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

CRIMINAL APPEAL NO.AAU 0065 of 2018
[In the High Court at Lautoka Case No. HAC 155 of 2015]

BETWEEN	:	**GANGA RAM**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Mataitoga, JA** **Qetaki, JA**
Counsel	:	**Appellant in person**
	:	**Ms. E. Rice for the Respondent**
Date of Hearing	:	**08 May 2023**
Date of Judgment	:	**25 May 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been indicted in the High Court at Lautoka on one count of rape allegedly committed on 22 January 2011 and another representative count of rape committed between July 2010 and December 2010 contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 at Nadi in the Western Division. The appellant had been acquitted of the first count by the trial judge as the prosecution tendered no evidence on that count.

[2] The assessors had by a majority opined that the appellant was guilty of rape under count 02. The learned trial judge had agreed with the unanimous opinion of the assessors and convicted the appellant and sentenced him on 24 May 2018 to 13 years of imprisonment with a non-parole period of 10 years. The appellant appealed only against the conviction and single judge had refused leave to appeal and the appellant had renewed his leave to appeal application before the full court.

Facts of the case

[3] The complainant had been a student under 18 years of age (who turned 18 on 13 December 2010) during the time the alleged acts of rape relating to the second count occurred and the appellant had been one of her uncles (father's cousin brother) and of twice her age. According to the complainant, the appellant had forced her to have sexual intercourse during the time mentioned in the second count on three to six occasions. In May 2011, she was found to be pregnant and the matter was reported to the police. Later she had given birth to a child and started raising the child as a single parent.

[4] The appellant had given evidence at the trial and admitted having had consensual sexual intercourse with the complainant only once in January 2011 but denied having any kind of similar relationships in 2010 except that she had admittedly hugged him in December 2010. He had admitted that he was responsible for her pregnancy.

[5] The prosecution had led the evidence of the complainant (PW1) and two other witnesses (Anjani Devi, a neighbor - PW2 and Raghwa, PW1's father- PW3). PW1 with her three younger siblings and PW3 had lived a short distance away from the appellant's house at the time relevant to the charge. PW1 was in high school at that time. PW1 used to go to the appellant's house to do household chores such as washing dishes and cloths and sweeping the house after school, during the weekends and school holidays as her father, a fisherman could not support her. The appellant used to give food and her bus fare to go to school. According to her, during such visits between July 2010 and December 2010 the appellant forced her to have sexual intercourse with him on 3-6 occasions. He had threatened to kill her if she reported the incident to anyone. She had got pregnant in December 2010. PW1 did not report to anyone until May 2011 when she revealed to PW2 that she was pregnant and the appellant was responsible for her pregnancy. PW3 came to know about it from PW2's husband and PW1 admitted it to him and implicated the appellant. He reported the matter to police.

[6] The appellant in his evidence had taken up the position that PW1 seduced him by hugging him in December 2010 and thereafter they started liking each other and had consensual sex only once in January 2011 where each took off their clothes. However, even after the first encounter PW1 used to come to his house. He had also stated that he and PW1 were contemplating getting married. He had admitted that he was the father of PW1's son. According to him, he did not know why PW1 came there in December 2010 for the first time and who had sent her to his house. She had said to the appellant that her father sent her there to get 02 dollars to be returned later. He also gave food to her. PW1 returned a week later while he was watching a movie and hugged him. He told her off and asked her to go home. She continued to come to his place, eat and go without doing anything. He even asked PW3 not to send her to his house. The appellant also said in evidence that he later told PW3 of his relationship with PW1. He admitted having had sexual intercourse with PW1 on a single occasion in January 2011 but denied having done on any other occasion.

[7] Grounds of appeal urged on behalf of the appellant before the full court are as follows:

> ***Ground 1***
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> *THAT the Learned Judge erred in law by failing to consider the pre charge delay of 4 years by the respondent in charging the appellant and a systematic post-charge delay of about 3 years to try the case. It is respectfully submitted that the European Convention incorporate most of the provisions of our constitution. The opening words of section 6 (1) of the European Convention reads that:*
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> *In the determination of his civil rights and obligation or of any criminal charge against him everyone is entitled to a fair and public hearing within a responsible time by in independent and impartial tribunal established by law.*
>
> *The pre-charge delay of 4 years in charging the appellant has caused and created a breach in his right to fair post charge delay of about 3 years to try the matter caused an enormous prejudicial effect on the defence logistics.*
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> ***Ground 2***
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> *THAT the Learned Judge erred in law by misdirecting the assessors since there was a withdrawal letter of complaint by the complainant prior to the hearing of the case. It was tendered to the prosecution but was overlooked by the counsel for the respondent at first day trial, making the summing up adverse and out of context. This misdirection has created injustice to the appellant in regards to the law, causing the trial to miscarry and the conviction invalid.*

Ground 3

THAT the Learned Judge erred in law by failing to ponder on the element of consent since the evidence presented by the appellant during the trial that the act of sexual intercourse between the complainant and the appellant was a consensual sexual relationship. It is respectfully submitted that there is no evidence in the prosecution case to prove the use of force upon the complainant at the material time negating the complainant's story that she was forcefully threatened by the appellant.

Ground 4

THAT the Learned Judge erred in law by finding the appellant guilty on the representative count of rape as there was no evidence for the original count. It is respectfully submitted that the complainants fabricated a story to implicate the appellant because she was found to be pregnant. It shows that she consented to this act resulting in her pregnancy. After 6 times of alleged forceful sexual intercourse the complainant's part to willingly offer herself to the appellant; for sex.

Ground 5

THAT the Learned Judge erred in law by finding the appellants guilty and proceeded to convict him since the second count of rape is not established upon the elements of penetration and force. It is respectfully submitted that the charge of rape raises difficult questions on both actus reus and mens rea. Because the act usually takes pace in private. The only incriminating evidence against the appellant is the complainant's testimony. In some courts the absence of injury to the victim's body has been taken to show that there was no resistance, which in some jurisdictions show that consent was given.

Ground 6

THAT the complainant was staying together in the same route after missing three family houses in the same vicinity. If there was any force or threatened or any allegation of rape, community and public won't support appellant to stand for their Advisory counsellor for Nadroga District.

01st ground of appeal

[8] The appellant complains that there has been an undue delay in the conduct of criminal proceedings against him. PW1 had made the first complaint on 28 May 2011 and the appellant had been caution-interviewed on 08 June 2011. He had been charged in the Magistrates' court on 02 September 2015 and produced before the High Court on 09 September 2015. Information had been filed in the High Court by the Director of Public Prosecutions on 19 November 2015. Both parties had moved for dates for various steps while the appellant had been on bail. The trial had commenced on 21

May 2018. As for the delay (over 04 years) in charging the appellant, it is difficult to ascertain the reason for it from the record. Perhaps, a letter allegedly written by PW1 and received by the DPP on 15 February 2016 seeking to withdraw her police statement might have contributed to this delay. Having perused the judges' notes, I do not find that either party had deliberately caused any delay (less than 03 years) in commencing the trial.

[9] The defense had not brought up either pre-charge or post-charge delay as an issue during the trial. No application for a stay of proceedings was made by the defense to the High Court. Courts are empowered to refuse to allow the indictment to proceed to trial on abuse of process (see **Connelly v Director of Public Prosecutions** [1964] AC 1254). Courts also have an inherent jurisdiction to prevent a trial which would be oppressive and vexatious (see **Humphrys** [1977] AC 1). Delay itself, could, in appropriate circumstances, be such as to render criminal proceedings an abuse of process (see **Central Criminal Court, *ex parte* Randle** [1991] 1 WLR 1087). Courts also have an inherent jurisdiction to prevent a trial which would be oppressive because of unreasonable delay (see **Bell v Director of Public Prosecutions of Jamaica** [1985] AC 937). In ***Bell*** (i) the length of delay (ii) the prosecution's reasons to justify the delay (iii) the accused's efforts to assert his rights and (iv) the prejudice caused to the accused, have been laid as guidelines for determining whether the delay would deprive the accused of a fair trial. Australian cases have added a fifth factor, namely the public's interest in the outcome of the case. In ***Ex parte Randle*** despite a delay of 23 years, lack of prejudice to the accused was held to be fatal to the application for the proceedings to be stayed on the ground of unreasonable delay. In assessing what prejudice has been caused to the accused on any particular count by reason of delay, the court should consider what evidence directly relevant to the defense case has been lost through the passage of time; vague speculation that lost documents or deceased witnesses might have assisted the defendant is not helpful; the court should also consider what evidence has survived the passage of time, and examine critically how important the missing evidence is in the context of the case as a whole (see **F. (T.B)** [2011] EWCA Crim 726; [2011] 2 Cr. App. R. 13).

[10] Sections 15 (1) and (3) of the Constitution of the Republic of Fiji guarantees an accused the right to a fair trial and the right to have his case determined within a reasonable time. The appropriate remedy for a breach of the right to a trial within a reasonable time is not necessarily for the proceedings to be stayed. Such a breach should result in a stay of the proceedings only if a fair trial is no longer is possible, or it would for some other compelling reason such as bad faith, executive manipulation and abuse of process be unfair to try the accused (see **Archbold Criminal Pleadings, Evidence and Practice 2020** at 4-80 at page 393). In **Sawoniuk** [2000] 2 Cr. App. R. 220, where the case turned on eye-witness evidence who was subject to cross-examination, and the jury had been afforded a view of the *locus in quo*, it was held that a fair trial had not been impossible, despite a delay of 56 years. It was held in **Warren v Att.Gen. for Jersey** [2012] 1 A.C. 22, PC that the question to be determined is whether a stay is necessary in order to protect the integrity of the criminal justice system; fairness to the accused, although not irrelevant, is subsumed in this primary consideration. Where delay was the sole ground for seeking a permanent stay, the accused must be able to show *'that the lapse of time is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute'* (**Jago v District Court of New South Wales** (1989) 63 ALJR 640 per Mason CJ at 644 quoting **Clarkson** [I9871 VR 962, 973). Deane J at page 655 & 654 in ***Jago*** also agreed that abuse of process could be called in aid if the inevitable effect of unreasonable delay would be to make any subsequent trial an unfair one. However, he thought that delay due to limited institutional resources had to be accepted as a 'normal incident' of the due administration of justice and, without more, could not be regarded as unfairly oppressive or an abuse of the process of the court.

[11] I have considered the appellant's complaint in the light of above legal principles regarding the alleged 'delay' and I find no basis to uphold this ground of appeal, for the appellant has not demonstrated how his defense was prejudiced by the so called delay or how the alleged delay infringed his right to a fair trial or how the criminal proceedings had not been fair to him. There is no abuse of process here and the trial against the appellant had not been oppressive and vexatious.

02nd ground of appeal

[12] The appellant's argument is based on the alleged letter of withdrawal purportedly submitted to the DPP by PW1 which is available in the record. There had been a discussion about this letter prior to the commencement of the trail among the trial judge, state counsel and the defense counsel. The trial judge had informed the state counsel, who said that he had not received it, that he would be given an opportunity to re-examine PW1 on the letter obviously on the assumption that the defense would produce it in the cross-examination of PW1. However, for reason best known to the defense, the appellant's trial counsel had not confronted PW1 with the said latter under cross-examination and therefore, there was no need for the prosecutor to re-examine her on the latter. There was no burden or duty on the part of the prosecution to produce the letter at the trial. In other words, the so called withdrawal letter is not part of trial proceedings. In the circumstances, the appellant's grievance is without any merits.

03rd ground of appeal

[13] The appellant submits that the prosecution had failed to prove lack of consent beyond reasonable doubt, as according to him sexual intercourse that happened was consensual.

[14] PW1 was emphatic that the last time there was an act of sexual intercourse between her and the appellant was in December 2010 which prompted the trial judge to acquit the appellant of the first count which alleged another act of rape on 22 January 2011. She had given cogent evidence that the appellant demanded to have sex with her and asked her to open up her cloths and when she told him not to do it, he forcibly took off her clothes, came on top of her and inserted his penis into her vagina. He had threated her not to divulge it to anyone or he would kill her. According to her, there had been 03-06 instances of sexual intercourse between July and December 2010; the first one in July.

[15] What is important is that because the second count was a representative count, it was sufficient for the prosecution to prove that at least one instance of sexual intercourse was without PW1's consent. It is immaterial even if the other acts were consensual.

[16] The appellant's counsel had cross-examined PW1 on the basis that there was a romantic relationship between the two, and suggested to her in general terms that there was no threat or force by the appellant to have sexual intercourse with her, both of which PW1 had denied. There was no specific suggestion at all that the appellant never had any act of sexual intercourse during the period from July to December 2010 but he engaged in sexual intercourse with her only once in January 2011 with her consent. No suggestion was ever made that she and the appellant were contemplating of getting married either.

[17] However, after PW1's evidence was over, the appellant and his counsel knew that there was no evidence by PW1 that any sexual intercourse, forcible or otherwise, that happened in January 2011 and he had been acquitted of the charge concerning the alleged act of rape on 22 January 2011. Based on that, the appellant seems to have taken up the safe position in his evidence that he had consensual sex with PW1 only once in January 2011 but denied a single act of sexual intercourse from July to December 2010. The fact that this position was not suggested to PW1 shows that it was an afterthought and part of a belatedly devised strategy. However, it significantly affect the credibility of the appellant's testimony.

[18] Further, the appellant's counsel had not suggested to PW1 that it was her who in fact seduced the appellant by hugging him in December 2010 much to his annoyance. Neither had it been suggested to PW1 that she had turned up at his doorstep to ask for 02 dollars for her father as adverted to by the appellant in his evidence. Although the appellant had testified that PW1 used to come to his house every weekend, eat and go but did not do any work, his counsel never challenged PW1 when she said that she washed dishes and cloths and swept the appellant's house. Her evidence that it was the appellant's plan for her to work at his house was also not challenged. Nor was it suggested to PW3, the complainant's father that the appellant complained to him not to send PW1 to his house or the appellant informed PW3 of his 'relationship' with

PW1. On the other hand, though the appellant denied in his evidence that he used to give her bus fare, his counsel did suggest to PW1 that the appellant in fact did so and PW1 admitted the suggestion. Therefore, there were material inconsistencies between the positions the appellant's counsel took up during the prosecution case and by the appellant in his own testimony, significantly damaging his credibility.

[19] Further, the appellant had taken up the position for the first time in his testimony that PW1 on her own hugged him in December 2010 while he was lying on his bed watching a movie and he does not know why she came and he chased her. In my mind his testimony under oath that it was PW1 who was barely 18 years old and his niece coming from nowhere who took the initiative by seducing him with a hug on the first day is a deliberate lie which can strengthen or support the evidence against him (see **Lucas (R)** [1981] Q.B. 720; (1981) 73 Cr. App. R. 159, CA and **Goodway** (1994) 98 Cr. App. R 11, CA).

[20] The appellant's defense of consensual sex was only relevant to an act in January 2011. PW1 did not speak to any act of sexual intercourse after December 2010. Thus, the main plank of his defense is not applicable to any acts of forcible sexual intercourse from July to December 2010 as spoken to by PW1. With regard to those acts, the appellant's defense was one of complete denial. Therefore, as far as those acts were concerned, the only issue to be decided was the credibility of the prosecution version of events as opposed to a bare denial on the part of the appellant. The majority of assessors and the trial judge had accepted the prosecution version and rejected the appellant's denial. As I have already analyzed, there is much to be desired as far as the credibility of the appellant's evidence is concerned.

04th ground of appeal

[21] The appellant's submissions on different aspects relating to the credibility of PW1 could be considered under this ground of appeal. The main points of contention are (a) PW1 had failed to report to the police until PW2 probed her as to the reason for her growing tummy (b) PW1's evidence that the appellant threatened her but not with

a knife whereas she had told the police that he threatened her with a knife (c) If PW1 had been raped why she kept going back to the appellant's house.

[22] PW2's explanation as to why she waited until her father took her to the police station was because she was afraid of the police and scared of her parents and only divulged it to PW2 when inquired and at that time she was 05 months' pregnant. It had not been suggested to PW1 that she did not inform anyone till May 2011 because she had consented to have sexual intercourse with the appellant. In her evidence, PW1 never wavered from her position that she did not consent to have sex with the appellant.

[23] Regarding PW1's evidence that the appellant threatened her but not with a knife as recorded in her police statement, it is clear that she had been truthful not to falsely implicate the appellant being armed with a knife but she was steadfast that he did threaten her. According to her, it was her parents who wanted her to introduce a knife in her police statement. This, rather than impeaching her credibility in fact served to enhance her credibility, for she could have easily stuck to her police statement, if she was all out to falsely implicate the appellant. This type of embellishments are not uncommon and they do not necessarily make the witnesses unreliable.

[24] As to why she kept going back to the appellant's house even after the first incident of rape, she was categorical that she never had the bus fare to go to school and therefore she continued to go to the appellant in order to get her bus fare. This position is consistent with the suggestion made by the appellant's trial counsel that the appellant indeed gave her bus fare in addition to food.

[25] The appellant also submits that PW1 had not complained to her aunt Latchmama whom she had visited on 23 May 2011. Latchmama was not called as a witness by either side and therefore, it is not possible to consider anything Latchmama had told the police. In any event, on 22 May 2011 PW1 had disclosed to PW2 that the appellant had made her pregnant and PW3 had come to know of it from PW2's family.

05th ground of appeal

[26] The appellant seems to argue that if he had engaged in sexual intercourse with PW1 forcibly, she should have suffered injuries on her body and the absence of such injuries suggests consent. This argument is misconceived.

[27] The prosecution had not led PW1's medical report in evidence and the appellant's counsel could have done so, if he so wished. In any event, no injuries could have been found after several months by a medical examination and perhaps, more so when PW1 was pregnant. The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent (vide section 206(1) of the Crimes Act, 2009. A person's consent to an act is not freely and voluntarily given if it is obtained by force (vide section 206(2)(a) of the Crimes Act).

[28] In **Rao Harnarain Singh, Sheoji Singh and ors v State of Punjab** AIR 1958 Punj 123 it was held as follows on submission to sex in the face of inevitable compulsion:

> *'A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act,….*
>
> *Submission of her body under the influence of fear or terror is not consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent.*
>
> *….A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted.'*

[29] On the material placed before the court it cannot reasonably be argued that PW1 was consenting to the acts of sexual intercourse with the appellant.

06th ground of appeal

[30] The appellant argues that if he had used force or threatened PW1 leading to an allegation of rape, the community in the area would not have supported him to stand for the Advisory Counsellor for Nadroga District.

[31] The appellant did not give evidence on this aspect at the trial. Neither did he produce any documents which he now refers to and available in the appeal record at the trial. Thus, this ground is totally misconceived and unmeritorious. In any event, it has little relevance to the charge of rape.

[32] When examining whether a verdict is unreasonable or cannot be supported by evidence, as stated by the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) 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 including defense 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 reasonably 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.

[33] Having applied the above test, it cannot be said that on the record of evidence the assessors ***must*** have entertained a reasonable doubt about the appellant's guilt, for upon the whole of the evidence it was reasonably open to the assessors to be satisfied beyond reasonable doubt of the commission of the offence under the second count. In my view, acting rationally, the assessors ought not to have entertained a reasonable doubt as to proof of guilt.

[34] **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) too applied more or less a similar test in considering whether the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

[35] When a verdict is challenged 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** [2014] FJCA 35; AAU0071.2012 (14 March 2014)]. I think that in this case the trial judge could have reasonably convicted the appellant of rape.

Mataitoga, JA

[36] I support your conclusions and orders.

Qetaki, JA

[37] I have read the draft judgment, and I agree with it and the reasons.

The Orders of the Court are:

1. Leave to appeal against conviction is refused.
2. Appeal is dismissed.

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL

.....
Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

Solicitors:

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