could not file his appeal in time. There is nothing to indicate that he had not been provided with copies of the summing-up, judgment and sentence by the trial court or he had made any attempt to contact his private lawyer or LAC. The appellant's explanations are inconsistent and therefore, not unacceptable.

Merits of the appeal

- [16] 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."

- [17] 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 substantial delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.
- [18] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of **Kim Nam Bae's** case. **For a**

ground of appeal untimely preferred against sentence to be considered arguable there must be a real prospect of its success in appeal. The aforesaid guidelines are as follows.

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration.*

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

Conviction

Ground 1

The Learned Trial Judge erred in law and fact when he failed to properly assess the Appellants admissions in the caution interview at Hearing stages rather, he re-iterated that the admissions in the caution interview had been admitted which was improper and raises an arguable error made by the Learned Trial Judge.

Ground 2

The Learned Trial Judge erred in law and fact when he failed to properly consider the material doubt raised through the Doctors evidence and in failing to do so then directed the assessors and himself to place reliance on the medical evidence given that the medical evidence was unreliable.

Ground 3

The Learned Trial Judge erred in law and fact when he did not direct the assessors and himself on the principle of delayed reporting.

Sentence

Ground 4

The learned sentencing judge did not fully consider the appellant's mitigation advanced at sentencing stage.

01st grounds of appeal

[20] The appellant's relies on **Maya v State** [2015] FJSA 30; CAV009 of 2015 (23 October 2015) as the basis for his criticism of the trial judge's directions to the assessors regarding his cautioned interview. The directions on the appellant's confessions are

found at paragraphs 24, 38, 39 and 40. The appellant had given evidence at the trial where after a *voir dire* inquiry his cautioned interview had been admitted by the trial judge.

[21] In **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) the Court of Appeal considered several previous decisions including **Maya v State** (supra) and stated:

*‘The correct law and appropriate direction on how the assessors should evaluate a **confession** could be summarised as follows.*

*(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*

*(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the **confession** (vide **Volau**).*

*(iii) Once a **confession** is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the **confession** including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide **Volau**).*

*(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the **confession** if they think that it may have been made involuntarily (vide **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

*(v) However, **Noa Maya** direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the **confession** is voluntary, Noa Maya direction is irrelevant and not required (vide **Volau** and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.’*

- [22] I think the trial judge's direction at paragraph 39 is adequate compliance with what the law required of the trial judge even if involuntariness remained a live issue before the assessors. It does not appear from the summing-up or the judgment that the trial judge had changed his mind in the course of the trial contrary to his original view about the voluntariness or he had contemplated that there was a possibility that the confessional statement may not have been voluntary.
- [23] Therefore, there is no real prospect of success of this ground of appeal.

02nd ground of appeal

- [24] The appellant criticizes the trial judge's direction on medical evidence at paragraph 42 that what the doctor had reported on 09 March 2016 should not have been relied upon against the appellant as the offending he is alleged to have committed was between 01 and 31 November 2015. The trial judge had left it to the assessors to treat the medical evidence where the doctor had observed a small laceration on anal mucosa at 6 o'clock position of the victim as being consistent with the history of anal penetration, as a matter for them to decide and stated that if they were to accept it that supported the victim's evidence against the appellant as well. The prosecution does not appear to have elicited from the doctor the age of the injury.
- [25] In the light of the fact that two other accused (03rd and 04th) had been alleged to have committed anal penetration on the victim in January 2016 and March 2016, the injury could not have been unequivocally connected to the allegation against the appellant and trial judge's direction should have been more specific without generalizing on all accused except the 04th accused whose name had not been mentioned in the medical history.
- [26] However, excluding this misdirection there had been direct evidence of the victim and the confessional statement of the appellant to establish the charge against him. Regarding the above misdirection of the trial judge to the assessors under the second ground of appeal 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 would consider

disregarding the misdirection or with a proper direction what a reasonable assessors would have done.

*[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.*

*[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:*

*"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.**"*

[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.

*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."*

[27] Therefore, I hold that there is no real prospect of success of the second ground of appeal.

03rd ground of appeal

[28] The appellant complains of lack of direction on delayed reporting in the summing-up. It appears that the reporting of the incidents of rape had been done in March 2016, after a few months of the appellant's alleged act of anal penetration of the victim. There is

no specific direction on the issue of delay in the summing-up. Nor does it appear that the appellant had challenged the victim's evidence on the basis of delay and demanded an explanation as to why he had not reported the incident promptly. This is a case of series of anal rapes that had happened over a period of time involving several accused all of whom were related to the victim in a village environment. The appellant position had been that he was not at the village during the time of the alleged incident but not that the victim had fabricated or embellished or exaggerated the allegation of rape.

[29] The issue of delay was dealt with by the Court of Appeal in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) on how to deal with a delayed complaint where it was held:

‘[24] In law the test to be applied on the issue of the delay in making a complaint is described as “the totality of circumstances test”. In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-

‘The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.’

[30] To decide whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay, it should have been a live issue at the trial. If the appellant had not made it a live issue, in my view, he cannot simply raise it as an appeal point on the basis that the trial judge had failed to direct the assessors on delay in which event the counsel for the appellant should have sought a redirection on the lines suggested in **Serelevu** on delayed reporting as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

[31] I dealt with the issue of delay particularly when child rape is involved in **Vulaono v State** [2020] FJCA 209; AAU0004.2018 (28 October 2020) in some detail where I *inter alia* quoted from **Tulshidas Kanolkar vs The State of Goa** Appeal (crl.) 298 of 2003

(27/10/2003) of the Supreme Court of India as follows on the effect of delay in reporting.

'In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case.'

[32] It appears that the appellant had not sought to cast any doubt on the credibility of the victim's testimony at the trial on the basis of belated reporting. In the circumstances, I do not think that this ground of appeal has a real prospect of success.

04th ground of appeal (sentence)

[33] The appellant argues that the trial judge had not fully considered mitigating factors at the sentencing stage. He has not submitted as to what other mitigating features the trial judge should have considered apart from his having been a first offender which had got a discount of 01 year. No other sentencing error had been demonstrated by the appellant either.

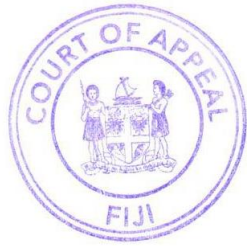
[34] Therefore, there is no real prospect of success in this ground of appeal.

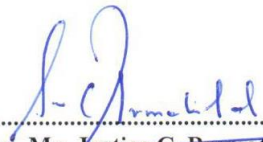
Prejudice to the respondent

[35] No prejudice had been pleaded by the respondent but given the fact that the offences had been allegedly committed in 2015 and 2016 any fresh litigation would cause prejudice to the then child victim.

Order

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




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