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

CRIMINAL APPEAL NO.AAU 155 of 2019
[In the High Court at Suva Case No. HAC 298 of 2018]

BETWEEN : **WALUSIO KALI FERESI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

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

Date of Hearing : **28 June 2022**

Date of Ruling : **30 June 2022**

RULING

[1] The appellant had been charged in the High Court at Suva with four counts under the Crimes Act No. 44 of 2009 *i.e.* criminal intimidation contrary to sections 375(1) (a) (i) and (v), assault with intent to commit rape contrary to section 209, anal rape contrary to section 207(1) and (2) (a) and oral rape contrary to section 207(1) and (2) (a) on SL (name withheld), his then legally married wife on 01 June 2013 at Navua in the Central Division.

[2] At the end of the trial, the assessors had expressed a unanimous opinion that the appellant was guilty of all counts. The learned High Court judge had agreed with the assessors and convicted the appellant as charged. The appellant had been sentenced on 22 February 2019 to an aggregate sentence of 10 years and 09 months of imprisonment with a non-parole period of 09 years and 09 months.

[3] The appellant had initially appealed against conviction in person over 06 months out of time (08 October 2019) and amended his grounds of appeal later (22 October 2021). He had not elaborated those grounds of appeal with written submissions. The state had tendered its written submissions on 22 June 2022.

[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 the appeal is substantial. The appellant has not explained the delay at all. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction 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.

> ‘*<u>Ground 1</u>*
>
> *That the learned trial judge erred in law in convicting me over this matter as the charges were defective on the basis that: a) That the particulars of the offences does not specifically provide the particular time and where the offence(s) was allegedly committed. (b) That the information charged offences that was allegedly committed under one transaction. Full particulars will be given upon receipt of the Court Record.*
>
> *<u>Ground 2</u>*
>
> *That the learned trial judge erred in law when he proceeded to hear the offences under Count 1 and 2 respectively at the High Court. Taking into account that Count 1 contains a "summary offence," an offence which can only be heard or tried at the Magistrate Court. Whereas Count 2 contains and "Indictable Offence Triable Summarily" which in my view means, an offence that can also be heard or tried at the High Court upon the election of the accused person. I have lost the right to be tried according to law and the right to a fair trial as a result of this action by the learned trial judge.*
>
> *<u>Ground 3</u>*
>
> *That the learned trial judge erred in law and in fact in failing to adequately put the defence case to the assessors for their proper consideration. Full particulars will be given during the hearing.*
>
> *<u>Ground 4</u>*
>
> *That the learned trial judge erred in law and in fact by misdirecting the assessors when he stated the following at paragraph 2, line 1-6 and 14-15 of summing up and I quote: "As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principles of law. To wit; If a person has committed an offence, he should be meted out with an adequate punishment. In other words, if you are sure that the accused committed the alleged offence, then it is your duty to find him guilty … if any of the said principal are violated, it would amount to a failure of the system, thus you have failed in your duty to the society." Full particulars will be given upon receipt of the Court Record.*
>
> *<u>Ground 5</u>*
>
> *That the learned trial judge erred in law and in fact in failing to clearly direct or explain to the assessors their distinct role in the case as assessors and his distinct role to the case as a judge.*
>
> *<u>Ground 6</u>*
>
> *That the learned trial judge erred in law and in fact in failing to clearly direct or explain to the assessors the meaning of inconsistency and the inconsistent statement or evidence given by PW1 resulting in a substantial miscarriage of justice.*
>
> *<u>Ground 7</u>*

That the learned trial judge erred in law and in fact in misdirecting the assessors by stating at paragraphs 25, line 1-4 of summing up that: "With the leading of the above evidence and marking and producing PE1, the prosecution closed their case, and the Court being satisfied that the prosecution has adduced sufficient evidence covering the elements of the alleged offences decided to call for a defence …." (emphasis mine).

[8] SL was married to the appellant but got separated from him in January 2013 and living with their son. On 01 June 2013 the appellant had asked her to come to his place as their son was with him. The appellant had without her knowledge taken the son from the custody of her parents. After she entered the house he had questioned her whether she was having an extra marital affair, and when answered in the negative, he had held her by her collar, pulled her and said "stop lying". There had been an axe and a cane knife already on the floor and he had said that he was going to chop her bones, pack them in a sack and ask her relatives to come and pick it. She was kneeling down and begged him to not to do so. Thereafter, he had punched her on the head and bitten her neck in order to leave 'love bites' to be seen by the 'boys'. Then the appellant, having taken off his pants, had held her by the hair and forced her to suck his penis. He had thereafter pushed her on to the bed face downwards, and pulled up her skirt and pulled down her panty, and inserted his penis into her anus. After she fled the scene, SL on 03 June 2013 had gone to the Draunibota DPC's office and complained. She, having been referred to the sexual offences unit at Totogo and medically examined by a doctor, had made the formal complaint on 04 June 2013.

