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

CRIMINAL APPEAL NO. AAU 67 of 2022
[In the High Court at Lautoka Case No. HAC 176 of 2018]

BETWEEN	**:**	**KELEPI NABUWAI**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Ms. T. Kean for the Appellant** **Mr. A. Singh for the Respondent**
Date of Hearing	**:**	**17 January 2024**
Date of Ruling	**:**	**19 January 2024**

RULING

[1] The appellant had been convicted in the High Court at Lautoka with one count of rape (second count) along with his co-accused. The charges were as follows:

*'**FIRST COUNT***

Statement of Offence

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

Particulars of Offence

***MARIKA SOQETA**, on the 18th day of September, 2018 at Nadi in the Western Division penetrated the vagina of "SN" with his penis without her consent.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

> ***KELEPI NABUIWAI****, on the 18th day of September, 2018 at Nadi in the Western Division penetrated the vagina of "SN" with his penis without her consent."*

[2] After trial before a judge alone, the trial judge had convicted the appellant on the above count and sentenced him on 16 April 2021 to an imprisonment of 09 years and 07 months with a non-parole period of 08 years and 07 months.

[3] The appellant's appeal against conviction is timely but the appeal against sentence is out of time.

[4] In terms of section 21(1) (b) and(c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] 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).

[6] The delay in the sentence appeal is over two years which is very substantial, and there is no acceptable explanation for the delay by the appellant. However, I would still 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 not averred any prejudice that would be caused by an enlargement of time.

[7] The trial judge had summarized the facts in the sentencing order as follows:

> *3. On 1st September, 2018 the victim and her mother left for Uto Village to cook for the workers at the logging site. Both the accused persons were workers of the logging company, the victim and both the accused persons knew each other.*
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> *4. On 18th September, 2018 at about 10pm the victim went near an electricity pole away from her uncle's house where she was staying. At the electricity pole one Atu came and relayed to her that Marika the first accused had asked the victim to go to him since the accused wanted her mobile phone charger. The victim did not have any phone charger with her, so she told Atu this, but Atu was forcing her to go to the first accused.*
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> *5. The first accused was living about 4 to 5 meters away from her uncle's house. The victim went to meet the first accused who was standing at the doorway of the house, there was no light inside the kitchen but due to moonlight she was able to see that it was the first accused. As soon as the victim stood at the doorway the accused took her hand, pulled her and threw her into the kitchen. He then blocked the complainant's mouth, removed her sulu and pushed her onto the bed and then removed her shorts and panty.*
>
> *6. Thereafter, the accused removed his clothes, went on top of the victim and had sexual intercourse by penetrating his penis into her vagina. After the first accused had forceful sexual intercourse the second accused went on top of the victim blocked her mouth and had forceful sexual intercourse.*
>
> *7. The victim did not consent for both the accused persons to have sexual intercourse with her. After she told her mother about what both the accused persons had done to her, the matter was reported to the police. Both the accused persons were arrested and charged.*

[8] The complainant and her mother gave evidence for the prosecution and the appellant gave evidence on his behalf and denied having had sexual intercourse with the complainant.

[9] The grounds of appeal urged by the appellant are as follows:

> ***Conviction:***
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> ***Ground 1:***
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> *THAT the Learned Trial Judge erred in law and in fact when he convicted the appellant when the prosecution's case cannot be sustained on the totality of evidence considering the evidence of Dr. Vasitia Cati.*
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> ***Ground 2:***
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> *THAT the Learned Trial Judge failed to fairly evaluate and give proper direction on the omissions made by the complainant.*
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> ***Sentence:***
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> ***Ground 3:***
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> *THAT the Sentencing Judge fell into error when he did not give adequate weight and attention to the mitigating factor of the appellant being a young and first offender and failed to direct himself the principles of sentencing an offender in terms of rehabilitation of an offender.*

Ground 1

[10] The appellant's argument is that in the light of the evidence of defense witness Dr. Cati who gave evidence based on the medical examination and report made of the complainant by Dr. Pene no forceful sexual intercourse is revealed. Dr. Pene had said that there had been no trauma and therefore Dr, Cati had assumed that no forceful sexual intercourse had happened as Dr. Pene's professional findings were normal.

[11] This line of this argument drops its force in the light of the appellant's defense that he did not indulge in sexual intercourse at all with the complainant though he admitted being present at the crime scene at or about the time of the incident. He never took up

the position that his sexual intercourse with her was consensual. Nor did he challenge her recognition of him by his voice.

[12] In any event, this was a case of adult rape and Dr. Pene had observed no hymen in the complainant and it is no surprise that there were no signs of trauma. Therefore, one would not necessarily expect or it would be unrealistic to expect physical injuries to be present in the genitalia of the complainant particularly when the evidence of the complainant did not suggest such a rough acts of sexual intercourse with her by both accused as to leave telltale marks.

[13] On the other hand, the complainant's very prompt complaint to her mother of what had happened greatly enhances her credibility. Therefore, one cannot find fault with the trial judge for not acting upon the evidence of Dr. Cati but decided to believe the complainant's evidence buttressed by her mother's evidence.

[14] This court has elaborated the test under section 23 of the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [before Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] where the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence as follows (which is the same test where the trial is held by judge alone – see **Filippou v The Queen** (2015) 256 CLR 47):

> *'[23] ……**the correct approach by the appellate court is to examine the record or the transcript** to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence. **These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors'***

[15] As expressed by the Court of Appeal in another way, before a judge alone the question is whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

[16] At the same time, it has been said many a time that the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[17] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

[18] I have considered the maters raised by the appellant under the first ground of appeal but do not find them to be in anyway adequate to render the verdicts unreasonable.

Ground 2

[19] The law on omissions, discrepancies, contradictions and inconsistencies is that the existence of inconsistencies by themselves would not impeach the creditworthiness of a witness and that it would depend on how material they are – **Laveta v State** [2022] FJCA 66; AAU0089.2016 (26 May 2022). The broad guideline is that omissions, discrepancies, contradictions and inconsistencies which do not go to the root of the

matter and shake the basic version of the witnesses cannot be annexed with undue importance [**Nadim and another v The State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) & **Krishna v The State** [2021] FJCA 51; AAU0028.2017 (18 February 2021)].

[20] As for the omission that the complainant had not mentioned the presence of the appellant from line 3-23 of paragraph 3 at page 1 of her police statement, it does not suggest that she had had not mentioned him in the rest of the same paragraph or in any other part of her statement or in a subsequent statement. If not, the appellant would not have been arrested and produced by the police. In any event, the appellant does not seem to have cross-examined the complainant of any such omission.

03rd ground of appeal (sentence)

[21] The trial judge had indeed considered good character (which must be the appellant being a first offender) and his young age in mitigation and given a discount of 01 year and 03 months.

[22] I cannot see any sentencing error in the sentencing process.

Orders of the Court:

1. Leave 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
RESIDENT JUSTICE OF APPEAL

Solicitors:

Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for the Respondent