

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

CRIMINAL APPEAL NO.AAU 015 of 2019
[High Court of Lautoka in Criminal Case No. HAC 182 of 2016]

BETWEEN : **SILAS SANJEEV MANI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Nasedra for the appellant**
: **Ms. R. Uce for the Respondent**

Date of Hearing : **22 June 2020**

Date of Ruling : **26 June 2020**

RULING

[1] The appellant had been charged in the High Court of Lautoka for having committed an offence of rape contrary to section 207(1) and (2)(a) & (3) of the Crimes Decree No.44 of 2009 by inserting his penis into the vagina of the victim who was 09 years old at the time the offence was committed.

Statement of Offence

RAPE: *Contrary to Section 207 (1) & (2) (a) & (3) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

SILAS SANJEEV MANI *between the 30th day of April, 2016 to the 11th day of July, 2016 at Sigatoka in the Western Division, inserted his penis into the vagina of **KR**, a 9 year old girl.*

- [2] After trial, the assessors had expressed a unanimous opinion of guilty on the count of rape on 15 October 2018. The learned High Court judge in the judgment dated 17 October 2018 had agreed with the assessors, convicted the appellant and sentenced him on 16 November 2018 to imprisonment of 18 years with a non-parole period of 15 years.
- [3] The appellant in person had signed an application for enlargement of time on 21 January 2019 along with grounds of appeal against conviction received by the Court of Appeal registry on 31 January 2019. At most the delay is about 1 ½ months. The appellant's additional grounds of appeal and an application for bail pending appeal had been received on 15 January 2020. Legal Aid Commission had thereafter tendered an application for enlargement of time, amended grounds of appeal against conviction and written submissions on 19 May 2020 on behalf of the Appellant. It had not, however, pursued the appellant's bail pending appeal. Although in the written submissions filed on behalf of the appellant, Legal Aid Commission has sought enlargement of time and leave to appeal against conviction and sentence, no grounds of appeal or submissions have been filed against sentence. Therefore, the state had filed its written submissions on 19 June 2020 dealing with the application for enlargement of time application against conviction.
- [4] The brief facts of the prosecution case could be ascertained from the learned High Court judge's sentencing order as follows.

5. *The accused is the brother of the victim. She was living with her mother and siblings in Kulukulu. They are from a broken family and shared the same father. Victim's mother went to prison after being convicted of murdering her own daughter. The deceased in the murder case is victim's elder sister. Accused's wife (victim's sister-in-law) also went to prison with victim's mother in the same murder case. The victim went through all the agonies and bitter experiences of her household.*

6. *After her mother and sister-in-law went to prison, the victim had to be relocated in several places. Firstly, she was taken by Suman, one of her aunties. Suman could not keep the victim for long as she had a dispute with her husband and had to leave her own house. The victim had to be relocated again. Finally the the victim was taken care of by the accused.*

7. *When the incident occurred, the victim was living with the accused and his two children in a two bedrooomed house owned by another aunty, Jocelyn. The victim shared a double bunk bed with the accused and his children. The victim slept on the top bunk and the accused and his children slept on the bottom bunk.*

8. *On the day of the incident, the, accused woke the victim up and told her to come down to the bottom bunk. Accused smelled of liquor and was drunk at that time. The victim refused to come down. She was then slapped and forced to come down. She finally complied and came down to the bottom bunk. Accused then carried his both children up and put them on the top bunk. Accused then came to the bottom bunk. He lifted victim's dress, took off her panty and inserted his penis into her vagina. It was a painful experience for her. She screamed. She was slapped and told to keep quiet. She started crying. When the accused heard somebody knocking the door he stopped and went away.*

9. *The victim complained to her aunty Roselyn on the following day. When Roselyn noted blood in victim's vagina, she slapped the victim and gave her a pad and was told to go to school.*

[5] More light is shed on matters that transpired at the trial by the judgment of the learned High Court judge as given below.

5. *'Prosecution called two witnesses, the victim KR and her father Avinesh. Prosecution's case is substantially based on the evidence of the victim. The victim gave evidence under oath. She is 11 years old at the time of giving evidence. The court was satisfied that she understood the nature of oath and her obligation to tell the truth.*

6. *Victim's mother had gone to prison murdering her daughter. After her mother had gone to prison, the victim was taken by her aunty Suman. Suman could not keep the victim for a longer period of time because of the dispute she had with her husband. Suman had asked the accused to take the victim with him to Roselyn's house. The alleged incidents had happened when the victim was taken by the accused to Roselyn's place.*

7. *The victim said that she informed aunty Roselyn the next morning of what had happened. However, Roselyn denied having received such a complaint but admitted seeing blood in victim's vagina. Roselyn also admitted giving a pad to the victim when she received the complaint of bleeding.*

8. *Roselyn was called by the Defence. She appeared to give evidence to save the accused. However she admitted receiving a complaint and therefore, there is no dispute that the victim was bleeding from her vagina when Roselyn received a complaint. Roselyn advanced several propositions to show that the blood noted in victim's vagina had nothing to do with this rape allegation.*

9. *Roselyn said that she thought the victim was having menses. She also said that the victim had informed her that something had hit her while playing at school. She also tried to attribute injuries to scratching by a comb and self-fingering.*

10. *The victim denied all those propositions. She however admitted having told Roselyn and the Head Teacher that a boy from her school used his finger where she used to urinate from. The victim explained why she had to tell such a story. She said that she had to tell this story because the accused taught her to do so. The victim's evidence that no boy from her school was brought before the Head Teacher regarding such an allegation further confirmed that this story was planted by the accused.*

[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] 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.....'*

[10] I would rather consider the third and fourth factors in **Kumar** first before looking at the other factors which will be considered, if necessary, in the end.

Grounds of appeal

1) *That the Learned Trial Judge erred in law and fact when he failed to fully and properly consider the issue of delayed reporting of the complaint thus questioning the credibility of the victim and the veracity of her complaint.*

2) *That the learned trial Judge erred in law and in fact when he failed to fully consider that there was a reasonable doubt in the State's case with the victim's admission that a boy from school had inserted a finger where she used to urinate from.*

3) *That the learned trial Judge erred in law and in fact when he failed to fully and properly consider the issue of delayed reporting and the apparent weakness in this evidence in light of the victim's aunt Noelene not being called to confirm that such a complaint was made to her.*

01st and 03rd ground of appeal

[11] The appellant complains of the learned judge's failure to properly consider the delay in the victim bringing the allegation against the appellant to the notice as a matter affecting the her credibility and the prosecution's failure to call Noelene to substantiate that the victim in fact made a complaint of sexual abuse against the appellant to her.

[12] I shall consider how the learned Trial judge has dealt with the issue of delay. Before that it is useful to understand how the allegation of rape came to light. It is described in the summing-up as follows. Avinesh is the victim's father and KR is the victim.

'46. Avinesh was residing at Malolo with his defacto wife Noelene, three boys and his biological daughter KR. His wife Sundhar Kaur is in prison having murdered her daughter Sanjini.

47. KR was residing at aunty Roselyn and uncle's house in Malaqereqere with her step brother Silas when the incident happened. He received some

messages that something wrong was happening to KR inside Roselyn's house and took KR back to him in 2016. When he first received the message, the Police Officers had gone to see KR at school. He went to school and asked the Head Master about it. The Head Master informed him that something had happened and reported the matter to the Police. Then he applied for KR's custody and brought her home. He asked his wife to inquire from KR as to what had happened.'

- [13] The events leading to Avinesh bringing the victim home in 2016 from the custody of the appellant and Roselyn and what happened thereafter is described above. What the victim had told Noelene and how the matter got reported to the police is at paragraph 42 of the summing-up. Perhaps, the full appeal record may reveal more on this aspect. But it appears that the investigative mechanism had commenced looking into the matter only after the victim left the appellant and Roselyn and come to stay with her father.

'42. When she was taken to her dad's place in Malolo in July 2016 she told aunty Noelene of what happened to her. Noelene took her to the Nadi Police Station and then for a medical.'

- [14] The learned trial judge had dealt with the same issue in the judgment as well.

'13. Victim's father Avinesh said that he received information that something bad was happening to the victim at Roselyn's place. He had taken custody of the victim and asked his wife Noelene to make inquiries. The victim had relayed the incidents to Noelene and later given a statement to police. That is how the sexual abuse came to light. There are no material contradictions between victim's previous statement and her evidence in court. I am satisfied that the complaint victim eventually made to police is genuine.'

- [15] However, the evidence reveals that there had in fact been a very prompt complaint of what the appellant had done to the victim to Roselyn in the following morning though Roselyn had treated it with disdain. The summing-up refers to that as follows.

'40. KR said that she informed aunty Roselyn the next morning of what happened. Aunty Roselyn slapped her and gave her a pad when she said that the place she used to urinate from was bleeding. Roselyn told her to put the pad on and go to school. Roselyn told her that she knew what was going on.

41. She said that Silas did the same thing to her many times after she moved to Malaqereqere. She complained to aunty Roselyn only to be slapped.'

- [16] For her part Roselyn had admitted at the trial that the victim had complained to her in the morning and she had noticed blood. Paragraph 58 of the summing-up summarises her evidence on this aspect as follows

'58. Under cross-examination, Roselyn said that RK had complained to her in the morning and she noticed blood in the morning. She admitted that she gave a pad and asked KR to go back to school. She admitted that KR was only 8 or 9 years old when she came to her. She denied slapping KR. She agreed that she could not say that there was no sign of KR losing her virginity although she had told so to police. She further said that KR was in the habit of playing with her finger at the private part whenever she used the washroom.

'69. There is no dispute that the victim was bleeding from her vagina when she complained to her aunty Roselyn about the injury in her vagina. Defence witnesses advanced several propositions in this regard and the Defence wants you to believe that the blood noted in victim's vagina had nothing to do with this rape allegation.

70. Roselyn said that she thought that the victim was having menses. She also said that the victim had informed her that something had hit her while playing at school. She also attributed injuries to scratching by a comb and self-fingering'.

71. The victim rejected those propositions....'

[17] Therefore, it is not correct to argue as if there had not been any prompt complaint by the victim but only a belated complaint only after she was removed to her biological father's place. Nevertheless, the learned trial judge had specifically addressed the issue of delay in the following paragraphs in the summing-up.

'16. You can consider whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.

17. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. Victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Victim's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. It takes a while for self- confidence to reassert itself. There is, in other words, no classic or typical response by victims of Rape. It is a matter for you to determine whether, in this case, complaint victim made to police is genuine and what weight you attach to the complaint she eventually made.'

'68. You will find that there is a delay in reporting the matter to police. You heard what the Prosecution witnesses had to tell about the delay. The victim said that she was slapped and told to keep quiet. She further said that when she reported the matter to Roselyn she was slapped. In light of the directions I have given in the Summing Up, you consider whether the complaint the victim eventually made to police is genuine.

[18] The learned trial judge had also given his mind to the issue of delay in the judgment.

'12. There is a delay in reporting the matter to police. However there are reasonable explanations for the delay. The victim was in a vulnerable situation at Roselyn's house. Roselyn had slapped the victim when the incidents were reported to her. Accused also had slapped the victim and told her to keep quiet.

[19] The reasoning behind the Learned trial judge's decision to believe the evidence of the victim buttressed by her father's evidence is substantially in harmony with the observations in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018)

'[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."

[20] When the 'the totality of circumstances test' is applied to the facts of this case where one of the victim's elders (appellant) had become the perpetrator and the other (Roselyn) had played the role of the almost protector of the perpetrator in the face of sexual abuse committed on her, the so called delay on the part of the 09 years old victim could be fully understood and she would not have been able to turn to and air her plight

to anyone else in confidence as long as she was with the appellant and Roselyn. However, as soon as she escaped the grip of the appellant and Roselyn, she had narrated the sexual abuse to Noelene and then to the police.

- [21] The appellant's behavior is documented in paragraph 39 of the summing-up as follows. Roselyn had treated her complaint with contempt as given in paragraphs 40 and 68.

'39. KR said that she was wearing a long dress. Silas then lifted her dress, took off her panty and tights and inserted his 'urinating thing' into her 'urinating thing'. She said that it was painful. She said she screamed. Then she was slapped and told to keep quiet. She started crying. Silas stopped it when somebody was knocking the door. He wore his clothes and went to open the door. She went to the top bunk and went to sleep, letting the nephew and nieces come down to the bottom bed.

- [22] Nothing much needs to be said about the prosecution not having called Noelene as a witness. It is part of the prosecutorial discretion enjoyed by the prosecutors to select whom to call to prove its case. It is always open for the defense to call any such witness as part of its case if the defense thinks that such a witness is very material to disclose the truth or could bolster its case. There is nothing to indicate that the appellant had raised any issue with the prosecution not having summoned Noelene at the trial. Even if called to give evidence, Noelene's evidence would not have constituted recent complaint evidence. There would not have been much evidentiary value of her evidence to the prosecution. Instead, the prosecution had called the victim's father to explain how the sexual abuse of the victim came to light.

- [23] Thus, the 01st and 03rd grounds of appeal have no real prospect of success in appeal.

02nd ground of appeal

- [24] The appellant argues that the learned judge had failed to consider that there arose a reasonable doubt in the prosecution case on account of the victim's admission that a boy from school had inserted a finger where she used to urinate from.

- [25] This aspect has certainly not escaped the attention of the learned trial judge. He dealt with it in the summing-up as follows

'44. She denied telling aunt Roselyn that her stomach was paining. She also denied telling Roselyn that she used a comb to scratch herself. She admitted telling aunt Roselyn that a boy from school had inserted a finger where she used to urinate from because Silas had taught her to say so. When Roselyn and Silas went to meet the Head Teacher she told that one of the boy from school had done bad stuff. But the boy was not brought in front of her by the Head Master.'

'71. The victim rejected those propositions. She however admitted having told Roselyn and the Head Teacher that a boy from the school used his finger where she used to urinate from. She said that she told such a story because the accused had taught her to do so. It is up to you to form your own opinion as to whether the fact that blood was noted in victim's vagina is consistent with the rape allegation.'

[26] Then in the judgment the learned trial judge directed himself as follows.

'10. The victim denied all those propositions. She however admitted having told Roselyn and the Head Teacher that a boy from her school used his finger where she used to urinate from. The victim explained why she had to tell such a story. She said that she had to tell this story because the accused taught her to do so. The victim's evidence that no boy from her school was brought before the Head Teacher regarding such an allegation further confirmed that this story was planted by the accused.'

[27] The assessors had the full benefit of hearing the story about a boy having fingered the victim's vagina through the summing-up and the learned trial judge had himself fully considered that and rejected it as a red herring. In fact rather strangely, neither the appellant nor Roselyn had adverted to a visit to school in their evidence on account of the allegation of a boy at school having inserted a finger inside her vagina.

[28] Thus, this ground of appeal has no real prospect of success in appeal.

[29] I am of the view that the delay is not substantial, the reasons for the delay may be acceptable and obviously no prejudice to the respondent could be foreseen at this stage. However, the appellant fails in the most important test of 'real prospect of success' to deserve enlargement of time.


[30] Accordingly, enlargement of time against conviction is refused and therefore any application for bail pending appeal would have been unsuccessful as the threshold for

bail pending appeal is ‘very high likelihood of success’ which is even higher than ‘real prospect of success’ needed for enlargement of time.

Order

1. Enlargement of time against conviction is refused.




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