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

CRIMINAL APPEAL NO.AAU 0021 of 2017
[In the High Court at Lautoka Case No. HAC 158 of 2012]

BETWEEN	:	**NACANI DOMO**
	:	**DAMASINO LEVI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. T. Lee for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**07 October 2020**
Date of Ruling	:	**08 October 2020**

RULING

[1] The appellants had been indicted in the High Court of Lautoka on four counts of rape committed on the same complainant at Ba in the Western Division on 28 September 2012 ccontrary to section 207(1) and (2) (a) of the Crimes Act, 2009.

[2] The information read as follows.

First Count
Statement of Offence

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

Particulars of Offence

NACANI DOMO *on the 28th day of September 2012 at Ba in the Western Division, had carnal knowledge with a woman namely* ***SN*** *without her consent.*

Second Count
Statement of Offence

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

Particulars of Offence

DAMASINO LEVI *on the 28th day of September 2012 at Ba in the Western Division, had carnal knowledge with a woman namely* ***SN*** *without her consent.*

Third Count
Statement of Offence

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

Particulars of Offence

NACANI DOMO *on the 28th day of September 2012 at Ba in the Western Division, had carnal knowledge with a woman namely* ***SN*** *without her consent.*

Fourth Count
Statement of Offence

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

Particulars of Offence

DAMASINO LEVI *on the 28th day of September 2012 at Ba in the Western Division, had carnal knowledge with a woman namely* ***SN*** *without her consent.*

[3] The brief facts as could be gathered from the sentencing order are as follows.

'[2] The facts of the case were that:

Complainant, a twenty year old mother, was returning home after a traditional Fijian ceremony called Tevutevu held at one of her close relative's

house. The Accused who were also participants at the same ceremony, on their way home, find the Complainant having sexual intercourse with young boys by the road side under a guava tree. When five boys have already finished, the Accused also join in the group in the belief that they were having consensual sexual intercourse with the Complainant. 1st Accused takes his turn, sucks Complainant's breasts, licks her vagina and inserts his penis into her vagina. Complainant was weak and unable to react. Her repeated calls for stoppage fall on deaf ears. She surrenders herself to the invasion. After the 1st Accused is done, the 2ndAccused follows the suite. After a short while, both the Accused repeat the same acts, this time, under a bamboo tree. Both the Accused admit having had sexual intercourse with the Complainant on two occasions; but with her consent.'

[4] Both Appellants had admitted in their cautioned interview statements PE.1 and PE.2 that they had sexual intercourse twice with the complainant. Giving evidence in court also they had maintained and confirmed their earlier position. It had also been recorded as an agreed fact that the main issue of the case was whether or not the complainant had consented in having sexual intercourse with the appellants.

[5] The only issue to be decided in the case therefore had been whether the prosecution had proved, beyond reasonable doubt, that the sexual intercourse took place without the complainant's consent.

[6] At the conclusion of the summing-up on 09 September 2015 the assessors had unanimously opined that the appellants were not guilty as charged. The learned trial judge had disagreed with the assessors in his judgment delivered on 11 September 2015, convicted the appellants and sentenced them on 07 October 2015 to 08 years of imprisonment with a non-parole period of 05 years on each of the counts; all sentences to run concurrently.

[7] The appellants' untimely notice of appeal/application for leave to appeal (without mentioning whether it was against conviction and/or sentence) had been signed in person on 21 December 2016 followed by grounds of appeal against conviction and sentence dated 24 January 2017 (both of which were received by the CA registry on 02 February 2017). Thereafter, the Legal Aid Commission had tendered applications for enlargement of time with amended grounds of appeal, written submissions and

affidavits from the appellants only against conviction. The state had tendered its written submissions on 23 June 2020.

[8] 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.

[9] 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?*

[10] ***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.'*

[11] I think 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.'

[12] 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.'

[13] 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

[14] The delay involved, admittedly is approximately one year and 03 months which is very substantial and would not in the ordinary course of things be condoned.

[15] In **Nawalu v State** [2013] FJSC 11: CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 3 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. The appellant in that case was 11½ months late and leave was refused.'*

[16] Faced with a delay of 03 years in **Khan v State** [2009] FJCA 17; AAU0046.2008 (13 October 2009) Pathik J observed that *'There are Rules governing time to appeal. The appellant thinks that he can appeal anything he likes. He has been ill-advised by inmate in the prison. The court cannot entertain this kind of application'*

[17] 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.'*

Reason for the delay

[18] The appellants have stated in their affidavits that all disclosures, summing-up and judgment were kept by his trial counsel and a timely appeal was filed. However, no supporting material has been provided to establish that such a timely appeal was filed and the state has submitted that two experienced counsel from Legal Aid Commission defended the appellants at the trial and they had not supported the appellant's assertion. Therefore, I consider the explanation for the delay to be unsubstantiated and unacceptable.

Merits of the appeal grounds

[19] In the **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."*

[20] 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 want of an acceptable explanation, still the prospects of his appeal would warrant granting enlargement of time.

[21] Grounds of appeal urged on behalf of the appellants are as follows.

> ***Conviction:***
>
> *1. **THE** Learned Judge erred in law and fact in failing to provide a balanced and adequate summing up without categorized ladies and ladies reactions to making complainants of injustices and deciding which category the complainant belonged and as such there was a substantial miscarriage of justice.*
>
> *2. **THE** Learned Trial Judge erred in law and fact in labelling the evidence of Prosecution witness namely Ratuniu Kaukilagi as 'evidence of an accomplice' when Ratuniu Kaukilagi was neither charged for the offence nor offered any immunity by the State.*
>
> *3. **THE** Learned Trial Judge erred in law and in fact by directing the assessors in Clause 82 of the Summing Up remarks that they [assessors] will generally find that an accused gives an innocent explanation to escape criminal liability.*
>
> *4. **THE** Learned Trial Judge erred in law ad in fact in Clause 7 of the Judgment to decide that the assessors had misconceived the directions given and failed to analyse the evidence regarding the issue of consent.*
>
> *5. **THE** Learned Trial Judge erred in law and in fact at Clause 14 of the Judgment to undermine and accuse the assessors when attempting to resolve the conflict in the evidence.*
>
> *6. **THE** Learned Trial Judge failed in fact to distance himself from generalizing that all rape victims was either similar to or faced the same effects as complainant.*

01st ground of appeal

[22] The appellants have criticized the trial judge for having treated the complainant as being 'ignorant, naïve, passive and powerless'. Although not stated specifically where the judge had made those comments it appears that the reference is to paragraphs 14 and 15 of the judgment which are as follows.

> *'14. It is not surprising that Assessors have recourse to personal standards of behaviour and demeanour, or to perceived standard of behaviour and demeanour, by victims of sexual offences when attempting to resolve the conflict in the evidence. General behaviour expected of a woman in a rape case may be different. But in the present case, I observed in the Complainant a naïve and passive woman. Any person who has been raped, will have undergone trauma whether the accused were known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in Court or at the Police Station. The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence.*
>
> *'15. The trial could not be started as scheduled due to the reason that the Complainant was not in a fit and proper condition to give evidence. At the outset, the Prosecution made four applications in the absence of Assessors. For a closed court; a screen to be put up so that the victim can't see the Accused; a bi-dialectal interpreter and name suppression of the victim. In view of the objections raised by the Defence, I had to refuse the second application to ensure a fair trial as there was no evidence at that time before this Court to treat the Complainant as a vulnerable witness. When the Complainant came to give evidence, I could observe her general disposition. She was a naïve and passive woman. In her evidence, she was murmuring and not speaking up; she was seated and hiding her face. She avoided facing others and, was not prompt in her answers.'*

[23] Thus, it is clear that the trial judge's comments of the complainant's disposition had been based on his observations of the complainant. A trial judge cannot be faulted for having drawn such inferences based on his own observations of the demeanor of the complainant as part of his duty when disagreeing with the majority of assessors.

[24] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the

evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)].

[25] This stance is consistent with the position of the trial judge at a trial with assessors in Fiji *i.e.* the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).

[26] Therefore, I see no real prospect of success in this ground of appeal.

02nd ground of appeal

[27] The appellants' complaint here is that the trial judge had wrongly treated the evidence of prosecution witness No.3 Ratuniu Kaukilagi as that of an accomplice and should not have directed the assessors as such. The trial judge's directions on PW3 are at paragraphs 79 of the summing-up.

> *'79. Ratuniu Kaukilagi was called by the Prosecution as an eye witness. He said that SN was pulled; her cloths removed and raped forcibly. He admitted that he also had sexual intercourse with SN even though he was not charged for rape. He conceded his participation in the commission of the crime. I must direct you as a matter of law that you must not rely upon his evidence if you are not satisfied that his evidence is corroborated by an independent source.'*

[28] The judge had directed himself on this witness in the judgment as follows.

> *'30. Ratuniu Kaukilagi was called by the Prosecution as an eye witness. He said that Complainant was pulled; her cloths removed and raped forcibly. He admitted that he also had sexual intercourse with the Complainant even though he was not charged for rape. He conceded his participation in the commission of the crime.*

31. The law says it is dangerous to convict an accused on the evidence of an accomplice alone, and without corroboration from other sources. Corroboration is some independent evidence, which implicate the accused in the commission of the offence.

32. Ratuniu's evidence was corroborated by the Complainant's evidence. Even if the Court were to reject his evidence, the Complainant's evidence alone is sufficient to bring about a conviction in this case. A rape case can stand or fall on the testimony of the victim. However, in some cases a court may warn itself about the inherent dangers of convicting on the unsupported evidence of a particular witness. I do not consider the Complainant to be one such witness. Despite the details of alleged trivial inconsistencies in her evidence alleged by the Defence counsel her evidence was coherent and believable.'

[29] Therefore, it appears that though treating Ratuniu Kaukilagi's evidence as that of an accomplice (the prosecution had not treated him as such) might have been an error, that error had been on the side of caution and not prejudiced the appellant at all, for his evidence had been subjected to a more rigorous test and scrutiny than if he had been treated as an ordinary witness. In any event, the trial judge had concluded that even if PW3's evidence were to be rejected the complainant's evidence alone was sufficient to prove the charges against the appellants beyond reasonable doubt.

[30] This ground of appeal had real prospect of success.

03rd ground of appeal

[31] The appellant finds fault with the trial judge for having directed the assessors in paragraph 82 of the summing-up that they will generally find an accused giving an innocent explanation to escape criminal liability. Paragraph 82 is as follows.

'82. I must remind you that when the Accused elected to give evidence they assumed no onus of proof. That remains on the Prosecution throughout. Their evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate. You will generally find that an accused gives an innocent explanation to escape criminal liability.'

[32] I agree that the sentence *'You will generally find that an accused gives an innocent explanation to escape criminal liability'* is unwarranted and trial judges should avoid similar expressions in a summing-up lest that it has the potential to convey the idea that whatever an accused says is only to escape his criminal liability and lacks

credibility. Such an expression could also have the effect of preempting the function of assessors in considering the accused's defense in its proper perspective.

[33] However, the trial judge had fully narrated the evidence led on behalf of the appellant in paragraphs 48-56 of the summing-up and then addressed the assessors as to how they should evaluate the defense evidence in paragraphs 81-85.

> *'84. It is up to you to decide whether you could accept the version of the Defence and that version is sufficient to establish a reasonable doubt in the prosecution case. If you accept the version of the Accused then you must not find them guilty. Even if you reject the version of the Defence still the Prosecution should prove its case beyond reasonable doubt.*
>
> *85. Remember, the burden to prove the Accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the Accused, at any stage of the trial. The Accused are not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt.'*

[34] In the light of the directions aforementioned on the defense case, the remarks in paragraph 82 of the summing-up cannot be said to have caused a miscarriage of justice.

[35] Thus, there is no real prospect of success in this ground of appeal.

04th ground of appeal

[36] The appellant's argument is that the trial judge erred in stating in paragraph 7 of the judgment that the assessors had misconceived his directions and failed to analyze the evidence regarding the issue of consent. Paragraph 7 is as follows.

> *'7. I find that the Complainant's evidence was probable and believable and the Assessors had reasons to believe her. Assessors misconceived the directions I gave and failed to analyse the evidence presented in a proper perspective and apply the same in deciding the issue of consent. I summarize my finding as follows.'*

[37] The trial judge had every right to disagree with the assessors and overturned their decision as already pointed out. However, he need not have guessed as to why the assessors came to the conclusion they came, for it was not simply necessary. It is possible that the trial judge was merely trying to indicate that he was not agreeing

with the assessors' decision on the issue of consent resolved in favour of the appellant, as that was the only issue to be decided before them.

[38] When disagreeing with the majority of assessors all what a trial judge is expected to do is to undertake an independent assessment and evaluation of the evidence giving 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors. The reasons so given must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.

[39] In my view, a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge

[40] Therefore, the crucial question is whether the trial had discharged his burden as aforesaid while disagreeing with the assessors. Having examined the judgment where the judge had in detail and extensively assessed, and evaluated the evidence and the credibility of the complainant, I am of the view that he cannot be said not to have given cogent reasons for disagreeing with the assessors.

[41] Therefore, despite the impugned statement of the trial judge, I cannot see any real prospect for the appellant to succeed in this ground of appeal.

05th ground of appeal

[42] The appellant once again complains about a statement in paragraph 14 of the judgment where the trial judge had said inter alia *'It is not surprising that Assessors*

have recourse to personal standards of behaviour and demeanour, or to perceived standard of behaviour and demeanour, by victims of sexual offences when attempting to resolve the conflict in the evidence.'

[43] I believe that what the trial judge was trying to covey was that the assessors may have applied a generalized or stereotyped standard in judging the issue of consent when faced with two diametrically opposed versions on 'lack of consent' or 'consent' presented by the complainant and the appellants. The trial judge throughout the judgment, particularly in paragraphs 08 -16 had given reasons why he believed the complainant's version of lack of consent on her part and why he completely rejected the defense version of 'consent' in paragraphs 33-39.

[44] What I have discussed under the fourth ground of appeal is equally applicable to this ground of appeal too. Therefore, despite the disputed statement of the trial judge in paragraph 14 of the summing-up, I cannot see any real prospect for the appellant to succeed in this ground of appeal.

06th ground of appeal

[45] The appellant's argument under this ground of appeal is not clear as it has not been shown in the submissions as to where the trial judge had stated that all rape victims were either similar to or faced the same effects as the complainant.

[46] However, I find that the trial judge had explicitly stated the contrary in paragraphs 12, 14 and 26 of the judgment.

> *'12. Complainant said that she did not scream or yell for help when she was being raped. During the course of Complainant's evidence it was suggested to her that she could have struggled, shouted or otherwise objected to what the Accused were doing. In his closing argument Defence Counsel has submitted that her failure to protest, demonstrates that she was not telling the truth. This is an argument that should be considered with care. We should not assume that there is any classic or typical response to an unwelcome demand for sexual intercourse. The experience of the Courts is that people who are being subjected to non-consensual sexual activity may respond in variety of different ways.*
>
> *'14. It is not surprising that Assessors have recourse to personal standards of behaviour and demeanour, or to perceived standard of behaviour and*

demeanour, by victims of sexual offences when attempting to resolve the conflict in the evidence. General behaviour expected of a woman in a rape case may be different. But in the present case, I observed in the Complainant a naïve and passive woman. Any person who has been raped, will have undergone trauma whether the accused were known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in Court or at the Police Station. The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence.

'26. It would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the Courts is that 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 would react with shame, or fear or shock or confusion, do not complain or go to Police or any other authority for some time. It takes a while for self confidence to re-assert itself. There is, in other words no classic or typical response. A late complaint does not necessarily signify a false complaint.'

[47] I cannot see any real prospect for the appellant to succeed on this ground of appeal as well.

Prejudice to the respondent

[48] The lapse of over 08 years since the commission of the offence may well diminish the chances of a successful prosecution and therefore may prejudice the respondent. It would also be unfair by the victim to force her to go through a trial once again after such a long time.

Order

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL