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

CRIMINAL APPEAL NO.AAU 039 of 2016
[High Court of Labasa in Criminal Case No. HAC 52 of 2012]

BETWEEN	**:**	**PENAIA VALEVESI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Ms. S. Nasedra for the appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	**:**	**11 June 2020**
Date of Ruling	**:**	**22 June 2020**

RULING

[1] The appellant had been charged in the High Court of Labasa for having committed an offence of rape contrary to section 207(1) and (2)(b) of the Crimes Decree No.44 of 2009 by inserting his finger into the vagina of the victim who was 05 years old at the time the offence was committed.

[2] After full trial, the assessors had expressed a unanimous opinion of not guilty on the count of rape on 10 July 2014. The learned High Court judge in the judgment dated 10 July 2014 had disagreed with the assessors, convicted the appellant and sentenced him on the same day to imprisonment of 09 years with a non-parole period of 06 years.

[3] The appellant in person had signed an application for enlargement of time on 02 October 2014 (original year written over and not clear) against conviction and sentence but received by the Court of Appeal registry on 23 March 2016. The delay could be between 07 weeks to 01 year and 06 ½ months. In another letter received by the registry on 30 May 2017 the appellant had informed that he had tendered his appeal papers with the prison authorities thrice within an year and the first of them within 28 days of the sentence. Therefore, he contends that the delay in having the appeal received by the registry was beyond his control. Legal Aid Commission had thereafter tendered an application for enlargement of time, amended grounds of appeal only against conviction and written submissions on 19 March 2019 on behalf of the Appellant. An application to abandon the appeal against sentence in Form 3 had been signed on the same day and tendered to court. The State had tendered its written submissions on 04 June 2020.

[4] The brief facts of the case are as follows. On 20 August 2012 the appellant whilst visiting a village in Nasau, Bua to buy copra from the villagers decided to take a rest in the house of one of the villages. While he was resting he saw the victim, aged 05, walking pass the house. The victim was going to a village shop. The appellant called the victim inside the house, undressed her and rubbed her vagina with his fingers. The victim's mother was distantly related to the appellant. The victim did not complain to anyone when she returned home until she was prodded by her mother on the following day or some days later (see paragraphs 18 and 19 of the summing-up) where she had told the mother that the appellant had poked her vagina. The mother in her evidence had confirmed the victim's position. The doctor who had examined the victim on 07 September had found mild bruising along the introitus of the victim's vagina and her hymen had been partially perforated. The medical opinion had been that the injuries were consistent with vaginal penetration. The doctor also had said that it was possible that the injuries could have resulted from a fall.

[5] The appellant while acknowledging that the complainant was with him inside the house at the relevant time, had said in his evidence that while he was sleeping inside the house the victim had walked in and jumped onto his bed and woke him up. He had slapped the victim in her cheek and chased her out of the house. The appellant had denied that he had penetrated the victim's vagina with his fingers.

[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:*
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> *(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

01st ground of appeal

> *'That the learned trial judge erred in law and fact when he failed to provide cogent reasons for overturning the unanimous not guilty verdict of the assessors.'*

[11] The appellant mainly complains that the learned trial judge had not fully considered the credibility of the victim in paragraph 7 of the judgment and other relevant considerations such as the delayed reporting by the victim in disagreeing with the assessors. He relies on decisions in **State v Hurtado** [2016] FJCA 115; AAU00148.2015 (30 September 2016), **Dutt v State** [2016] FJCA 3; AAU36.2015 (27 January 2016).

[12] I said in **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020) that:

> *'A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing, 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).'*

[13] The State relies on **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) where it was held

> *'[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have "cogent reasons" for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the judge's views as to the credibility of witnesses: **Ram Bali** v **Regina** [1960] 7 FLR 80 at 83 (Fiji CA), affirmed **Ram Bali** v **The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962); **Shiu Prasad** v **Reginam** [1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in **Setevano** v **The State** [1991] FJA 3 at 5, the reasons of a trial judge:*

[14] I find from the summing-up that in paragraphs 18, 19 and 20 the learned trial judge had drawn the attention of the assessors to the fact that the victim had not reported the incident promptly as confirmed by the mother (thus, rightly or wrongly it was not considered a recent complaint). In paragraph 7 of the judgment the learned judge had again referred to the fact that the victim had not volunteered to complain to the mother of the incident and the complaint anyway was not prompt. However, the trial judge had further said that nevertheless, he would accept the victim's evidence based on her demeanour in court, who at age 06 when giving evidence, had impressed him as a naive but an honest witness. The learned trial judge had further accepted the medical evidence and concluded that the injuries seen on the victim's genitalia had been due to penetration but not due to a fall. In fact I cannot gather from the material available as to whether the defense had at least suggested to the victim that she had suffered those injuries as a result of a fall in cross-examination. The trial judge had concluded in paragraph 8 of the judgment that he found the appellant's version that the victim had voluntarily walked into the house and jumped on him while he was asleep improbable.

[15] Therefore, The learned trial judge had clearly dealt with the weight of the evidence and his view of credibility of the victim and the appellant.

[16] In this context, one must not forget the judicial pronouncements on the role played by the assessors in Fiji.

[17] **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006) the Court of Appeal held that

> *"...In Fiji, 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..."*

[18] **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] Keith, J reiterated:

> *"21...in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".*

[19] In **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016) the Supreme Court again held on the role of assessors and the judge as follows.

> *'58.'In Noa Maya v. The State* [2015] FJSC 30*; CAV 009. 2015 (23 October 2015] his Lordship Sir Keith, J said at paragraph 21:*
>
> *"...in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".*

[20] One must also not ignore the views expressed in the following decisions as I find the learned trial judge's decision to disagree with the assessors and convict the appellant is not obnoxious to the principles underlined therein.

[21] **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) the Court of Appeal said

> *'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.*

[22] In **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) the Supreme Court said

> *'[23] In the course of its judgment in Ram v The State this Court succinctly described the role of the trial judge as well as the supervisory function of the appellate court in the following words-*
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> *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the*

Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case."(emphasis added)

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

02nd ground of appeal

'That the learned trial judge erred in law and fact when he failed to consider the issue of delayed reporting of the complainant thus questioning the credibility of the complainant'

[24] I have already addressed this concern under the first ground of appeal. As I pointed out the learned trial judge had given his mind to this aspect in paragraphs 18, 19 and 20 of the summing-up and paragraph 7 of the summing-up. The reasoning behind the Learned trial judge's decision to believe the evidence of the victim buttressed by the medical 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:-
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> > *"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."*

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

[26] In view of my above determinations on overall real prospect of success of the appeal before the Court of Appeal I would not rule on the delay, the reasons for the delay and prejudice to the respondent at this stage.

[27] Accordingly, leave to appeal against conviction is refused.

Order

1. Leave to appeal against conviction is refused.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL