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

CRIMINAL APPEAL NO.AAU 092 of 2017
[High Court of Lautoka Criminal Case No. HAC 27 of 2013]

BETWEEN	:	**AMARJEET SINGH**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**27 August 2020**
Date of Ruling	:	**31 August 2020**

RULING

[1] The appellant had been charged in the High Court of Lautoka on two counts of attempt to commit rape [section 208], two counts of rape [section 207 (1) and (2) (a) and (3)] and one count of indecent assault [Section 212] contrary to the Crimes Decree, 2009. The alleged acts had been committed on 18, 19 and 29 January 2013 at Namulomulo, Nadi, in the Western Division.

[2] The information read as follows.

'FIRST COUNT
Statement of Offence

ATTEMPT TO COMMIT RAPE: *Contrary to Section 208 of the Crimes Decree 44 of 2009.*

Particulars of Offence

AMARJEET SINGH *on the 18th of January, 2013 at Namulomulo, Nadi, in the Western Division, attempted to insert his penis into the anus of YK, a 6 year old girl.*

SECOND COUNT
Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Decree 44 of 2009.*

Particulars of Offence

AMARJEET SINGH *on the 18th of January, 2013 at Namulomulo, Nadi, in the Western Division, inserted his penis into the vagina of SK, a 7 year old girl.*

THIRD COUNT
Statement of Offence

ATTEMPT TO COMMIT RAPE: *Contrary to Section 208 of the Crimes Decree 44 of 2009.*

Particulars of Offence

AMARJEET SINGH *on the 19th of January, 2013 at Namulomulo, Nadi, in the Western Division, attempted to insert his penis into the anus of YK, a 6 year old girl.*

FOURTH COUNT
Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Decree 44 of 2009.*

Particulars of Offence

AMARJEET SINGH *on the 19th of January, 2013 at Namulomulo, Nadi, in the Western Division, inserted his penis into the vagina of SK, a 7 year old girl.*

FIFTH COUNT
Statement of Offence

INDECENT ASSAULT: *Contrary to Section 212 of the Crimes Decree 44 of 2009.*

Particulars of Offence

> ***AMARJEET SINGH*** *on the 29th of January, 2013 at Namulomulo, Nadi, in the Western Division, rubbed his penis on the leg of YK, a 6 year old girl.*

[3] After full trial, the assessors had expressed a unanimous opinion of guilty on all five counts on 25 November 2015. The learned High Court judge in the judgment delivered on 30 November 2015 had agreed with the assessors and convicted the appellant as charged. He was sentenced on 07 December 2015 to 03 years of imprisonment each on the two 'attempt to commit rape' charges, 14 years and 10 months and 15 days of imprisonment each on the two 'rape' charges and 02 years of imprisonment on the 'indecent assault' charge; all sentences to run concurrently with a minimum serving period of 12 years.

[4] The appellant himself had signed an untimely notice of appeal on 25 May 2017 against conviction and sentence. The delay is over 01 year and 05 months. Later, Legal Aid Commission had tendered an application seeking enlargement of time along with written submissions on 11 September 2019 only against conviction. The state had tendered its written submissions on 16 July 2020 and 27 August 2020.

[5] The evidence against the appellant as described in the summing-up is as follows.

> 01st victim (SK)
>
> *'55. On 18th January, 2013 her parents had gone somewhere leaving her and her younger sister YK at home with Chintu. Chintu called her and her sister YK in his room. Then he asked YK to bring a condom form mother's room. Then he asked them to take off their clothes. She took off her clothes. Chintu also took off his trousers and underwear. He wore the condom on punnu and asked YK to do the sit-ups on his punnu, meaning penis. Chentu was lying down on the bed when YK was doing the sit-ups.*
>
> *56. After YK had finished, Chintu called her and asked her to do the same. He was holding his punnu with one hand while she was doing sit-ups on his punnu. His punnu went inside her pupu. Pupu is the part where they urinate from. She started having pain. Blood was coming out. YK was standing beside.*
>
> *57. As her mother was coming home he asked them to hurry up and wear the clothes. He asked her not to tell mom, if she does he will go to jail and no one will be there to cuddle her.*

58. On the following day, 19th January 2013, Chintu went to grandma's room and asked YK to bring coconut oil and a condom. YK brought all those and gave them to Chintu. Then he asked her to take off her clothes. He gave her the oil and asked her to put it on her pupu. YK was standing beside. Then he wore the condom and applied oil on pupu. He lied down and asked her to do the sit-ups. She did the sit- ups on his punnu. She had a strange feeling. When papa was coming he asked her to wear the cloths.

59. On the 29th January, 2013, Chintu took YK to the well. YK told her what Chintu did to her near the well. Chintu had opened up his zip, took out his punnu and rubbed it on her legs. YK had felt bad. She told her mom what Chintu did to them. Mum went to police and reported the matter. Police officers took them to the hospital where medical check-up was done.

60. Under cross examination, SK said that she told mother about this on 18th and in turn mum told her father. She was not in pain. On 19th she had a headache. She did not show blood to mom. She had already washed. Blood was not on her clothes. When asked about sit- ups, she demonstrated to us how she did sit ups.

<u>02nd victim (YK)</u>

'62. Next witness for the Prosecution was complainant, YK. She was year one student in 2013. She said that Chintu was the person who did all bad things to her. She recognised the accused sitting in the dock.

63. Chintu went to his room and called her and sister in. He asked her to bring a condom. She brought a condom from mother's room. He wore the condom on his punnu. He took off his clothes and asked her to do the sit-ups. He was lying on the bed. She started having pain when she was doing sit ups on his punnu. She said she won't do it. Then he asked her sister SK to do the sit-ups. She saw SK doing sit ups on Chintu's punnu. Then he showed her how his punnu becomes small. Then mum was coming. He asked them to hurry up and wear the clothes.

64. On 19th January, Chintu called her and her sister SK in his room. He asked her to bring oil. She brought oil and gave it to Chintu. He then took off their cloths and applied oil on their pupus. He asked to do the sit ups on his punnu. She refused as it is painful. Then he asked her sister SK to do the sit-ups. Father was coming. He asked them to go and told not to tell anything happened. She did not tell anybody until the incident near the well happened.

65. On 29th January, 2013, Chintu took her to the well. He opened up his dress and undressed her. Then he started rubbing his punnu on her legs. She went home and told her sister, SK, what happened to her near the well. SK in turn told mother. Mother reported the matter to Police. She told Police officers what happened and showed the room and the well when police visited home. She was feeling bad and strange.

66. Under cross examination, she said she and her sister were in pain and she saw blood on her. They were able to walk after Chintu did these things.

67. She said she knew about condoms. They are round and long. Mother had told about condoms when she was given them at the hospital. She told her mother about these incidents little by little because Chintu had told her not to tell and otherwise he would go to jail and no one will be there to cuddle them.

[6] The medical examination of the child victim SK had revealed that her hymen was not intact and torn and the vaginal opening was loose and soft. The doctor had been of the opinion that any kind of penetration whether penile or fingering could cause such a condition. Regarding the other child victim YK, the doctor had said that her hymen was intact. Her vaginal ores was normal and no signs of injuries had been observed. The doctor had concluded that there was no visible sign of penetration.

[7] 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

[8] 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?

[9] ***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.'

[10] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. 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. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

[11] **Grounds of appeal**

> *'Ground 1: That Learned Trial Judge erred in law and in fact having considered in his Judgment that the two complainants corroborated each other without any contradiction, when accepting their evidence to be credible, probable and believable, failing to consider that;*
>
> *i) Corroboration is not required by law; and*
> *ii) The two complainants' evidence are not independent of each other.*
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> *Ground 2: That Learned Trial Judge erred in law and in fact by not adequately directing himself and the assessors on how to approach the contradiction in the evidence of SK and Hem Lata in relation to Mohammed Ameen*
>
> *Ground 3: That Learned Trial Judge erred in law and in fact, by taking into account in his judgment the hearsay evidence adduced by Hem Lata that her husband told her not to report the matter to police, placing considerable weight on such evidence, when assessing the delay of the complaint lodged with police.*

01st ground of appeal

[12] The appellant's complaint is based on paragraphs 5 and 6 of the judgment. They are as follows.

> *'5. Prosecution evidence is consistent, plausible and believable. On the other hand, Defence version is not consistent and believable. Although the accused has nothing to prove his innocence or prove anything at all, he failed to create any doubt in the Prosecution case. Evidence led in the trial by the Prosecution proved all the charges beyond reasonable doubt.*

> *6. Both complainants presented direct evidence in respect of Rape and Attempted Rape incidents. Their evidence was consistent, probable and believable.* ***Although their evidence need not necessarily be corroborated by an independent source, they corroborated each other without any contradiction.*** *Prosecution case was further bolstered by recent complaint evidence of the mother of the complainants, Hem Lata and by doctor's expert evidence which is consistent with rape of SK.*

[13] The appellant argues that it was wrong for the trial judge to have said that one victim corroborated the other when there was no requirement in law to look for corroboration. It is now trite law that by section 129 of the Criminal Procedure Act, 2009 the common law requirement of corroboration in sexual cases was abolished. However, that does not mean that when there is corroboration of the complainant's evidence such evidence should be disregarded. In fact evidence corroborative of the complainant's testimony, if available, would go to strengthen the prosecution case. No sensible and vigilant prosecutor should refrain from leading such corroborative evidence.

[14] In **Prasad v State** [2019] FJSC 3; CAV0024.2018 (25 April 2019) the Supreme Court looked into a direction by the trial judge on corroboration where he had said that though there is no rule requiring corroboration, the assessors may look for evidence supportive of the complainant's evidence but such evidence should come from some independent source to support the victim's story. The Supreme Court held

> *'9. The effect of this passage was that the assessors were being told that they could conclude that Prasad was guilty even if there was no corroboration of the girl's account. But they could also take into account such corroboration of her account as there was in deciding whether her account was true. That meant that the judge had to explain to the assessors what evidence was capable of amounting to corroboration. The help he gave them was that it was "independent evidence" which supported her account. That was entirely correct, but some explanation of what "independent" meant in this context was required.* ***It did not mean that the evidence had to come from someone who was independent in the sense that they did not know the girl and therefore had no axe to grind. It meant that the evidence had to be independent of the girl. In other words, she could not be the ultimate source of the evidence if the evidence was to amount to corroboration of her account.***

[15] The appellant complains that the evidence of SK and YK cannot be treated as independent of each other and therefore, the impugned direction was erroneous. It is very clear from the evidence that SK's account of what happened to YK and YK's account of what happened to SK, was totally independent of each other. Neither relied on what one had told the other. They were the subjects as well as witnesses to the bizarre sexual orgy the appellant perpetrated on them, one after the other. The fact that they happened to be blood relations *i.e.* sisters did not the affect the independent nature of each one's account of what happened to the other. Each victim's evidence was independent of the other. Therefore, the evidence of the victims was mutually corroborative.

[16] There is no real prospect of success of this ground of appeal.

02nd ground of appeal

[17] The appellant complains that there was inadequate direction to the assessors and himself by the trial judge on how to approach the contradiction in the evidence of SK and her mother Hem Lata. The basis of this complaint emanates from Hem Lata's denial of any knowledge or affair with a man called Mohammed Ameen whereas SK had said that he used to come home and the mother knew him. The appellant's position had been that Hem Lata got the two daughters to falsely implicate him as he caught her affair with Mohammed Ameen which Hem Lata had denied. The trial judge had referred to this matter in paragraph 100 of the summing-up and paragraph 21of the judgment.

> *'100. Hem Lata totally denied having an affair with Mohammed Ameem. She said that she did not even know such a person. SK said that Ameem used to come to her place and Hem Lata also knew him. You consider these contradictory versions affect the credibility of the prosecution version.*
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> *'21. Hem Lata's evidence that she never knew Ameem is not consistent with that of her daughter, SK's while her sister, YK's evidence conformed to her mother's evidence on that point. I directed the assessors on inconsistencies. Assessors found Hem Lata's evidence truthful in light of overall evidence led in the trial. Finding of assessors, in my view, is not perverse.'*

[18] The appellant's suggestion to Hem Lata in my view is farfetched. It is unthinkable that Hem Lata, being a mother would involve 06 year old and 07 year old two daughters in sexual abuse charges including rape with the appellant (who was their cousin) merely because he caught her illicit affair with a man called Mohammed Ameen. On the other hand the appellant's suggestion becomes even more hilarious when one considers the fact that two child victims' versions of events where they had with undoubted clarity and detail described how the appellant committed sexual abuses on them. The manner and method of sexual abuses employed by the appellant had been somewhat unique and could not have been fabricated by the two children or even the mother.

[19] In any event, the alleged inconsistency is not on a fundamental issue but only on some peripheral matter. Even if Hem Lata is totally disbelieved there was ample evidence to convict the appellate based on the evidence of the two victims and medical evidence. As stated in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the alleged contradiction cannot shake the foundation of the prosecution case

> *'[13]..... 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] Further, the trial judge had adequately addressed the assessors of the appellant's position that Hem Lata had fabricated sexual abuse allegations against him through the daughters because he had refused to give her money and also because he had caught her having an affair with Mohammed Ameen (which according to the appellant the whole village was aware of and he had brought it to the notice of her uncle *i.e.* Hema Lata's husband but he had not done anything about it) in paragraph 79-82 of the summing-up. The trial judge had addressed himself on the appellant's position in paragraphs 20-26 of the judgment.

[21] This ground of appeal has no real prospect of success.

03rd ground of appeal

[22] The appellant criticizes the trial judge for having taken into account in the judgment what he calls some hearsay evidence adduced by Hem Lata in that she had told in evidence that her husband had told her not to report the matter to police. He points out paragraph 16 of the judgment.

> *'16. Hem Lata reported the matter to Police on 31st of January, 2013. She said that she took seven days to relate the matter to her husband because she thought it is a lie and she was not assured. There was another discouraging factor also. Chintu is her husband's nephew. Husband was insisting her not to report the matter to police. YK had told Hem Lata about these incidents little by little because Chintu had told her not to tell. YK had come up with the full story only after the incident at the well on the 29th of January 2013.In this context, explanation given by Hem Lata for the delay in reporting to Police is acceptable.'*

[23] The appellant argues that because Hem Lata's husband was not called to give evidence what she had told about his having told her not to report to the police became hearsay and should not have been relied upon to explain the delay in reporting the mater to police.

[24] The trial judge had dealt with the question of delay in paragraphs 92-95 of the summing-up. Paragraph 95 is as follows.

> *'95. Hem Lata reported the matter to Police on 31stof January, 2013. She said that she took seven days to relate the matter to her husband because she thought it is a lie and she was not assured. Chintu is her husband's brother's son. Husband was insisting her not to report the matter to police. YK told Hem Lata about these incidents little by little because Chintu had told her not to tell. In this context, you analyse the evidence and see whether Hem Lata has given a probable explanation for her delay in reporting to Police.'*

[25] Therefore, it is clear that there were many reasons as to why Hem Lata delayed reporting the matter to the police other than her husband having insisted that she should not report. In any event delay in reporting is not an absolute or abstract concept and cannot be determined only in terms of days, weeks or months.

[26] In **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) the guidelines were suggested on how to deal with a delayed complaint. 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.***'

[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of **Thulia Kali v State of Tamil Naidu**; 1973 AIR.501; 1972 SCR (3) 622:

> *'A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well-wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.'*

[27] The learned trial judge cannot be faulted for not having strictly followed ***Serelevu***, for it was decided in October 2018 and the trial in this case had been concluded in November 2015. However, the trial judge had given his mind to the totality of the circumstances with regard to the delay of less than two weeks from the first incident and about 03 days since the last incident.

[28] In any event, I do not think that what Hem Lata had told in her evidence as to what her husband had told her comes strictly within the definition of hearsay evidence in the context of this case. It is a request made by her husband to Hem Lata not to report the matter to the police and not something that he had learned from another [see **Navaki v State** [2019] FJCA 194; AAU0087.2015 (3 October 2019) **Delailagi v State** [2019] FJCA 186; AAU0060.2015 (03 October 2019) and **Goundar v State** [2020] FJCA 4; AAU29.2015 (27 February 2020) for discussions on hearsay evidence]. Whether the husband had in fact told that to Hema Lata or not is a different question going to her credibility.

[29] This ground of appeal has no real prospect of success.

[30] House of Lords in **Stirland, Appellant; and Director of Public Prosecutions, Respondent** [1944] A.C 315 laid down the test that should be applied in this type of situation as follows.

> *'When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should be applied*

[31] The delay in filing the appeal is very substantial and the appellant's reasons for the delay are all too common and unconvincing. However, the respondent cannot be said to be prejudiced by the dely.

Order

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL