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

CRIMINAL APPEAL NO.AAU 054 of 2020
[In the High Court at Suva Case No. HAC 121 of 2019]

BETWEEN	:	**PAULIASI BALEIWAKAYA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Ms. K. S. Semisi for the Respondent**
Date of Hearing	:	**03 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) (b) of the Crimes Act, 2009 and one count of sexual abuse contrary to section 210 (1) of the Crimes Act, 2009 committed at 22 March 2019 at Suva in the Central Division.

[2] The information read as follows:

'Count 1

Statement of Offence

RAPE: *Contrary to section 207(1) and (2)(b) of the Crimes Act, 2009.*

Particulars of Offence

PAULIASI BALEIWAKAYA *on the 22nd day of March 2019, at Suva in the Central Division, penetrated the vagina of* ***LC*** *with his tongue without her consent.*

Count 3

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

PAULIASI BALEIWAKAYA *on the 22nd day of March 2019 at Suva in the Central Division, unlawfully and indecently assaulted* ***LC*** *by touching her vagina, kissing her mouth and touching her breasts.'*

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of both counts. The learned trial judge had agreed with the assessors' opinion, convicted the appellant of both counts and sentenced him on 31 January 2020 to an aggregate sentence of 09 years of imprisonment (after the remand period was deducted the sentence was 08 years and 10 months) with a non-parole period of 06 years.

[4] The appellant had appealed in person against conviction out of time (15 May 2020) followed-up with submissions on 15 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 15 June 2021. Advisedly, the LAC has not pursued the appellant's application for bail pending appeal filed in person in August 2020. The state had tendered its written submissions on 23 August 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 2 ½ months) is not substantial for the appellant who had filed his appeal in person and could be excused. The appellant had stated that he was expecting his LAC trial lawyer to visit him in prison and lodge the appeal but the visit never materialised. Then, he decided to file his appeal in person. Yet, I would have to 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

'Ground 1

THAT the Learned Trial Judge erred in law and in fact to have admitted into evidence the complaint made to Vilimone Ratu whereas:

i. What the complainant purported to have relayed to Vilimone Ratu in the circumstances does not amount to recent complaint evidence; and
ii. The Learned Trial Judge ought to have warned the assessors and himself to disregard the complaint made as such facts is hearsay and is inadmissible.

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

> 4. *The facts in brief are that the complainant was a security guard in a Security Company. You were a supervisor in the same company. As a supervisor, you were in a position of authority vis-a-vis the complainant. On the day in question, the complainant was assigned to a four storied fashion shop as a stand-by lone security guard for a night shift. The complainant was new to this job and it was the first time that she was assigned to this four storied building as a security guard.*
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> 5. *When you made the first visit to this building with your colleague at around 8 pm, you came to know that the complainant was assigned alone to this building. You went back to the Suva office and you alone returned for a second visit at around 2 a.m. You found that the complainant was sleeping and the main gate was not properly locked. You warned the complainant that these security lapses could lead to a suspension or even termination of her service. The complainant under these circumstances was frighten and in a vulnerable situation.*
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> 6. *You told the complainant to go and check around the building. You also went with her by lift to check all the four levels. When you were still on the lift, you started touching her breast, on top of her company shirt. She was shocked. She told you not to do it.*
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> 7. *You then told the complainant to go and check one Chinese shop in the building. When she returned, you pushed the complainant to the passage towards the toilet and seized her. She told him not to do it because you are a married man. You pulled her into the toilet and made her lie down forcefully. You forced her to remove her clothes. The complainant was scared and was in a state of shock. You started playing with her vagina with your hand. Then you put your tongue inside her vagina and started licking inside of her vagina. The complainant was scared. She tried to flee away but she couldn't because you were holding her tightly. She did not agree to what you were doing. She expressed her disagreement. But you continued to do so until her telephone started ringing. She reported this to the police at the first available opportunity.*

[10] The other witnesses for the prosecution was Vilimone Ratu (PW2), the controller of the security company the complainant worked for.

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

'10. The Accused does not deny that he tapped and woke the complainant up at around 12. 30 am on 22 March 2019 but he denies touching her breasts and vagina or licking or putting his tongue inside her vagina. The Defence Counsel proposed that the complainant had lodged a report with police because she feared that the Accused will complain about her lapses in her security duties and she lose her job….'

01st ground of appeal

[12] The appellant's complaint is of two-fold. Firstly, he argues that the complaint made by the complainant to PW2 (Vilimone Ratu) did not amount to recent complaint evidence. Secondly, the trial judge should have warned the assessors and himself to disregard the said complaint as it was hearsay and inadmissible.

[13] The complaint in issue is what the complainant had told PW2 soon after the alleged incident namely that the appellant had forced her into the toilet and did something to her. She was asked by PW2 to wait at the site until the reliever came to go to the police station. When the reliever came at 07 am, she changed her clothes and went to Totogo Police Station and lodged a report. PW2 on his part had said in evidence that when he called the complainant she answered the phone. She sounded frightened and was crying. She said that Pauliasi (the appellant) did something to her and wanted it to be reported immediately to police. He asked her to wait until another security officer would took over.

[14] The recent complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence [vide **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. Even the state has conceded that in the complaint made by the complainant to PW2 she had not disclosed any unlawful sexual conduct and therefore it was not qualified to be treated as a recent complaint and as recent complaint evidence. Even the appellant seems to agree that it could explain the absence of recent complaint evidence direction by the trial judge.

[15] Therefore, there was no need for the trial judge to have given the typical recent complaint evidence direction as highlighted in **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017) and **Raj v State** (supra) *i.e.* recent complaint evidence is not evidence of facts complained of, nor is it corroboration; it goes to the consistency of the conduct of the complainant with the evidence given at the trial. It goes to support and enhance the credibility of the complainant but not the truth of the complaint.

[16] In any event, the appellant's trial counsel had not sought any redirection from the trial judge to disregard it altogether. The unexplained failure to seek redirections would disentitle the appellant even to raise this ground of appeal with any credibility [vide **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018)].

[17] Secondly, the appellant contends that the complainant's evidence that she told PW2 that the appellant had forced her into the toilet and did something to her is hearsay evidence. I do not think so. She had told PW2 what she experienced and not anything she heard from a third party. If PW2 had told in evidence what the complainant narrated to him without the prosecution calling her and her confirming it, PW2's evidence would have been hearsay.

[18] The state submits that it did not rely on PW2's evidence as recent complaint evidence. The appellant questions as to what purpose the prosecution then led that evidence and ponders whether the prosecution could not have treated PW2's evidence in issue as distress evidence.

[19] In fact, PW2's evidence (subject to criticism) may have been treated as distress evidence [see **Tuagone v State** [2021] FJCA 86; AAU136.2018 (31 March 2021) and **Bebe v State** [2021] FJCA 75; AAU165.2019 (18 March 2021)]. However, neither the prosecution nor the trial judge had considered his evidence as such and no direction was given on distress evidence.

[20] The trial judge had stated in the judgement that although the complaint she made to Vilimone does not contain anything of sexual nature, it supported the version of the complainant. Obviously, the trial judge had not considered PW2's evidence as corroborative of the complainant's evidence but only lending support to her evidence.

[21] I do not think that it could not be seriously doubted that PW2's evidence had in fact lent support to her version of events particularly given her state of being frightened and wanting to go to the police station immediately which she did as soon as her shift was over. Her immediate posture and behaviour after the incident is consistent with the allegation she made against the appellant and therefore it is relevant and admissible. The cause for her conduct was obviously what she described to PW2 as 'something that the appellant did to her' which in a very short time appeared from her police complaint as rape and sexual assault. In the context of the whole scenario one cannot find fault with the trial judge's impugned statement.

[22] Though, there can be an argument that the trial judge had failed to direct the assessors as to how they should approach the impugned pieces of evidence from the complainant and PW2 the appeal itself has no reasonable prospect of success on such a ground leave aside a real prospect of success [vide **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019)]

[23] In any event, quite independent of PW2's evidence, the assessors and the trial judge could have satisfied themselves with the complainant's evidence to the criminal standard of beyond reasonable doubt and when believed, her evidence was sufficient to bring home convictions on both charges. A perusal of the judgment reveals that the trial judge had indeed been satisfied of the guilt of the appellant on the complainant's evidence and the judge had rejected the appellant's version.

[24] The conviction seems inevitable when the assessors and the trial judge decided to act on the evidence of the complainant coupled with the rejection of the appellant's version. Therefore, I cannot conclude that there has been a substantial miscarriage of justice by the evidence of PW2 [see **Baini v R** (2013) 42 VR 608; [2013] VSCA 157 and **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021) though

technically it had fallen short of being recent complaint evidence and no specific direction had been given to the assessors by the trial judge as to how they should approach it.

[25] I have also considered whether the verdict is unreasonable and cannot be supported by evidence. Upon examining the summing-up and the judgment, I am of the view that upon the evidence of the complainant alone it was quite open to the assessors and the trial judge to be satisfied and have found the appellant guilty of both counts beyond reasonable doubt. I cannot by any means say that the assessors and the trial judge 'must' have entertained a reasonable doubt about the appellant's guilt on the counts of rape and sexual abuse [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] HCA 30; (2007) 230 CLR 559, **M v The Queen** [1994] HCA 63; (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)]

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