[9] The doctor had noted a laceration of 01cm at 12 O'clock position in SL's anus which had happened due to a sexual abuse on or after 01 June 2013. The injuries seen on the back half of her head may have been caused by blunt force and punching. According to the doctor, SL had 02 love bite marks on the left neck.

[10] The appellant in his evidence had admitted to having had consensual oral sex with SL but totally denied other acts relating to other charges.

01st ground of Appeal

[11] The appellant's complaint is that the information had not sufficiently particularized the details such as the time and the place of the offences and all offences should not have been included in one information based on 'same transaction' rule. I have examined the information as attached to the respondent's written submissions and I do not see any logical basis for the appellant's complaint under this ground of appeal. Exact time of the offence need not be given in an information. Further, it was permissible to include all acts of sexual abuse in one information as they were part and parcel of the same transaction at least to avoid multiplicity of cases. It would have been quite artificial to charge the appellant separately on each and every criminal act leading to an unwarranted burden on the justice system including the victim. Section 59(1)(a) and (b) of the Criminal Procedure Act allow offences founded on the same facts or which are part of a series of offences of the same or similar nature to be included in one information. Principles of law expressed in **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) on 'defective charges' need not be even invoked in this instance. This appeal ground is frivolous.

02nd ground of appeal

[12] The appellant argues that since the first count on criminal intimidation is a summary offence he should have been tried in the Magistrates court and since the second count on assault with intent to commit rape is an indictable offence tribal summarily he should have been given the right of election to be triad in the Magistrates court or the High Court. As both charges were tried in the High Court, the appellant argue that he had been deprived of a fair trial and right to be tried according to law.

[13] I have dealt *in extenso* with a similar argument in **Kumar v State** [2021] FJCA 243; AAU0009.2019 (29 October 2021) and held that an information may contain not only indictable offences but also indictable offences tribal summarily and summary offences for reasons given therein. However, since I have granted enlargement of time to appeal on this issue in **Kumar v State** (supra) to enable the full court to pronounce upon it, I am inclined to allow enlargement of time to appeal on this ground of appeal in this appeal as well. In any event, it involves a question of law only.

03rd ground of appeal

[14] On the contention by the appellant that the trial judge had failed to adequately put the defense case to the assessors, I am satisfied that at paragraphs 26 (i)- 26 (xiv) , 27 and 30 of the summing-up the trial judge had discharged his obligation in so far as the defense case is concerned more than adequately. I see no merit in this ground of appeal.

04th ground of appeal

[15] The rationale for this ground of appeal is placed on one part of paragraph 2 of the summing-up. Upon a consideration of the whole of paragraph 2, I do not see anything objectionable in it. The appellant has clearly cherry-picked a part of paragraph 2 for his complaint. I see no merit in this ground of appeal.

05th ground of appeal

[16] As regards the appellant's complaint that the trial judge had failed to explain the role of assessors and the judge, I think paragraphs 01-07 of the summing-up have sufficiently fulfilled that task. This, ground of appeal has no merits.

06th ground of appeal

[17] The appellant argues that the trial judge has failed to explain to the assessors the meaning of inconsistency and the inconsistent statements in SL's evidence.

[18] I find that the trial judge at paragraph 9 -12 had adequately addressed the assessors on inconsistent evidence and how to evaluate them. Under paragraph 22 (iii), (iv) and (v) the trial judge had highlighted the inconsistencies and omissions brought to light by the defense in cross-examination of SL.

[19] The applicable test in assessing the contradictions, inconsistencies and omissions was laid down in the case of **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) as follows.

> *'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses*

*(see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any **inconsistency** or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that 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 **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280)'*

[20] **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) the Court of Appeal stated:

'[35]...........Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) The powers of observation differ from person to person. What one may notice, another may not. ...... It is unrealistic to expect a witness to be a human tape recorder;"

[21] Applying those principles to the appellant's contention, I see no merit in his complaint.

07th ground of appeal

[22] The center of the dispute here is the following statement in the summing-up at paragraph 26.

'.... The Court being satisfied that the prosecution has adduced sufficient evidence covering the elements of the alleged offences, decided to call for a defense.....'

[23] This court has dealt with similar arguments in a number of decisions and did not proceed to uphold the same. Although the learned judge had made a general reference as to the existence of a *prima facie* case, he had not referred to any specific contested issue in a conclusive manner. Hence, in my view no perceivable prejudice could have caused to the appellant affecting the legitimacy of the trial (see for e.g. **Raqio v State** [2017] FJCA 82; AAU0061A.2015 (23 June 2017). Though, it is always

advisable for trial judges not to use similar phrases in the summing-up, it is not fatal to the ultimate conviction.

Order

1. Enlargement of time to appeal against conviction is allowed only on ground 2.

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