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

CRIMINAL APPEAL NO.AAU 104 of 2019
[In the High Court at Lautoka Case No. HAC 96 of 2015]

BETWEEN	:	**BIU CABEBULA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Mr. S. Waqainabete for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**02 September 2021**
Date of Ruling	:	**03 September 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka on one representative count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and another count of indecent assault contrary to section 212 (1) of the Crimes Act, 2009 committed at Sigatoka in the Western Division.

[2] The information read as follows:

FIRST COUNT

REPRESENTATIVE COUNT

Statement of Offence

RAPE*: Contrary to section 207 (1) & (2) (a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

BIU CABEBULA *between the 9th of July, 2012 to the 31st of July, 2012 at Sigatoka in the Western Division, penetrated the vagina of "**AB**" with his penis without her consent.*

SECOND COUNT

Statement of Offence

INDECENT ASSAULT*: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

BIU CABEBULA *on the 6th day of July, 2012 at Sigatoka in the Western Division, unlawfully and indecently assaulted **"AB"** by caressing her breast.*

[3] At the end of the summing-up the assessors had in unanimity opined that the appellant was guilty of rape and by a majority opined that he was guilty of indecent assault as well. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 20 March 2018 to an aggregate sentence of 13 years and 11 months with a non-parole period of 10 years.

[4] The appellant's belated appeal against conviction and sentence filed in person had reached the Court of Appeal registry on 26 June 2019. The delay is over 01 year and 02 months. He had tendered an application for extension of time with an affidavit on 10 June 2020. The Legal Aid Commission had tendered a formal application for enlargement of time consisting of amended grounds of appeal, the appellant's affidavit and written submissions on 21 January 2021. The state had filed its submissions on 29 January 2021. Both parties have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or *via* Skype.

[5] 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 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC

17. Thus, the factors to be considered in the matter of enlargement of time 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?

[6] 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 [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[7] The delay of the appeal (being over 01 year and 02 months late) is substantial. The appellant has attributed the delay to the misplacement of the acknowledgement letter by Naboro Maximum Correction Office, issued by the Court of Appeal registry about his initial appeal papers. However, the CA file does not contain any appeal papers filed by the appellant prior to 26 June 2019. The available acknowledgement dated 01 August 2019 is regarding his appeal papers tendered on 26 June 2019. In fact the appellant had admitted in his initial affidavit dated 03 June 2020 that he filed his appeal on 01 April 2019 after more than a year and attributed paucity of his knowledge in law as the reason for the delay. Thus, his explanation for the delay is incredible, if not completely false. Nevertheless, I would see whether there is a real prospect of success for belated grounds of appeal in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent had not averred any prejudice that would be caused by an enlargement of time.

[8] The grounds of appeal urged on behalf of the appellant by the Legal Aid Commission are as follows:

> ***Grounds of Appeal***
>
> ***Ground 1***
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> *THAT the conviction was unreasonable and cannot be supported by the totality evidence at trial when the Learned Trial Judge found that Appellant*

had penetrated the vagina of the complainant with his penis without her consent when State had not proven beyond reasonable doubt the lack of consent.

Ground 2

THAT the Learned Trial Judge may have fallen into an error in fact and law by convicting the Appellant without any regard to the belatedness of the complaint of rape thus raising a reasonable doubt on the credibility and reliability of the complainant's allegation of rape.

[9] The appellant without leave of this court, without informing his counsel and after the matter had been fixed for hearing, had tendered 08 additional grounds of appeal against conviction and sentence on 02 July 2021 (with no written submissions). The state too does not appear to have had notice of the amended grounds in order to respond to them. I do not condone and in deed frown upon the practice of the appellants filing grounds of appeal or any other papers relating to the appeal behind the back of their counsel when they are represented by counsel taking this court and the respondent by surprise and leaving this court totally unassisted. It amounts to abuse of judicial process and disrespect to court. No party to judicial proceedings should attempt to steel a march on the opponent and subvert the orderly procedure of court. Therefore, I shall not consider any of the amended grounds of appeal at this stage, as this court has not been assisted by counsel for the appellant and the respondent regarding the same as none of them had received any notice of the amended grounds of appeal.

[10] The trial judge had summarized the prosecution case in the sentencing order as follows:

> 2. *The victim in the year 2012 was 15 years of age and a Form 4 student of Sigatoka Village. In the same year the accused also moved to the same Village with his father who was a Pastor.*
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> 3. *On 6 July, 2012 at about 7.30pm the victim and her youngest sister went to attend a church service at the accused's house. After the church service finished and as the victim and her youngest sister were about to leave for home, the accused came and offered to drop them.*
>
> 4. *The victim refused the offer but the accused insisted, whilst walking the accused told the victim that he wanted to have sex with her but the victim refused. Upon reaching home, the accused told the victim's sister to go*

and watch movies at her uncle's house. The victim also wanted to go with her sister but the accused stopped her by forcefully pulling her arm.

5. *The victim repeatedly told the accused that she could not have sex with him. After the accused let go of her hand she entered her house through the front door. After locking the door she went out through the back door to bring her sisters home. When they were returning home the victim saw the accused standing outside their kitchen. The victim was shocked to see the accused she then told her sisters to go inside the house. The accused came and pulled her hand and took her inside the kitchen which was detached from the main house.*

6. *In the kitchen the accused forced the victim to sit on the floor and started touching her breast over her clothes. The victim managed to escape from the accused but before she left the accused warned her not to tell anyone about what had happened.*

7. *When the accused was touching her breast the victim was afraid because this was the first time someone had done this to her.*

8. *On 9 July, 2012 the accused went to the house of the victim, she was at her home with her sisters and a cousin Ana. After the grog session finished, the victim went to sleep, whilst asleep she felt someone tapping her leg and also pulling it. When she woke up she saw the accused standing beside the bed in the bedroom. She was shocked to see the accused in her bedroom.*

9. *The victim told the accused to go into the living room so as not to disturb her mother who was sleeping with the victim in the same bedroom. In the living room she asked the accused how he was able to get inside the house.*

10. *The accused pulled her hand and laid her on the bed, took off her pants and also his pants he then inserted his penis inside her vagina and had sexual intercourse for three (3) minutes.*

11. *When the accused was on top of her having sex, she felt pain all over her body especially her thighs. The victim did not consent to what the accused had done to her. After having sex the accused stood up got dressed and before going away he told the victim not to tell anyone about what had happened. After the accused left, the victim went to the bathroom and she saw blood coming out from her vagina.*

12. *The victim also informed the court about another incident in the same month that is July. At about 9pm whilst the victim was sleeping in the bedroom with her sisters she felt someone tapping her leg. When she woke up she was shocked to see the accused standing beside her bed.*

13. *The accused pulled her hand and took her to the last bedroom and inside the room he forcefully took off her clothes and inserted his penis into her*

vagina and had sexual intercourse for 10 minutes. The victim was scared and tried to get away from the accused because this was not the first time he had done this to her.

14. *The victim wanted to shout but the accused had blocked her mouth with his hand and also told her not to shout. She tried to push and kick him away but could not since he had held her tightly and continued to have sex with her.*

15. *The victim felt weak all over and couldn't do anything, her sisters were sleeping inside their bedroom and her mother was not at home. Before leaving, the accused told the victim not to tell anyone about what had happened.*

16. *On 27 February, 2013 the victim went to the Lautoka Hospital with her aunt since she was sick, on this day she came to know that she was 7 months pregnant. A Doctor from the hospital reported the matter to the police. At the Police Station the victim told the police officers everything the accused had done to her.*

[11] The appellant had elected to give evidence and called two witnesses on his behalf. His defense had been one of consensual sex as set out by the trial judge in the judgment.

31. *The accused in denying all the allegations states that he had consensual sex with the complainant on two occasions only. The accused further states that he was in a relationship with the complainant who was his girlfriend.*

32. *In respect of the count of rape the accused maintains that he had not forced the complainant at any time and that she had the opportunity to shout or raise alarm but she did not because she had consented to have sex with him. The accused also states that the complainant cried rape after it was revealed that she was pregnant and it took her 7 months to lodge a complaint against him when she had all the opportunity to do so earlier.*

33. *In respect of the count of indecent assault the accused states that the complainant had willingly come into the kitchen where he was waiting for her. The accused did not touch the complainant's breast at all but had sexual intercourse with her consent.*

34. *Finally the accused says the complainant had made up the allegations against him after it was revealed that she was pregnant.*

01st ground of appeal

[12] The appellant's counsel submits that the complainant should have shouted out had the appellant pulled her into the kitchen outside the main house on 06 July 2012 (described at paragraphs 39-43 of the summing-up) suggesting that she was a consenting party. Regarding the incident on 09 July 2012 the counsel argues that unless the complainant had opened the door the appellant could not have entered the house as she had previously closed the door (described at paragraphs 46-53 of the summing-up) insinuating that she was consenting to his presence. On the third incident in July 2012 (described at paragraphs 55-57 of the summing-up) the appellant's counsel argues that the complainant should have shouted out the moment she saw the appellant inside the bedroom and when pulled into the last room of the house because she was a consenting party to sexual intercourse.

[13] It appears that on 06 July 2012 the appellant had only touched the complainant's breasts in the kitchen and she had run inside the house before anything else happened where the appellant had told her not to tell anyone as to what happened.

[14] On 09 July 2012 where the appellant had forcible sexual intercourse the complainant had not shouted or raised alarm because she had thought that the mother would think that she was consenting to what the appellant was doing and she was also frightened as he was big man and she was a small girl.

[15] Regarding the last incident in July the complainant's evidence is that she wanted to shout but the appellant had blocked her mouth and told her not to shout. She could not get away though she tried as the appellant had held her tightly and continued to have sexual intercourse with her.

[16] The appellant's counsel relies on **Kaiyum v State** [2014] FJCA 35; AAU0071 of 2012 (14 March 2014) to buttress his arguments and submits that it was incumbent upon the prosecution to have asked the complainant why she did not resist or raise alarm on 06 July 2012, why she did not did not resist or raise alarm when her mother

was lying beside her on 09 July 2012 and why she did not resist or raise alarm when the appellant was tapping her leg when her sister was sleeping next to her.

[17] In fact these are matters that should have been probed by the defense counsel and not by the prosecuting counsel as it was the defense position that acts of sexual intercourse were consensual. The complainant had given her own reasons for not behaving the ideal way the appellant's counsel expects her to have reacted in the three instances. There were essentially trial issues and should have been fully ventilated under cross-examination.

[18] In fact I find that the counsel's propositions appear to have been indeed tested albeit not exactly on the same lines under cross-examination and the trial judge had referred to the complainant's answers at paragraphs 43, 44, 45, 52, 56, 57, 58 and 59 of the summing-up.

[19] The Constitutional Court of South Africa stated in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) paras 61-63:

> *'[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness' attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn (1893) 6 R 67 (HL) and has been adopted and consistently followed by our courts.*
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> *[62] The rule in Browne v Dunn is not merely one of professional practice but is "essential to fair play and fair dealing with witnesses". [See the speech of Lord Herschell in Browne v Dunn, above.] . . .*
>
> *[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed . . . particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the*

witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.'

[20] In my view, the decision in **Kaiyum v State** [2014] FJCA 35; AAU0071 of 2012 (14 March 2014) should be confined to the facts of that case and cannot be applied across the board.

[21] The assessors had clearly accepted the complainant's evidence. The trial judge at paragraphs 36-47 of the judgment stated in clear terms as to why he believed the complainant.

[22] It is a well-established principle that courts of appeal will not tamper lightly with the trial court's credibility findings [vide **R v Dhlumayo and Another** [1948] 2 All SA 566 (A); 1948 (2) SA 677 (A) at 705-706. see also **S v Francis** 1991 (1) SACR 198 (A) at 204C-E]. Absent demonstrable, material misdirection and clearly erroneous findings, the appellate court will not disturb the trial court's factual findings (vide **Naidoo v The State** (333/2018) [2019] ZASCA 52 (1 April 2019) para 46). Upon examining the summing-up and the judgment, I am of the view that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied and have found the appellant guilty of two acts of rape beyond reasonable doubt. I cannot say that the assessors and the trial judge 'must', as opposed to 'might', have entertained a reasonable doubt about the appellant's guilt on two counts of rape [see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[23] Therefore, I do not think that there is a real prospect of success in this ground of appeal.

02nd ground of appeal

[24] The appellant's counsel argues that the trial judge may have fallen into error in convicting the appellant without any regard to the belatedness of the complaint of rape.

[25] The complaint had been made to the police on 27 February 2013, the day the complainant want to hospital as she was sick and it was revealed that she was 07 months pregnant. She was 15 years old when the incidents happened.

[26] The following paragraphs from the summing-up are relevant to this complaint:

> *'60. On 27 February, 2013 the complainant went to the hospital with her aunt since she was sick, on this day she came to know that she was 7 months pregnant. A Doctor from the hospital reported the matter to the police.*
>
> *61. At the Police Station the complainant told the police officers everything the accused had done to her, it took her so long to tell anyone because the accused had warned her if she told anyone about what he had done to her he will do something to her.*
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> *69. The complainant agreed that had she not been pregnant she would not have told anyone about the incidents, she denied the allegations of rape was made up by her due to the fear of being beaten by her father. According to the complainant she wanted to tell her father and when she got pregnant the whole Village was pointing to the accused family. Although she had 7 months from July 2012 to February, 2013 to report the three incidents to somebody she did not.*
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> *70. In re-examination the complainant clarified that the reason why she did not tell anyone for about 7 months was because she was really ashamed of herself which had affected her in school work even her teacher had asked her what had happened but she did not say anything.*
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> *87. The accused denied all the allegations made against him by the complainant. According to the accused this was the last time he had sex with the complainant. The complainant informed the accused that she was pregnant before they had sex and that he was not to inform anyone about her pregnancy.*
>
> *106. The reason why the complainant did not tell anyone for 7 months from the date of the allegation was because she was really ashamed to tell anyone.*

108. ……..The accused also states that the complainant cried rape after it was revealed that she was pregnant and it took her 7 months to lodge a complaint against him when she had all the opportunity to do so early.'

[27] The trial judge had specifically directed the assessors on different reactions of victims of rape as follows:

71. Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for a child of 15 years not to complain to anyone about what she had gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

72. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant in this case did not inform anyone about the incidents until she came to know that she was pregnant on 27 February, 2013.

[28] According to the appellant the complainant was his girlfriend and first act of sexual intercourse was on 06 July 2012 and the last on 09 July 2012. Thus, the 07 month's pregnancy by 27 February 2013 tallies with the lapse of time from 06/09 July 2012. The complainant could not have been pregnant even before the last day of sexual intercourse as claimed by the appellant.

[29] The trial judge had addressed this issue of delay in the judgment as follows:

34. Finally the accused says the complainant had made up the allegations against him after it was revealed that she was pregnant.

39. I accept the reasons given by the complainant that she was frightened and did not know what to do. I also accept that the complainant told the Police everything the accused had done to her when the matter was reported. Although the complainant was late by 7 months, this delay does not cast any doubt on the reliability of the complainant's evidence.

[30] The delay in reporting, in my view, passes *'the totality of circumstances test"* as set out in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) which discussed as to how to deal with a belated complaint. Contrary to the appellant's theory that the complainant complained of rape because she was found to be pregnant, it appears that the complainant's pregnancy had finally revealed the appellant's crime and make it come to light which otherwise may have been swept under the carpet forever.

[31] Therefore, there is no real prospect of success in this ground of appeal either.

Order

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

COURT OF APPEAL FIJI

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