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

CRIMINAL APPEAL NO.AAU 0042 of 2020
[In the High Court at Suva Case No. HAC 117 of 2016]

BETWEEN : **RUPENI VULI SUGUTURAGA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. T. Kean in person**
: **Ms. R. Use for the Respondent**

Date of Hearing : **10 August 2023**

Date of Ruling : **11 August 2023**

RULING

[1] The appellant had been charged in the High Court at Suva on a single count of rape. The charge is as follows.

'COUNT ONE
Statement of Offence

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

Particulars of Offence

***RUPENI VULI SUGUTURAGA** , on the 1st day of June, 2016 at Lautoka in the Western Division, penetrated the vagina of **LUISA WATI SOKILAU** with his penis, without the consent of the said **LUISA WATI SOKILAU**.*

[2] The assessors had unanimously opined that the appellant was guilty of rape. Having agreed with the assessors, the trial judge had convicted the appellant and sentenced him in his absence on 19 December 2019 to a sentence of 10 years. The effective sentence was to be 09 years', 11 months and 20 days imprisonment with a non-parole period of 08 years after deducting the remand period.

[3] The appellant had lodged in person an untimely appeal only against conviction. 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? (vide **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).

[4] The delay is over 06 months which is substantial. The appellant has stated that he waited for the Corrections Centre to provide him the summing-up, judgment and the sentence order to file his appeal but COVID restrictions intervened and delayed it. The appellant on his own had kept away from court on the sentencing day and if not, he would have obtained necessary documents from his LAC counsel. Further, COVID restrictions were imposed in March/April 2020 and by that time the appellant had already been out of time. I am not convinced that the appellant has explained the delay satisfactorily. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The respondent has averred that prejudice would be caused by an enlargement of time.

[5] The prosecution case against the appellant had mainly depended on the evidence of the complainant and the appellant's cautioned interview. The trial judge had summarized the evidence in the judgment as follows:

> 5. *The complainant informed the court that on 31st May, 2016 after work she went to a grog shop in Nadi Town where her two friends drank grog, from there she went to the Deep Sea Night Club. After having*

some drinks the complainant went to the White House Night Club where she met her two school mates, by this time it was 1am the next day.

6. *The complainant and her two school mates continued drinking till 5 am when the complainant came out of the night club to go home there was only one taxi parked outside. Her friends boarded this taxi and left at this time a car came driven by the first accused. The first accused called out "taxi" the complainant responded by saying Saunaka and then she boarded the car.*

7. *In the car she sat in the front passenger seat fastened her seat belt and fell asleep when she woke up she saw the sea and some trees, her seat belt was still fastened. The driver was not in the car, he was drinking at the back of the car with three boys and a girl.*

8. *After some time the complainant got out of the car she was offered a bottle of beer to drink. After drinking, she became unconscious only to regain consciousness when her head hit the root of a tree. She saw the first accused was having sexual intercourse with her since the complainant was feeling weak she did not do anything.*

9. *The complainant felt pain on her vagina and her thighs she "blacked out" again. When she regained consciousness another man was having sexual intercourse with her at a different location. She was not wearing her panty and this person was on top of her, again the complainant fell asleep.*

10. *After sometime, a lady came and woke the complainant when she sat she noticed that she was without her shoes and panty. The complainant saw there were people gathered around her, at this time she realized something had happened. By this time it was after 9 am when she stood up she felt pain in her vagina.*

11. *The complainant was taken to a house where she was given a cup of tea, "Sulu" and panty to wear, on the same day the complainant reported the matter to the police.*

13. *The second witness Otto Delana informed the court that on 1st June, 2016 he was at work at about 7.30am renovating the roof of a customer at Vesi Crescent, Waiyavi, Lautoka. The witness was on the roof top when he saw two ITaukei boys and two ITaukei girls standing under a Vaivai tree.*

14. *After a while all of them moved to the volleyball court, he then saw one female move further into the grass and was having sexual intercourse, both the man and the girl were "fully drunk" while another man was taking pictures of them.*

> 15. *The witness came down from the roof and went near the scene, the young man was still on top of the girl when this man saw the witness he pulled up his pants and ran away.*
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> 16. *The witness was able to recognize this man as the second accused since he knew the second accused from his earlier employment. He used to call the second accused "tau" meaning they were from the same ancestry. The witness saw the girl was naked and was "blacked out".*

[6] The appellant had given evidence on his behalf and as summarized by the trial judge had stated as follows

> 22. *The first accused Rupeni informed the court that on 31st May, 2016 at around 10 to 11pm he drove Susana and another guy from Lautoka to White House Night Club in Nadi. At the night club the accused drank about four cans of rum and cola till 5am. By this time the second accused had joined them and all of them were drinking.*
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> 23. *When the night club closed, all went to the car the accused was driving with Susana sitting in the front passenger seat whereas the second accused and the other boy sat at the back seat. At the exit of the car park the second accused called the complainant who was standing there. The complainant came and sat in the front passenger seat of the car while Susana went to the back seat.*
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> 24. *On the way the complainant was laughing about something the accused did not know about. As they went further the complainant put her head on his shoulder and was leaning on his shoulder and kissed his cheek. By this time they reached Waimalika where they bought some beer. On the way the complainant was also asking him questions whether he had a girlfriend or not.*
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> 25. *It was around 6am when they reached the Saweni Beach here the complainant pulled his hands so both went for a walk on the beach about 10 meters away from the others. At the beach, both started kissing each other.*
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> 26. *At this time the complainant put a cloth on the sand and took off her skirt. The complainant asked the accused to lie down so he lay on top of her and both started kissing each other. The accused had not taken off his clothes and the kissing had continued for 10 minutes until Susana and the second accused called him so both left. The complainant put on her skirt and both left by holding each other's hand.*
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> 27. *From the Saweni Beach, the accused drove everyone to Kaleli Settlement, in Waiyavi. Here the accused went to open the door for the complainant to come out of the car, however, she had already left the*

car so he took out the left over drinks from the car and sat down to drink.

28. *After a while he dropped Susana at Jinnu Road, Waiyavi and then went to Kaleli Settlement to pick the second accused. At Kaleli Settlement the second accused was already at the road side, the second accused got into the car and told the first accused to leave the place.*

[7] The grounds of appeal urged by the appellant are as follows.

Conviction:

Ground 1

THAT the learned trial Judge erred in law and fact when he convicted the appellant when the prosecution's case cannot be sustained on the totality of evidence accepted by the trial Judge in light of the varied version of events pertaining to penetration, raising serious doubts as to the veracity of the allegation; and

Ground 2

THAT the learned trial Judge failed to independently evaluate the disputed admissions in the appellants caution interview and the totality of the evidence before arriving at a conclusion on the guilt of the appellant.

Ground 1

[8] The appellant's position is that he and the complainant were kissing each other but not engaged in sexual intercourse but he had described the events on the day of the incident in a similar vein to the complainant. According to the complainant, she was conscious only on the two occasions when she found the appellant and later the co-accused on top of her having sexual intercourse with her. The rest of the time she was in a state of 'black out' or temporary loss of consciousness.

[9] According to the appellant's evidence, the complainant did not appear to have been so drunk as not to understand what was happening around her and was doing things consciously though she was still under the influence of liquor. However, as per the complainant she was in a state of loss of consciousness most of the time and did not resist the sexual intercourse by the appellant because she was feeling weak due to intoxication.

[10] The medical evidence called by the appellant had shown that the complainant's hymen was intact but she had a bruise noted on the hymen. The doctor, who had examined only 02 cases of sexual assault before, had not ruled out sexual intercourse as the bruise of the hymen may suggest forceful entry or due to other causes. However, this evidence is inconclusive as far as the appellant is concerned because the co-accused had supposedly engaged in sexual intercourse with the complainant thereafter as witnessed by PW2. The complainant being only 19 years of age and presumably having no previous experience on sexual intercourse and then having been raped by two men had only a bruise of her hymen other than a few minor injuries on her upper body.

[11] The complainant's complaint was prompt and she had been examined medically on the same day. However, she had told the doctor that she had been sexually assaulted (not specifically rape) but not named any culprits.

[12] The appellant had answered 'yes' in the cautioned interview when asked whether he had sexual intercourse with the complainant but taken up the position that he in fact said 'no'.

[13] Thus, the issue boils down to the question of 'penetration' and 'consent'. According to the complainant there was penetration but not consent. According to the appellant, there was no sexual intercourse and thus, no question of consent.

[14] Given the above aspects of the case, in my view, since the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence, the full court should be allowed to examine the record or the transcript to see whether by reason of the above issues and any other inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence including that of the appellant, the court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt or not as to proof of guilt beyond reasonable doubt in the light of principles set out in **Kumar v State** [2021] FJCA 181; AAU102.2015 (29 April 2021) at para [8] to [24]

and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) at para [36] to [44].

[15] As for the trial judge, when a verdict tested on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

02nd ground of appeal

[16] The appellant argues that the trial judge had not independently evaluated the disputed admission in the appellant's cautioned interview and the totality of evidence arriving at the conclusion of guilt.

[17] On a perusal of the summing-up and the judgment, I do not think that there is sufficient evaluation of the appellant's position that the disputed answer 'yes' in the light of his evidence was 'no'. The trial judge had certainly, narrated this aspect adequately both in the summing-up and the judgment but evaluation of evidence is different from summarising the evidence which is no substitute for evaluation.

[18] This is particularly so when it was, for the most part, the complainant's word against the appellant's word. It was held in **Anderson** (2001) 127 A Crim R 116 at 121 [26] that it is preferable that a ***Liberato*** direction be framed along the following lines **(i)** if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; **(ii)** if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and **(iii)** if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?

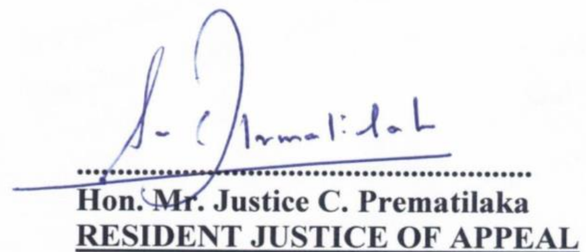
[19] The decisions in **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) are also relevant in this regard and particularly when the accused gives evidence.

[20] I tend to think that the directions by the trial judge on the assessors and himself on the lines highlighted above regarding the appellant's evidence is not adequate. Ultimately, the full court will have to consider whether this inadequacy had resulted in a substantial miscarriage of justice and the test is whether the full court can conclude from its review of the record that despite the error the conviction was inevitable. It is the inevitability of the conviction which will sometimes warrant the conclusion that there has not been a substantial miscarriage of justice with the consequential obligation to allow the appeal and either order a new trial or enter a verdict of acquittal (see para [35] in ***Naduva***)

[21] However, this ruling should not be taken to necessarily mean that the appellant has a real prospect of success in his appeal before the full court.

Order

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



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