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

CRIMINAL APPEAL NO.AAU 011 of 2019
[In the High Court at Suva Case No. HAC 064 of 2017S]

BETWEEN	:	**ISOA RAINIMA**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Appellant in person**	
	:	**Dr. A. Jack for the Respondent**	
Date of Hearing	:	**02 February 2021**	
Date of Ruling	:	**03 February 2021**	

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of assault with intent to rape contrary to section 209 of the Crimes Act, 2009, seven counts of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009, one count of sexual assault contrary to section 210(1)(a) and (2) of the Crimes Act, 2009, one count of criminal intimidation contrary to section 375(1)(a)(IV) of the Crimes Act, 2009 and robbery contrary to section 310(1)(a) of the Crimes Act, 2009 committed at Suva in the Central Division on 30 day of December 2016.

[2] The information read as follows.

'FIRST COUNT

REPRESENTATIVE COUNT

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE: *Contrary to section 209 of the Crimes Act 2009.*

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division assaulted one* ***M.S.*** *with the intention to rape her.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division* ***had*** *carnal knowledge of* ***M.S.*** *without her consent.*

THIRD COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division penetrated the vagina of* ***M.S.*** *with his fingers without her consent.*

FOURTH COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division penetrated the vagina of* ***M.S.*** *with a stick without her consent.*

FIFTH COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division penetrated the vagina of* ***M.S.*** *with his tongue without her consent.*

SIXTH COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division penetrated the anus of* ***M.S.*** *with his fingers without her consent.*

SEVENTH COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

ISOA ***RAINIMA*** *on the 30th day of December 2016 at Suva in the Central Division penetrated the anus of* ***M.S****. with a stick without her consent.*

EIGHTH COUNT

Statement of Offence

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

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division penetrated the mouth of* ***M.S****. with his penis without her consent.*

NINTH COUNT

REPRESENTATIVE COUNT

Statement of Offence

***SEXUAL ASSAULT**: Contrary to section 210(1)(a) and (2) of the Crimes Act 2009.*

Particulars of Offence

***ISOA RAINIMA** on the 30th day of December 2016 at Suva in the Central Division unlawfully and indecently assaulted the complainant **M.S.** by licking her vagina.*

TENTH COUNT

Statement of Offence

***CRIMINAL INTIMIDATION**: Contrary to section 375(1)(a)(IV) of the Crimes Act 2009.*

Particulars of Offence

***ISOA RAINIMA** on the 30th day of December 2016 at Suva in the Central Division criminal intimidated **M.S.** by threatening to kill her.*

ELEVENTH COUNT

Statement of Offence

***ROBBERY:** Contrary to section 310(1)(a) of the Crimes Act 2009.*

Particulars of Offence

***ISOA RAINIMA** on the 30th day of December 2016 at Suva in the Central Division robbed **M.S.** of 1 mobile phone, 1 gold plated wrist hand watch, 1 hand bag, 1 pencil case, pens, 1 pair of flip flops, charger, USP ID cards, clothes and $40.00 cash monies and at the time of such robbery did use personal violence on the said M.S.*

[3] According to the summing-up, the only issue at the trial was the identity of the assailant and to establish the identity of the rapist the prosecution had relied on the complainant's identification of the appellant at the material time. The appellant had remained silent but called his girlfriend (DW1) to testify that the appellant was with

her at Tamavua from 6.30 a.m. till next morning *i.e.* throughout the time relevant to the allegation of sexual abuses of the complainant.

[4] The facts of the case had been summarized by the trial judge in the sentencing order as follows.

> *2. The facts of your case were briefly as follows. On 30 December 2016, the complainant (PW1), aged 23 years old, was walking along Holland Street towards Knolly Street. It was after 10.05 am. It was a bright sunny morning. You suddenly came from behind her and shoulder tackled her. You then threw her over the metal railings. She fell 2 meters down the slope. You jumped in after her. You landed beside her and threw several heavy punches to her face and head. She cried out loud to raise the alarm, but it was to no avail. Her left eye was swollen, and it was also cut below the same. You repeatedly swore at her, and threatened her not to "misbehave".*
>
> *3. You later forced her down the slope, and took her through a tunnel below Holland Street. You forced her to the other side, facing Wainibukalou Creek. You later stripped her naked, and repeatedly raped her, as alleged in counts no. 2, 3, 4, 5, 6, 7 and 8. In the course of raping her, you were extremely brutal to her. You repeatedly threatened to kill and assault her. You unlawfully confined and dominated her for an hour. You thrust a big stick into her vagina. You later strangled her with some nearby bush vines. You later whacked her head three times with a big stick, and left her for dead. You also stole her properties as alleged in count no. 11, and indecently assaulted her on many occasions. You were extremely cruel to the complainant.*

[5] At the end of the summing-up on 24 October 2018 the assessors had unanimously opined that the appellant was guilty of all counts. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on 24 October 2018, convicted the appellant on all counts and sentenced him on 25 October 2018 to 23 years of imprisonment with a non-parole period of 20 years.

[6] The Court of Appeal registry had received on 28 January 2019 the appellant's untimely notice of appeal against conviction and sentence along with an unsworn affidavit seeking an extension of time and explaining the delay. The delay is about 65 days or just over 02 months. The appellant had tendered amended grounds of appeal from time to time and written submissions on 02 October 2020. Later, on 17 November 2020 the appellant had filed another affidavit once again explaining the reasons for the delay. The state had tendered its written submissions on 12 November 2020.

[7] At the leave to appeal hearing the appellant relied on his written submissions filed on 02 October 2020 and submitted additional submissions on two of the grounds of appeal. The state too relied on its written submissions.

[8] 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

[9] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors 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?*

[10] ***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.'*

[11] The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

> *'(a).....*
>
> *(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.*
>
> *(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected*

that each of these factors will be considered in exactly the same manner in all cases.

(d) 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.

(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'

[12] Sundaresh Menon JC also observed

'27..... It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.'

[13] 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..... '*

Length of delay

[14] As already stated the delay is little over 02 months and could be excused as the appellant had preferred the appeal in person.

[15] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 03 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.'*

[16] However, I also wish to reiterate the comments of Byrne J, in **Julien Miller v The State** AAU0076/07 (23 October 2007) that

> *'... that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'*

Reasons for the delay

[17] According to the appellant's first affidavit the delay in filing his appeal within time is attributed to the failure of his trial counsel from the Legal Aid Commission and want of trial documents with him to do so in person. In his second affidavit the appellant had not made any allegation against the trial counsel but had pleaded his lack of knowledge and the difficulty in seeking legal advice from prison as reasons for the delay and stated that had had finally managed to file appeal papers with the help of his fellow inmates who had gone through the summing-up, judgment and sentence. Thus, the reasons for the delay given by the appellant have not been consistent and in fact contradictory.

Merits of the appeal

[18] In **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

> *"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."*

[19] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well in order to consider whether despite the excusable delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.

[20] Grounds of appeal urged on behalf of the appellant are as follows.

> ***Conviction***
>
> ***Ground 1***
>
> *That the Appellant was prejudiced by inadequate legal representation where Prosecution evidence, flawed as it was had not been contested by defense counsel in breach of the Appellants entrenched rights under the 2013 Constitution.*
>
> ***Ground 2***
>
> *That the investigation by police was procedurally flawed and was prejudicial to the Appellant's rights to attain justice.*
>
> ***Ground 3***
>
> *That the Judge erred in law and in fact when he failed to properly/adequately warn himself and the assessors on the issue of lies by the Prosecution witness, a failure that occasioned a miscarriage of justice to the Appellant.*
>
> ***Ground 4***
>
> *That the Judge erred in law and in fact when he admitted propensity evidence and evidence of bad character by the Prosecution witness which was detrimental to the interest of justice for the Appellant.*
>
> ***Ground 5***
>
> *That the Judge as judges of facts had failed to investigate and acquaint himself well in a fair and balanced manner the evidence in totality tendered at the trial where the Prosecution witnesses had conspired to pervert and defeat the course of justice, a failure occasioning a miscarriage of justice to the Appellant.*
>
> ***Ground 6***
>
> *That the evidence upon which the Judge convicted the Appellant was flawed of inferior quality, inadequate and not sufficient for the Court to "safely convict."*
>
> ***Ground 7***
>
> *That the guilty verdict of the Trial Court was perverse and wrong law.*

Ground 8

That the directions of the Judge to the assessors during the summing up did not effectively canvass the defence case thereby encumbering the Appellant's right to a fair trial, in that the Judge was wrong in fact and in law.

Sentence

Ground 1- *That the Judge had acted under a wrong principle.*

Ground 2 *- That the Judge mistook the facts.*

Ground 3 *– That the Judge had considered or allowed irrelevant matters to affect him.*

Ground 4 *- That the Judge had failed to take into account some relevant matters.*

01st ground of appeal

[21] The gist of the appellant's complaint is that his trial counsel (02) had not contested the prosecution evidence. He particularly criticizes the trial counsel for not having contested the DNA report despite the fact that it had failed to connect him with the crime or the crime scene.

[22] The Court of Appeal set down the procedure to be followed prior to advancing a ground of appeal based on criticism of trial counsel in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019). The appellant has not followed the guidelines given in ***Chand*** and therefore, I shall not consider this ground of appeal.

[23] In any event, it is clear why the trial counsel had not contested the DNA report. It was not adverse at all to the appellant and the trial judge had wondered as to why the prosecution had produced it as part of its case in the following words in the summing-up.

> *'35.Prosecution Exhibit No. 5 provides you with scientist Naomi Tuitoga's (PW6) police statement, and her Forensic DNA Report. DNA matters were considered during the trial. However, the prosecution was unable to provide any DNA evidence to link the accused to the alleged crimes in the information. If anything, the prosecution's DNA report appears to clear the accused's presence from the crime scene, at the material time. Of all the items from the crime scene analysed, they could not obtain the accused's DNA sample from*

the same. The DNA report was unhelpful to the prosecution's case. Why they called the same in the trial, somewhat battles me.'

[24] Therefore, there is no real prospect of success of this appeal ground.

02nd ground of appeal

[25] The appellant argues that the police investigation had been flawed and deprived him of justice in that the he did not have the tattoo marks, studs on his earlobes and a gold tooth as described by the complainant to the police. Further, the appellant submits that the police had interviewed several witnesses who had encountered a suspect after the incident but none of them were called to given evidence at the trial by the prosecution. He also complains that when the investigating officer (PW2) Woman Sergent 2952 Ms. Salote Vuniwaqa had shown two sets of photos (exhibits 3A and 3B) to the complainant where she had identified the appellant in both sets, he was already in police custody on 10 February 2017 and in any event the investigating officer should not have conducted the photographic identification but should have left it to another officer.

[26] The summing-up does not refer at all to any persons found by the police who had encountered the rapist after the incident. If that be the case, it is baffling as to why the defense refrained from calling those persons as witnesses for the appellant. Nor does it appear that the defense had successfully demonstrated any material differences between the description of the assailant provided to the police by the complainant and those of the appellant as alleged by him. These aspects cannot be probed any further at this stage unless the complete appeal record is available.

[27] Paragraph 42 of the summing-up describes the photographic identification and identification at the formal parade.

> *'42. On 9 and 10 February 2017, Woman Sergeant 2952, Ms Salote Vuniwaqa (PW2) showed the complainant (PW1) two sets of photos, which were tendered in evidence, as Prosecution Exhibit 3(A) and 3(B). PW2 said, she did the above as part of the police investigation, and at the time, she was the police investigation officer. When shown the sets of photos, PW2 said, PW1 picked out the accused in both sets. PW1, in her evidence, confirmed the above. On 13 February 2017, PW1 later positively identified the accused as the person who attacked her on 30 December 2016, in properly held police*

identification parade. As a matter of law, the prosecution should not have tendered Prosecution Exhibit No. 3(A) and 3(B) as part of its case, because its prejudicial effect could far outweigh its probative value. However, since Defence counsel, during the trial, demanded its production by the prosecution as part of its case, the prosecution is excused from doing so.'

[28] It does not appear from the summing-up that the defense had taken any exception to the investigating officer (PW2) giving evidence at the trial on the photographic identification on the basis that she should not have conducted it being the investigating officer. Neither does it appear that the defense had made any submission to that effect even at the closing address.

[29] I examined a similar complaint in **Baba v State** [2020] FJCA 238; AAU0079.2018 (26 November 2020) in relation to the Fiji Police Force Manual (FPM) and do not propose to repeat the analysis once again here. I *inter alia* stated therein as follows

'[17] The appellant based his submission on paragraphs 7 and 8 of the 'Identification By Photographs' available at Fiji Police Force Manual (FPM) which is appendix 'A' (FRO19/90) to Fiji Police Force Standing Orders (FSO) made by the Commissioner of Police by virtue of section 7(1) of the Police Act Cap 85.

[18] Paragraph 7 of FPM of states:

> *'Identification Parades by photograph will be carried out only when the identity of the offender is unknown and there is no other way of establishing his identity; or if it is suspected that there is no chance of arresting him in the near future. A photographic identity parade of a person already in custody shall not be held.'*

[19] Paragraph 8 of FPM sets out in detail the procedure or the manner in which an identification parade by photograph should be conducted.'

[30] It cannot be ascertained at this stage due to the lack of trial proceedings whether the appellant had been arrested before or after PW2 conducted the photographic identity parade. There is no allegation that the complainant had seen the appellant before she was shown exhibits 3(A) and 3(B) by PW2. Therefore, it is only the full court that can examine this aspect more fully along with the legal consequences of the investigating officer herself conducting the photographic identity parade contrary to the FPM.

[31] On the other hand, the complainant had identified the appellant at an identification parade proper held on 13 February 2017 *i.e.* about 06 weeks after the incident. The appellant does not make any complaint about that identification. The trial judge had at paragraph 39-41 fully explained to the assessors the complainant's identification of the appellant at the formal ID parade and the fact that she had him under observation for nearly an hour in broad daylight during the spate of sexual abuses. The judge had nevertheless administered the Turnbull cautionary guidelines too on the assessors. He had also accepted the complainant's identification of the appellant at paragraph 8 of the judgment.

[32] Having examined the identification evidence I myself have little doubt that the complainant was well placed to identify the appellant at the photographic identity parade and the identification parade proper on 13 February 2017. Therefore, despite any possible breach of Fiji Police Force Manual (FPM) by PW2 in the conduct of photographic identity parade, excluding that evidence there is still strong evidence of identification of the appellant at the formal identification parade.

[33] Therefore, I my view, the test applied to a complaint of an irregularity of a first time dock identification could be safely adopted here as well.

First time dock identification

[34] On a complaint of the irregularity of a first time dock identification the following test was formulated in **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) following **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 and **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018)

> '[36] *Thus, the Supreme Court appears to formulate a two tier test. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Secondly, whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second*

hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23 (1) of the Court of Appeal Act would apply and appeal would be dismissed

[35] The same or similar two-tiered test may be suitable to the appellant's complaint under this ground of appeal. **Firstly,** the appellate court would consider ignoring the evidence on photographic identity evidence whether there was sufficient evidence on which the assessors could express the opinion that the appellant's identity was established and therefore he was guilty and on which the trial judge could find the appellant's identity established and find him guilty (*i.e.* quantity/sufficiency of the evidence available sans the impugned item of evidence). **Secondly,** the court would see whether the assessors and the judge would have found the appellant guilty even in the absence of the photographic identity evidence (*i.e.* whether the quality/credibility of the available evidence without the impugned evidence is capable of establishing the appellant's identity and proving the case against the accused beyond reasonable doubt).

[36] The above approach in consistent with the powers conferred on the appellate court under section 23 of the Court of Appeal Act *i.e.* having considered the admissible evidence against the appellant as a whole, could the appellate court say that the verdict was unreasonable; whether there was admissible evidence on which the verdict could be based [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212: AAU0027.2018 (3 November 2020)].

[37] In other words, could the trial judge also have reasonably convicted the appellant on the admissible evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) and **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[38] Therefore, there is no real prospect of success of this appeal ground.

03rd ground of appeal

[39] The appellant's submissions on this ground of appeal are repetitive of submissions made under the first ground of appeal and they have been already dealt with.

04th ground of appeal

[40] The appellant complains that bad character evidence had been given by the prosecution witnesses. However, in his submissions the appellant had not identified what such bad character evidence was. Surveying the summing-up I cannot find any such bad character evidence.

[41] Therefore, this ground of appeal is vexatious and frivolous.

05th ground of appeal

[42] The appellant's submissions under this ground of appeal like some other appeal grounds are not focused. On the one hand he complains of PW2 having given false evidence about her visit to Naqali police station and the number of his photographs obtained. On the other hand he also complains of bad character evidence surfacing when the complainant admitted PW2's evidence on photographic identity to be true. These are not matters arising from the summing-up or the judgment and cannot be examined without the transcript of proceedings and for lack of clarity of the appeal ground itself.

[43] The appellant also criticizes the trial judge for having accepted the complainant's identification evidence of the appellant at the time of the incident as strong and of good quality. Given what the trial judge had stated at paragraphs 39 and 41 it appears that the complainant had ample opportunity to register a good quality memory of the appellant in her mind as to constitute a strong identification at the photo identification and the formal identification parade.

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

06th ground of appeal

[44] The appellant's argument that the identification evidence was not sufficient to safely convict him is based on his premise that the physical descriptions given of the rapist by the complainant to the police did not tally with those of the appellant.

[45] As I have already indicated under the first ground of appeal where the appellant had brought up the same point, there is nothing to show in the summing-up or the judgment that it had been demonstrated at the trial that there were material contradictions or omissions between the complainant's description of the appellant to the police and his real life features.

[46] Therefore, I do not see any real prospect of this ground of appeal at this stage which cannot be examined in depth without the complete appeal record.

07th ground of appeal

[47] The appellant argues that the guilty verdict was perverse and wrong in law in view of the alleged poor identification evidence.

[48] As far as the summing-up goes, it appears that based on the evidence placed before assessors by the trial judge, the assessors had been satisfied of the guilt of the appellant with whom the trial judge too had agreed in his judgment. In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take in the face of a similar argument.

> *'That leaves us to consider the evidence, including the statements, in relation to each of the two counts appealed on the ground that it does not support the convictions. How is the Court to approach this?*
>
> *Section 23(1)(a) of the Court of Appeal Act sets out our powers:*
>
> *"23-(1) The Court of Appeal -*
>
> *(a) on any such appeal against conviction shall allow the appeal if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the grounds*

of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal."

The present wording is from the Court of Appeal (Amendment) Decree 1990 but, in this part, follows exactly the wording of the previous section.

It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.

Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in ***R v Cooper*** *(1968) 53 Cr. App. R 82.*

Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.

The appeal is dismissed."

[49] The above approach in consistent with the powers conferred on the appellate court under section 23 of the Court of Appeal Act *i.e.* having considered the admissible evidence against the appellant as a whole, could the appellate court say that the verdict was unreasonable; whether there was admissible evidence on which the verdict could be based [vide **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)].

[50] In other words, could the trial judge also have reasonably convicted the appellant on the admissible evidence before him (vide **Kaivum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) and **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)).

[51] This exercise could be undertaken only by the full court with the benefit of the complete appeal record. There is nothing to suspect at this stage that the guilty verdict was perverse or wrong in law on the totality of the evidence available.

[52] Therefore, this appeal ground has no real prospect of success.

08th ground of appeal

[53] The appellant submits that the trial judge had not effectively canvassed the defense case in the summing-up. At the same time he also complains that the judge had failed to direct the assessors on weaknesses of the prosecution witnesses but not highlighted what those weaknesses were. He is critical of the trial judge having said at paragraph 34 of the summing-up the underlined sentences.

> *'34. Under this heading, we will discuss Prosecution Exhibits 1, 2, 4, 5 and 6. We will discuss Prosecution Exhibit 3(A) and 3(B) later, when we consider the State's case against the accused. Please, carefully consider the two "Booklet of Photos", Prosecution Exhibits No. 1 and 4. By observing all the photos, you will get a fair idea of what the complainant (PW1) was going through, when you consider her evidence against the person, who allegedly attacked her on 30 December 2016. The Police Fair Sketch Plan, Prosecution Exhibit No. 2, assist you consider the crime scene, from a sketch plan point of view. The two Booklets of photos and the Police Fair Sketch Plan shows you the environment and the surrounding circumstances, of the scene where the alleged offending occurred. It was an area where very few members of the public go during the day, and appears to provide the type of privacy ideal to commit such alleged crimes. So, when you consider Prosecution Exhibit 1, 2 and 4, they set the scene of what is to follow.*

[54] The trial judge had addressed the assessors on the appellant's defense at paragraphs 28-31 and 44 & 45 and I do not find any inadequacy in that effort. It looks from a reading of the complete paragraph [34] hat the trial judge had made those impugned observations based on what had showed up on the exhibits. I do not think that those remarks were out of place for the trial judge to make and more so because he had

asked the assessors at paragraph 01 of the summing-up either to accept or not his opinion on facts when expressed, as judges of facts.

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

Sentence

01st ground of appeal

[56] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013; 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal untimely preferred against sentence to be considered arguable there must be a real prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[57] The appellant joins issue with the trial judge having used the word 'predator' in the sentencing order. It appears in paragraph 9 of the sentencing order.

> '9.The aggravating factors in this case were as follows:
>
> > ***(i) Pre-planning of the offences.*** *Looking at the total evidence provided in the case, it showed that you had obviously pre-planned these offendings. You knew the Holland Street well. You knew the tunnel and the surrounding environment very well. You knew that the public does not often come to the area. You knew it would be an ideal place to offend against the complainant. You knew the privacy in the area. You knew that even if the complainant raised the alarm, it would be difficult for others to hear her. With the above knowledge in hand, you shoulder tackled the complainant and threw her over the metal*

railings on 30 December 2016, and later proceeded to offend against her. You were like a ***predator****, waiting to pounce on unsuspecting innocent girls, who were going about their own business on Holland Street. You were cunning and deceitful. You must accept that your type of behaviour will not be tolerated by society. You must also accept that predators like you, will have to serve a long prison sentence, to protect innocent young girls, like the complainant.*

[58] While it may have been unnecessary for the trial judge to have used the word 'predator' in the sentencing order to describe the appellant it had been obviously used in a metaphorical sense and not in the real or literal sense of the word. The trial judge was trying to emphasis the preplan involved in the commission of the crimes against the complainant.

[59] However, the use of the word 'predator' does not constitute a sentencing error. Therefore, this ground of appeal has no real prospect of success.

02nd ground of appeal

[60] The appellant's submissions under this appeal ground relate to the conviction and not to the sentence. There is no rule of law, procedure or evidence requiring corroboration of the charges (outside sexual offences) mentioned by the appellant to confirm the complainant's evidence.

03rd ground of appeal

[61] Once again the appellant had submitted matters relating to the conviction such as identification evidence and bad character evidence under this ground of appeal against the sentence. Both these issues have been already dealt with previously under the appeal against conviction. The trial judge had not taken any irrelevant matters into consideration in the matter of sentence.

[62] Therefore, there is no sentencing error and this ground of appeal has no real prospect of success.

04th ground of appeal

[63] Once more the appellant contends that the trial judge had not taken relevant matters such as alleged contradictions or omissions between the description given to the police by the complainant of the rapist and the appellant's features in to account in sentencing the appellant. These are matters that have been canvassed under the appeal against conviction and they have already been dealt with earlier. Thus, the trial judge had not failed to take relevant matters into account in the matter of sentence.

[64] Therefore, there is no sentencing error and this ground of appeal has no real prospect of success.

Prejudice to the respondent.

[65] The respondent had not pleaded any prejudice by an extension of time. However, given that the incident had happened in the year 2016 and the brutality displayed in the commission of the offences any fresh litigation would cause untold hardship and unbearable psychological trauma to the complainant.

Order

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL