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

CRIMINAL APPEAL NO.AAU 52 of 2020
[In the High Court at Suva Case No. HAC 348 of 2018]

BETWEEN	:	**SHIVA SHIVNESH LAL**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Mr. M. Fesaitu and Ms. S. Daunivesi for the Appellant**
	:	**Ms. K. S. Semisi for the Respondent**
Date of Hearing	:	**02 November 2021**
Date of Ruling	:	**05 November 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva with one count of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 and one count of sexual abuse contrary to section 210 (1) (a) of the Crimes Act, 2009 committed at Nasinu in the Central Division between 01 August 2018 and the 31 August 2018.

[2] The information read as follows:

*'**COUNT ONE***

Statement of Offence

RAPE: *contrary to section 207(1) and (2) (a) of Crimes Act of 2009.*

Particulars of Offence

SHIVA SHIVNESH LAL *between the 1st day of August 2018 and the 31st day of August 2018 at Nasinu in the Central Division had carnal knowledge of* ***SL****, without her consent.*

COUNT TWO

Statement of Offence

SEXUAL ASSAULT: *contrary to section 210 (1) (a) of Crimes Act of 2009.*

Particulars of Offence

SHIVA SHIVNESH LAL *between the 1st day of August 2018 and the 31st day of August 2018 at Nasinu in the Central Division had unlawfully and indecently assaulted* ***SL****, by touching her thighs and kissing her mouth.'*

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was not guilty of both counts. The learned trial judge had disagreed with the assessors' 'not guilty' opinion, convicted the appellant of both counts and sentenced him on 31 July 2019 to an aggregate sentence of 10 years of imprisonment with a non- parole period of 06 years (after the remand period was deducted the sentence was 09 years, 08 months and 15 days with a non-parole period of 05 years, 08 months and 15 days.

[4] The appellant had appealed in person against conviction out of time (14 July 2020). Thereafter, the Legal Aid Commission had sought enlargement of time to appeal accompanied by an affidavit, amended grounds of appeal and written submission filed on 17 June 2021. The state had tendered its written submissions on 16 September 2021.

[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 10 ½ months) is substantial. The appellant had stated that he was expecting his private trial lawyers to lodge the appeal but his father learnt that $28,000.00 had to be paid in order to obtain their services for the appeal. Then, he decided to file his appeal in person. Nevertheless, this explanation cannot account for the delay of 10 ½ months. Thus, his explanation for the delay is unacceptable. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] The sole ground of appeal urged on behalf of the appellant against conviction is as follows:

> ***Conviction***
>
> *'THAT the Learned Trial Judge did not provide cogent reasons when overturning the unanimous opinions of the assessors.'*

[9] The trial judge in the summing-up had summarized the complainant's evidence against the appellant as follows:

> *36. In August 2018 she was living with her father, step mother, step brother and real brother. She was in form 6. On Wednesday, 29/08/2018 she did not go to school because her step mother and the step brother went to Viria. They went*

there because her step mother was sick. That day, the accused came home around 7pm. The accused told her to go for prayers held at her aunt's house and she went there. The prayer session concluded around 10pm and she came home around that time. She started watching a TV series. While she was watching TV, the accused came to the house around 11pm and then came to her room. The accused then rolled a 'suki' and started smoking in the verandah. After smoking, he came to the room and told her that he is feeling cold and he came under her blanket.

37. He then started touching her thighs. When she asked him what he is doing, he did not respond. She said that the accused was touching her indecently and she did not like it. Thereafter the accused played a porn movie in the TV. When she asked him why he is playing that kind of a movie, he did not respond. She then removed the CD. Thereafter, the accused told her to massage his head because he is having a headache. She placed a pillow on her lap and the accused placed his head on the pillow and she started massaging his head. The accused again started touching her thighs. She pushed him away but the accused came over her forcefully. He put his hand inside her dress and started to touch her breast. She pushed him when he was trying to forcefully grab her breast and as a result, her breast got scratched by the accused's nails. Thereafter the accused tried to kiss her. He first tried on her neck, but she kept on moving the upper part of her body.

38. Then the accused forcefully lifted her legs and removed her undergarments. At this time she tried to get out of the bed but the accused kept on pulling her to the bed. The accused forcefully lifted her legs and inserted his penis inside her vagina. She tried to push him with her legs but was not successful. The accused had sexual intercourse for few seconds. When the accused was having sexual intercourse with her, she felt pain in her vagina and also was disgusted. She said that the accused told her not to tell anyone because if she tells anyone then her life and his life will be ruined. Thereafter he left.'

[10] The other witnesses for the prosecution were the complainant's stepbrother (PW2) and the doctor.

[11] The appellant's position had been a denial and it is described as follows in the judgment:

15. The position taken by the defence was that the complainant is of a bad character and she had fabricated the allegations against the accused to get even with him for him reporting to their father about the complainant. According to the accused, their father had requested him to check on the complainant and to put her on the right track and he was doing just that. In essence, the defence asserted that given the complainant's bad character she cannot be trusted. This is what the defence counsel relayed to the assessors

during his closing address. I noted that the defence counsel also stressed on what the complainant said during her re-examination about living her life on her own terms.

01st ground of appeal

[12] The trial judge had overturned the opinion of not guilty by the assessors which he was entitled to do. The judge is the sole judge of fact (and law) 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).

[13] 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) and **Fraser v State** [2021]; AAU 128.2014 (5 May 2021)].

[14] A ground based on lack of cogent reasons alone would not automatically help an appellant to succeed in appeal as the ultimate test is whether the verdict recorded by the trial judge should be set aside on any of the grounds set out in section 23 of the Court of Appeal Act.

[15] On a similar ground of appeal I had the occasion to remark in **Baleimakogai v State** [2021] FJCA 58; AAU076.2018 (1 March 2021) as follows:

> *'[18] However, it can be argued that the consequence of failure to give 'cogent' reasons would not necessarily guarantee success for the appellant in appeal, for this court can adequately discharge its appellant function independent of the said failure on the part of the trial judge. The argument goes further to state that section 237(4) is silent on the consequence of failure to adhere to the section by the trial judge i.e. to give reasons in differing with the assessors…….*
>
> *[19] In other words, the argument goes to state that irrespective of whether the trial judge had failed to give cogent reasons in the judgment in disagreeing with the assessors, still the Court of Appeal could independently assess evidence to determine whether there is any ground enumerated in section 23 Court of Appeal Act upon which the verdict should be set aside and if not, the verdict would not be disturbed. The appellate function is prescribed by section 23 of the Court of Appeal Act.'*

[16] Going by the submissions of the appellant under the sole ground of appeal it appears that the gist of the appellant's complaint is that the trial judge's verdict convicting the appellant is not reasonably available on evidence whereas 'not guilty' verdict of the assessors is reasonably available. As stated earlier it is the judge who ultimately decides whether an accused is guilty or not and not the assessors and what matters is the verdict of the trial judge. The question that should be posed is whether the judge's verdict is unreasonable or cannot be supported having regard to the evidence.

'Unreasonable or cannot be supported having regard to the evidence'

[17] At a trial by the judge assisted by assessors the test has been formulated as follows. Where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an

appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. *"Must have had a doubt"* is another way of saying that it was *"not reasonably open"* to the jury to be satisfied beyond reasonable doubt of the commission of the offence. (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).

[18] When the above test is recalibrated to a situation where the trial judge disagrees with the assessors or the trail is by the judge alone it may be restated as follows. The question for an appellate court would be whether or not upon the whole of the evidence acting rationally it was open to the trial judge to be satisfied of guilt beyond reasonable doubt against the assessors' opinion; whether or not the trial judge must, as distinct from might, have entertained a reasonable doubt about the accused's guilt; whether or not it was 'not reasonably open' to the trial judge to be satisfied beyond reasonable doubt of the commission of the offence.

[19] However, in this case the appellant's complaint is the lack of cogent reasons. Even there what is more important is whether the trial judge had embarked on an independent assessment and evaluation of the evidence and in the process come up with clear, logical and convincing reasons why not only was he differing from the opinion of the assessors thereby disagreeing with the assessors' opinion but also why he was convicting the appellant.

[20] The underlying argument of the appellant's counsel appears to be of twofold. Firstly, the counsel submits that the complainant had in examination-in-chief stated that the incident of rape and sexual abuse took place on 29 August 2018 but agreed with the defence under cross-examination that she told the police that it happened on 30 August 2018 and said under re-examination that she was not sure whether it was 29 or 30 August 2018.

[21] The trial judge had dealt with this inconstancy as follows:

> 8. *The complainant initially said in her evidence that the incident took place on 29/08/19. But later on she said that it was either 29th or the 30th and she cannot remember the exact date. In her statement to the police, she had stated that the incident took place on the 30th.*
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> 9. *Given all the evidence in this case and especially the consistency between the evidence of the complainant and the accused regarding certain events that had taken place on the day in question as highlighted above, in my view, the fact that the complainant could not remember the exact date does not affect the reliability of the account given by the complainant.*

[22] This inconsistency has to be considered in the context of the appellant's own evidence where he admitted that on the night of 30 August 2018 he went to the house the complainant was staying and opened the door by putting his hand through an open window. He had also admitted that the complainant was alone in the house when he went inside. This version seems to be consistent with the account given by the complainant about what happened on that night where the appellant allegedly raped and sexually abused her. Whether it happened on 29 August or 30 August 2018 is really immaterial. 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 [**Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)].

[23] In addition, the evidence of the complainant and PW2 had revealed that she had waited for two days (02 September 2018) for her stepbrother (PW2) to return from Viria to inform him in writing that the appellant had raped her and that she wants justice or otherwise she will kill herself. Thereafter, a prompt complaint had been made to the police and she had been medically examined on 05 September 2018. This recent complaint and the manner in which it was made lends much credibility to the complainant's allegation against the appellant.

[24] Thirdly, the information had clearly given the period within which the rape and sexual abuse happened as between 01 August 2018 and the 31 August 2018. The appellant therefore had full notice when he faced the trial that the date relating to the allegation

could be any day during that time. Thus, the complainant's evidence that she was not sure whether it was 29 August or 30 August could never have come as surprise to the appellant or prejudiced his defense.

[25] The second aspect of the appellant's complaint is that the trial judge had asserted in the judgment that medical evidence supported the complainant's account of events. It is as follows:

> *'13. I accept the evidence of PW4, the doctor who examined the complainant on 05/09/18. She had observed during her medical examination, a superficial abrasion below the vaginal opening which is an injury that could be inflicted during penile penetration of the vagina. More importantly, PW4 had also observed injuries on the complainant's breasts. According to her, the bruise on the complainant's left breast could have been caused by excessive force applied on that area by a hand or fingers and the abrasion on the right breast could be caused by fingernails. In her (PW4) opinion these injuries may have been sustained during the last 07 days from the date of examination. The complainant said that her breast got scratched by the accused's fingernails when she pushed the accused while he was trying to grab her breasts. Therefore, the aforementioned medical findings supports the account given by the complainant.'*

[26] The doctor had observed a bruise on the complainant's left breast that could have been caused by excessive force applied on that area by a hand or fingers and an abrasion on the right breast that could have been be caused by fingernails. In the doctor's opinion these injuries may have been caused during the last 07 days from the date of examination. 29 and 30 August 2018 fell within this timeframe. The complainant's evidence had been that she pushed the appellant when he was trying to forcefully grab her breast and as a result, her breast got scratched by the appellant's fingernails. Thereafter, the appellant had tried to kiss her; first on her neck, but she kept on moving the upper part of her body. Thus, obviously, the medical evidence and doctor's opinion had been supportive of the complainant's account of the initial attack on her.

[27] Even the superficial abrasion below the vaginal opening observed by the doctor that could have been inflicted during penile penetration of the vagina within 07 days of the examination is supportive of the complainant's version of forced penetration. The

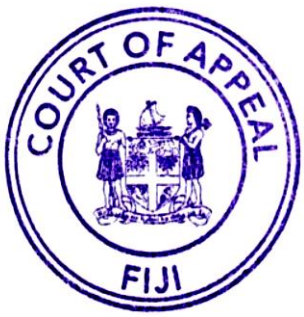
healed hymnal laceration seen was said to have occurred more than two weeks ago. Healed hymnal laceration is consistent with the complainant having admittedly had a history of previous sexual intercourse. It does not cast doubt on her testimony on forced penetration by the appellant. Therefore, I do not see anything wrong with what the trial judge had stated at paragraph 13 of the judgment.

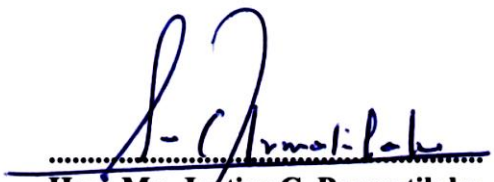
[28] Therefore, upon the whole of the evidence acting rationally it was open to the trial judge to be satisfied of guilt beyond reasonable doubt against the assessors' opinion of not guilty. It cannot be said that the trial judge must, as distinct from might, have entertained a reasonable doubt about the appellant's guilt. Nor could it be said that it was 'not reasonably open' to the trial judge to be satisfied beyond reasonable doubt of the commission of the offence.

[29] Therefore, I do not see any real prospect of this ground of appeal succeeding.

Order

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





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