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

CRIMINAL APPEAL NO.AAU 010 of 2020
[In the High Court at Lautoka Case No. HAC 40 of 2018]

BETWEEN : **MOHAMMED FAIYASH**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **05 August 2022**

Date of Ruling : **08 August 2022**

RULING

[1] The appellant had been charged in Lautoka High Court with a single count of attempted murder of Sital Shivnali Lata contrary to sections 44 and 237 of the Crimes Act, 2009 and damaging property of Telecom Fiji Limited telephone booth valued at $3,000.00 contrary to sections 369(1) of the Crimes Act, 2009 committed on 15 February 2018 at Lautoka in the Western Division.

[2] At the end of the trial, the assessors had expressed a unanimous opinion that the appellant was not guilty of attempted murder but the majority of assessors had decided that he was guilty of the lesser offence of act intended to cause grievous harm. The learned High Court judge had disagreed with the assessors' unanimous opinion and convicted the appellant for attempted murder. Both the majority of assessors and the trial judge had concurred with each other that he was guilty of the second count. The appellant had been sentenced on 28 June 2019 to an aggregate

sentence of mandatory life imprisonment with a minimum term of 06 years 07 months and 20 days to be served before a pardon may be considered. A permanent non-molestation and non-contact orders were issued to protect the victim under the Domestic Violence Act.

[3] The appellant's appeal against conviction is untimely and late by about 07 months. Both the appellant and the state had tendered written submissions for the enlargement of time to appeal hearing.

[4] 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? (vide **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).

[5] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. 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. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[6] The delay of this appeal is substantial. The appellant's explanation is that his counsel had assured that the appeal would be filed in time but he had not done so. Then the

appellant had lost contact with his counsel and later he had been informed that the appeal was 'too risky' (by whom is not mentioned). Thus, the reasons for the delay are not substantiated. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against 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.

[7] The grounds of appeal urged on behalf of the appellant against conviction are as follows:

> '*Ground 1*
>
> *THAT the Learned Trial Judge erred in law by shifting the burden of proof to the appellant by stating at (paragraph 53) of the judgment that the defense has not been able to create any doubt in the prosecution case in respect for both counts.*
>
> *Ground 2*
>
> *THAT the Learned Trial Judge erred in allowing the caution interview statement to be admissible in the trial proper which was obtained involuntarily.*
>
> *Ground 3*
>
> *THAT the Learned Trial Judge erred in law and fact by misdirecting himself and the assessors when his lordship himself contradicted in his summing up by stating what part of the appellant caution interview to accept or believe and what part to reject or disbelieve.*
>
> *Ground 4*
>
> *THAT the Learned Trial Judge erred in law and in fact by not directing himself and the assessors adequately that existed a serious contradiction in regards to the issue of complainant's relationship with the appellant as per evidence obtained from prosecution witness Simione Raluve.*
>
> *Ground 5 and 6*
>
> *THAT the Learned Trial Judge erred in law and fact by misdirecting himself and the assessors at paragraph 7 of the summing-up by stating that "I direct you not to assume or speculate anything from the answer given by the accused" referring to A:144 in which the appellant has implied that he did not intend to kill the complainant, without leaving it to the assessors as to what weight they are to attach in arriving at the conclusion of their individual opinions, there causing substantial miscarriage of justice.*
>
> *Ground 7*
>
> *THAT the Learned Trial Judge erred in law and in fact by misdirecting himself and assessors in (page 8) of his summing up to reject the defense position that there was no real intention to cause serious harm or intention to kill causing substantial miscarriage of justice.*

Ground 8

THAT the Learned Trial Judge erred in law and fact in misdirecting himself and the assessors that there was no evidence that the car was travelling at low speed. Whereas there was evidence before court that the car in question was just reversed, made u-turn and bumped the telephone booth in just few meters away and such the only inference could possibly be drawn that the car would not have driven at high speed in that short distance.

Ground 9

THAT the Learned Trial Judge erred in law by not directing his mind on the mental status (mens rea) of the appellants before, during and after the alleged incident in question.

Ground 10

THAT the Learned Trial Judge erred in law and fact by not directing his mind in the judgment that beside the appellants admission in the caution interview of the intention to kill the complainant which the appellant contends to be voluntary obtained there was nothing else to bring strength to the prosecution's case that the appellant indeed had intention to kill the complainant resulting in miscarriage of justice.

Ground 11

THAT the Learned Trial Judge erred in law and in fact when his lordship rejected the appellant version by stating that he did not tell his counsel/lawyer about police assault because he was scared and not drawing the highly inference in this mind that the police station is a place of high authoritative environment and as such no ordinary will fell normal and comfortable in the circumstances surrounding the investigation into the matters by police on the appellant.'

[8] The facts of the case had been summarised in the sentencing order as follows:

3. *On 15th February, 2018 the victim and the accused were at the Lautoka Police Station at about 4.50pm the victim walked out of the police station, since it was raining she took shelter in the bure outside the police station.*

4. *After a while, the victim went into the telephone booth which was about half a minute walk from the bure. Inside the telephone booth which was near the fence of the police station the victim was talking to a friend on her mobile phone.*

5. *Upon seeing the victim in the telephone booth the accused ran out of the police station to his car which was parked outside the police station facing Nadi. The accused reversed his car in the opposite lane of the road and drove the car across the road and bumped the telephone booth. As a result of the impact, the telephone booth fell off its basement and the victim was thrown out of the telephone booth thereafter the accused fled the scene in his car.*

6. *The victim received injuries as a result of the impact and was subsequently taken to the hospital. The telephone booth which belonged to Telecom Fiji Limited was damaged to the value of $3,000.00.*
7. *After the accused was arrested in his caution interview he admitted that he intended to kill the victim with his car. The victim and the accused were good friends from 2016.*

[9] However, the appellant's position under oath had been that it was an accident.

01st ground of appeal

[10] The appellant contends that by stating at paragraph 53 of the judgment that defense has not been able to create any reasonable doubt in the prosecution case in respect of both counts the trial judge has shifted the burden of proof to the appellant.

[11] This argument is simply misconceived. The appellant has picked just one short paragraph out of 57 paragraphs of the judgment most of which had been devoted to analyzing the prosecution evidence in detail before the trial judge concluded that the prosecution had proved its case of attempted murder beyond reasonable doubt against the appellant. It is in that context that the trial judge had added that the defense has not been able to create any reasonable doubt in the prosecution case.

02nd ground of appeal

[12] The appellant finds fault with the trial judge for having allowed his cautioned interview to be led in evidence at the trial as it had been obtained involuntarily.

[13] The trial judge had determined in an elaborate ruling delivered earlier after the *voir dire* inquiry on the voluntariness of the confessional statement and therefore, there was no bar for the prosecution to lead that evidence at the trial. In that process, the trial judge had applied the correct standard (beyond reasonable doubt) and burden of proof (on the prosecution). However, the appellant had challenged the voluntariness of his cautioned interview once again at the trial proper. Therefore, the trial judge had directed the assessors to decide whether the appellant had given the incriminating

answers in the cautioned interview and if so whether they were true. Not stopping at that the trial judge had also asked the assessors to consider whether the appellant had done so voluntarily (see paragraphs 86-89, 107-113, 118-121 and 129-130 of the summing-up) and addressed himself on those issues relating to the cautioned interview of the judgment (see at paragraphs 33-39 and 48-51).

[14] The trial judge in his judgment had particularly considered the fact that the appellant had failed to complain to his lawyer who visited him on the second day of the interview and also his failure to complain to any court of any assault upon him by the police. According to the trial judge, the appellant had come out with self-incriminating answers only on the second day after the visit to the police station by his lawyer (see paragraphs 48-49 of the judgment).

[15] The trial judge's directions and his own considerations on the cautioned interview are substantially in conformity with the principles set out in **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30], **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51, **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19 and **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017).

03rd ground of appeal

[16] The appellant seems to complain that the trial judge has misdirected the assessors and himself by not stating in the summing-up as to what part of the caution interview to be believed and what part of it is not to be believed.

[17] This ground may have its roots in the appellant's evidence where had had accepted some answers given in the caution interview while denying self-incriminating answers. However, it is not for the trial judge to direct the assessors what answers to accept and what not to accept. The judge had fairly and squarely left it with the assessors (see paragraph 87 and 89 of the summing-up).

04th ground of appeal

[18] The appellant submits that the trial judge had failed to alert the assessors as to the contradiction between the complainant's evidence that she had a normal friendship with him whereas the police officer IP Simione Rolava's evidence was that they were *de facto* partners.

[19] While the trial judge had mentioned these items of evidence in the summing-up, he had not addressed the assessors on them specifically as contradictions. They are in fact not contradictions or inconsistencies going to the very core of the prosecution case. His defense too had nothing to do with the nature of his relationship with her. According to the appellant's cautioned interview, they were *de facto* partners and she demanded money from him. If so, that might suggest a possible motive for his actions on the day in question.

[20] In any event, discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (See **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)] and **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016)].

05th and 06th grounds of appeal

[21] The gist of the appellant's complaint is that the trial judge had taken away from the assessors any possible inference in his favour that they would have drawn from his answer to question 144 in the cautioned interview which seems to have implied that he did not intend to kill the complainant. It appears that the trial judge should have advisedly refrained from making the impugned statement at paragraph 7 of the summing-up.

[22] However, by finding him guilty only of the offence of act intended to cause grievous harm instead of attempted murder, the assessors appear not to have been sure that he had entertained the required fault element. The appellant's answer to question 144 is that he reversed the car after bumping the telecom booth to avoid it going over the

damaged booth lying in front of the car which the defense counsel had interpreted to imply that the appellant did not intend to kill. The trial judge had directed the assessors not to assume or speculate anything from that answer. The assessors may have been swayed by the defense counsel's suggestion.

[23] On the other hand, the appellant had made his intention to kill clear in answer to questions 96, 108, 109 and 111 of the cautioned interview. In the light of the manner in which the appellant had acted and his declared intention to kill her the trial judge seems justified in overturning the assessors' verdict.

<u>07th and 08th ground of appeal</u>

[24] The appellant challenges the trial judge's direction to the assessors at paragraph 8 which reads as follows:

> *'8. Furthermore, the defence counsel also stated that this was a low speed, short distance impact which negated any real intent to cause serious harm or to kill the complainant. I direct you that there was no evidence that the car before the impact was travelling at low speed hence I direct you to disregard this submission in respect of the speed at which the car was travelling before the impact.'*

[25] As pointed out by the state the facts do suggest that the appellants' vehicle may have travelled at a high speed prior to the collision with the telecom both. The telecom booth had literally started flying and heavy damage had been caused to it by the impact. The damage to the appellant's car had been significant and according a witness from TFL that the slightest bump could not have caused that damage. The fact that the appellant reversed the car in order to slam the booth with the injured inside demonstrates an intentional act and not an accident. Thus, it is not unfair for the trial judge to say that there was no evidence that the car was travelling at a low speed.

<u>09th and 10th grounds of appeal</u>

[26] The appellant contends that apart from his admissions there was not sufficient evidence to infer his intention to kill. However, his conduct of running out of the

police station, getting into his car, reversing it and then drove it right into the telecom booth knowing that the injured was inside and his subsequent conduct of fleeing the scene seem to provide adequate evidence to establish his fault element. The judge had ventilated these aspects in the summing-up and the judgment. He would not have escaped the crime scene in the manner he did if it was a mere accident. The appellants' confessional statements regarding the fault element at the time of the offending leave no room for the trial judge to conclude otherwise.

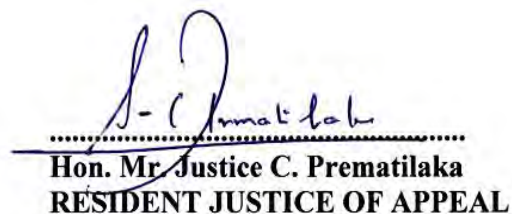
11th ground of appeal

[27] The appellant finds fault with the trial judge for having rejected his evidence that he did not tell his counsel of the alleged police assault as he was scared.

[28] As observed by the trial judge the appellant had not confessed to anything on the first day of the interview. However, after the visit of his lawyer on the second day he had made self-incriminatory statements in his cautioned interview. This cannot be explained if the appellant had been scared of the police. Secondly, he had not made any complaint of any police assault to any of the courts below either.

Order

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



Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL