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

CRIMINAL APPEAL NO.AAU 106 of 2016
[High Court Criminal Case No. HAC 91 of 2013]

BETWEEN

: **AJITH SINGH**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Ratu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **31 March 2020**

Date of Ruling : **20 April 2020**

RULING

[1] The appellant had been charged in the High Court of Lautoka under one representative count of having committed abduction of a young person under 18 years of age with intent to have carnal knowledge contrary to section 211 of the Crimes Decree, 2009 (now Crimes Act, 2009), two counts of rape (one representative count) contrary to section 207(1) and (2) and of the Crimes Decree, 2009 and one count of common assault contrary to section 274 of the Crimes Decree, 2009. The charges were as follows:

FIRST COUNT
[REPRESENTATIVE COUNT]
Statement of Offence

ABDUCTION OF A YOUNG PERSON UNDER 18 YEARS OF AGE WITH <u>INTENT TO HAVE CARNAL KNOWLEDGE:</u>*Contrary to section 211 of the Crimes decree No.44 of 2009 and section 70(3) of the Criminal Procedure Decree No. 43 of 2009.*

Particulars of Offence

AJIT SINGH *between the 1st day of November 2011 and the 31st day of May 2012 at Ba, in the Western division, with intent that* ***SP****, being unmarried and being under the age of 18 years, be unlawfully and carnally known by* ***AJIT SINGH****, took the said* ***SP*** *out of the possession and against the will of her aunty,* ***PRABHA WATI*** *on more than one occasion.*

SECOND COUNT
[REPRESENTATIVE COUNT]
Statement of Offence

RAPE*: Contrary TO SECTION 207 (1) AND (2) (a) of the Crimes Decree NO. 44 of 2009 and section 70(3) of the Criminal Procedure Decree No. 43 of 2009.*

Particulars of Offence

AJIT SINGH *between the 1st day of November 2011 and the 31st day of May 2012 at Ba, in the Western Division, penetrated the vagina of* ***SP*** *with his penis without her consent on more than one occasion.*

THIRD COUNT
Statement of office

RAPE*: Contrary TO SECTION 207 (1) AND (2) (a) of the Crimes Decree NO. 44 of 2009*

Particulars of Offence

AJIT SINGH*, on the 17th day of April 2013 at Ba, in the Western Division, penetrated the vagina of* ***SP*** *with this penis without her consent.*

FOURTH COUNT
Statement of Offence

<u>COMMON ASSAULT</u>*: Contrary to section 274 of the Crimes Decree No. 44 of 2009*

Particulars of Offence

AJIT SINGH *on the 16th day of April 2013, at Moto, Ba in the Western division unlawfully assaulted* ***SP****.*

[2] After full trial, the assessors had expressed a unanimous opinion on 01 April 2016 that the appellant was guilty of all counts except the fourth count. The Learned High Court Judge in the judgment dated 07 April 2016 had agreed with the assessors and convicted the appellant of the first three counts, disagreed with their opinion of not guilty on the fourth count and convicted the appellant on that count as well. He was sentenced on 19 April 2016 to 09 years 07 months with a non-parole period of 07 years.

[3] The appellant had filed an application for extension of time to appeal on 06 July 2016 against conviction and sentence. He had filed written submissions dated 05 December 2016. Later, Legal Aid Commission appearing for him had tendered an amended notice of appeal on 31 December 2019 containing two grounds of appeal only against conviction accompanied by written submissions and the appellant's affidavit explaining the delay. The State had tendered its written submissions on 02 March 2019.

[4] The appellant had filed Form 3 dated 17 March 2020 under Court of Appeal Rule 39 seeking to abandon his appeal against sentence and it was allowed by two judges of this court on 31 March 2020 and his application for enlargement of time was heard on the same day.

[5] The facts as narrated by the learned High Court judge are briefly as follows. The appellant, a cane cutter, wanted underage victim to be his girlfriend but she refused. Then, he made series of threating calls over the phone and forced her to meet him in a hotel in Ba. The complainant finally succumbed to his threats and went, on two occasions, to the hotel he booked. He knew the complainant to be under the age of 18 and forced her to come to the hotel twice with the intention of having sexual intercourse. He did not inform her father or aunt before going to the hotel. On both occasions, he had sexual intercourse with her without her consent. In April 2013 he entered her house forcibly, threatened and punched her. Then he had sexual intercourse with her without her consent. The victim was 15 years old in 2011 when the first incident happened. The appellant was 24.

[6] According to the trial judge, the appellant had admitted having threatened her at the cautioned interview. He also had admitted that he knew she was only 15 when they first went to the Ba Hotel. The appellant had further admitted in court that he had had sexual intercourse with the complainant on three occasions.

[7] The delay in filing the notice of appeal/application for leave to appeal is about 02 months and 02 weeks. 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 **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.'*

[9] Until the Legal Aid Commission agreed to provide legal assistance in his appeal the appellant had to act on his own. Therefore, rather than going through the usual 05 factors set out in ***Kumar***, I would first consider the third and fourth factors together, for if the appellant fails to pass the test in respect of those two considerations it would be superfluous to go into the first, second and fifth factors in this appeal. However, I must once again emphasise that rules and time limits must always be complied with.

[10] 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.....'*

Grounds of appeal

[11]

'1. THE Learned Judge erred in law and fact in failing to provide a balanced and adequate analysis of the totality of evidence.

2. THE Learned Trial Judge erred in law and fact in directing the assessors with this analysis of the evidence where he reiterates the prosecution argument of the complainant having a fear psychosis without being substantiated with medical evidence.'

Ground 1

[12] It is clear that the first ground of appeal is so broadly formulated that neither the respondent nor the court would have been in a position to understand what the real complaint of the appellant is. The Court of Appeal in **Gonevou v State** [2020] FJCA 21; AAU068.2015 (27 February 2020) reiterated the requirement of raising precise and specific grounds of appeal and frowned upon the practice of counsel and litigants in drafting omnibus, all-encompassing and unfocused grounds of appeal. The Court of Appeal said

'[10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.'

[13] However, the counsel for the appellant in written submission had attempted to confine the arguments under the first ground of appeal by focusing on the aspect of the summing-up where the learned trial judge had used the term *'substantial interference'* in relation to the offence of abduction. On the face of it, this argument can, if at all, only be remotely related to the ground of appeal widely couched. A precise and specific ground of appeal could have been easily framed based on the argument now being pursued. Be that as it may, I shall now consider the appellant's said contention as formulated in the written submissions.

[14] According to the appellant, what the trail judge had stated in paragraph 20 and 108 of the summing-up there was no direction as to what would amount to "substantial interference". I quote those paragraphs for easy reference.

> *'20. "Taking" need not be by force, either actual or constructive and it is immaterial whether the girl consents or not. In a 'Constructive taking' the person abducted is not taken out of the possession of his or her parents or guardian by the perpetrator physically but, by some act, words or conduct, he or she cause the victim to leave his/ her parents or guardian. There must be some evidence that there was a "substantial interference with the possessory relationship of parent and child"*
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> *'108. Accused, in evidence, admitted that he went to the Ba Hotel twice and had sexual intercourse with the Complainant. He also admitted that he did not speak to her father or aunt before going to the hotel with her. According to the birth certificate, Complainant was born on 14th September, 1995. She was under the age of 18 years during the period mentioned in the information. There is no dispute that after the demise of complainant's father, Prabha Wati became the legal guardian of the Complainant. The evidence that he went to a hotel with the complainant to have sexual intercourse without consulting her father or aunt is sufficient to find that there was a 'substantial interference' with the possessory relationship of parent/ guardian and child.*

[15] The appellant's complaint has to be viewed in the light of section 211 of the Crimes Decree

> *'Abduction of person under 18 years of age with intent to have carnal knowledge*
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> *211. (1) A person commits a summary offence if he or she, with intent that any unmarried person under the age of 18 years shall be unlawfully and carnally known by any person (whether such carnal knowledge is intended to be with any particular person or generally), takes or causes to be taken the person out of the possession and against the will of his or her father or mother, guardian or any other person having the lawful care or charge of the person under 18 years.*
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> *Penalty — Imprisonment for 5 years*
>
> *(2) It shall be a sufficient defence to any charge under this section if it shall be made to appear to the court that the person so charged had reasonable cause to believe and did in fact believe that the other person was of or above the age of 18 years.*

[16] Shameem J. in **Ali v The State** [2003] FJHC 67; HAA0008J.2002L (14 March 2003) said in relation to section 153 of the Penal Code as follows

> *'As for the count of abduction, he found that the complainant was under the age of 18 at the time of the offence, that the complainant had accepted a lift from the Appellant so he would take her home, that the Appellant intended to rape her when he took her in his van and that the complainant's consent to the lift was immaterial. He said he found on the evidence, "some conduct amounting to a substantial interference with the possessory relationship of parent and child" (**R –v- Jones** (1973) Crim. L.R. 621.) He convicted the Appellant on both counts.*
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> *'This offence is similar to the offence of "Abduction of unmarried girl under eighteen" under the Sexual Offences Act 1956 in England. The offence is committed when a girl under the age of eighteen, is taken out of the possession of her parents against their will for the purpose of sexual intercourse. In **R –v- Manktelow** (1853) 6 Cox 143, it was held that the "taking" need not be by force, either actual or constructive and it is immaterial whether the girl consents or not. There must be some evidence (as the learned Magistrate held) that there was a "substantial interference with the possessory relationship of parent and child" (**Jones** supra). In **R –v- Timmins** (1860) 8 Cox 401, the accused planned with the victim to meet and stay away from her home for several days. They did so meet and had sexual intercourse. The father did not consent, and the accused knew he did not consent. It was held that accused was rightly convicted of Abduction. It is a defence for the accused to show that he did not know, and had no reason to know that the girl was under the lawful care of her parents, or that he had reasonable cause to believe that she was over the age of eighteen. And, it was held in **R –v- Mycock** 12 Cox 28 that where the girl has already left her father's house for a temporary purpose, intending to return to it, she is still in her father's care within the meaning of the offence, and if whilst out of the house the accused induces her to go away with him, he is guilty. The question of whether the girl was in the possession of her parents is a question of fact.*

[17] Section 153 of the Penal Code stated

> *"Any person who, with intent that any unmarried girl under the age of eighteen years shall be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, takes or causes to be taken such girl out of the possession and against the will of her father or mother, guardian or any other person having the lawful care or charge of her, is guilty of a misdemeanour:*
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> *Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of eighteen years."*

[18] It appears that the term *'takes or causes to be taken the person out of the possession and against the will of his or her father or mother, guardian or any other person having the lawful care or charge of the person under 18 years'* found in both section 153 of the Penal Code and section 211 of the Crimes Decree, have been interpreted to include *'some conduct amounting to a substantial interference with the possessory relationship of parent and child'*. However, this is not an exhaustive interpretation of the requirement of disturbing or interfering with the possession of the person taken away held by any one or more of the persons having lawful care of the said person against their will.

[19] Therefore, the learned trial judge cannot be said to have erred in law in using the phrase *'some conduct amounting to a substantial interference with the possessory relationship of parent and child'* in the summing-up. However, it might have been better had the learned High Court judge explained the term *'substantial interference'* to the assessors but given the facts of the case, particularly the admissions of the appellant, there was clear and ample evidence for such an interference to be drawn as highlighted by the trial judge in the impugned paragraphs. Moreover, the trial judge in paragraph 22 of the judgment had found that *'...The evidence that Accused went to a hotel with the Complainant to have sexual intercourse without consulting her father or aunt is sufficient to find that there was a 'substantial interference' with the possessory relationship of parent/ guardian and child.'* I shall also place on record the fact that the counsel for the appellant at the trial had not requested any redirection on this aspect despite the availability of an opportunity to do so.

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

Ground 2

[21] The appellant argues that the learned trial judge had used the word *'fear psychosis'* in paragraph 98 of the summing-up without any medical evidence that the complainant was suffering from such a mental state and failed to explain to the assessors what psychosis is. Paragraph 98 is as follows

'98. Complainant's explanation was that accused and Vikash threatened and kept on threatening her generating in her a fear psychosis that they will harm her family and tell the principal and father that she slept with him. She was fifteen years old when the first alleged incident occurred. She stayed with her father who was sick. After the death of her father, she lived with her aunt. In light of the direction I give with regard to late complaints by rape victims, you consider if her explanation is probable in all the circumstances of this case. It is up to you to form your own opinion on her explanation. Whether that is so in this particular case is a matter for you to consider and resolve."

[22] The learned trial judge had more or less stated the same thing in paragraph 11 of the judgment as well.

[23] Medical literature reveals that symptoms of psychosis include (i) difficulty concentrating (ii) depressed mood (iii) sleeping too much or not enough (iv) anxiety (v) suspiciousness (vi) withdrawal from family and friends (vii) delusions (viii) hallucinations (ix) disorganized speech, such as switching topics erratically (x) depression (xi) suicidal thoughts or actions.

[24] It is also revealed in medical writings that there is no psychiatric disorder with the name fear psychosis. However, it is considered as a synonym of paranoid psychosis which is experienced with longstanding feelings and perceptions of being persecuted. Fear psychosis is supposed to be basically accompanied with anxiety. The individual seems to relate to the traumatic experience for more than a while. Yet, it is not expected to last longer and to be dealt with by relaxing, spending time with family and friends and getting back to normal routine.

[25] However, it does not appear from the summing-up or the judgment that there has been evidence to medically substantiate a scenario involving *'fear psychosis'* or that the complainant may have been in such a state of mind. It looks as if the learned trial judge has used the term *'fear psychosis'* in a more general sense to describe the fear factor entertained by the complainant in not making a prompt complaint against the appellant.

[26] It is always advisable for the trial judges to avoid technical terms such as *'fear psychosis'*, unless there is concrete evidence, which have far deeper and technical meanings than ascertainable on the surface. Such exaggerated descriptions can communicate an unwanted massage to and create a wrong impression in the assessors keeping in mind that they are laymen. The best way for the trial judges to address the assessors and direct themselves in dealing with factual situations is to use uncomplicated, plain and simple language avoiding the use of technical terms as much as possible. If such a term is to be used the trial judge should be mindful to explain it simple language to the assessors.

[27] Having said that, I do not think that given the comprehensive nature of the summing-up, the use of the phrase *'fear psychosis'* would have had a decisive impact on the opinion of the assessors. A summing-up should be looked at as a whole and not be compartmentalised. Given the very strong evidence led against the appellant, the assessors and the trial judge would have been left with no other verdict.

[28] There is no real prospect of the appellant succeeding on his 02nd ground of appeal too.

[29] In view of my above conclusions on both grounds of appeal, there is no need to consider the delay and reasons therefor and whether any prejudice would be caused to the appellant by the extension of time.

[30] Accordingly, enlargement of time is refused.

Order

1. Enlargement of time against conviction is refused.

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL