

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

CRIMINAL APPEAL NO.AAU 166 of 2019
[In the High Court at Lautoka Case No. HAC 83 of 2015]

BETWEEN : **WILLIAM PETERS**

AND : **STATE**

Appellant

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. L. J. Burney for the Respondent**

Date of Hearing : **17 August 2021**

Date of Ruling : **20 August 2021**

RULING

[1] The appellant (19 years old) had been indicted in the High Court at Lautoka upon two counts of rape of a child (his 04 year old step cousin) contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009 committed at Nadi in the Western Division on 29 April 2015.

[2] The information read as follows:

FIRST COUNT

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) (3) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

WILLIAM PETERS on the 29th day of April, 2015, at Nadi in the Western Division, had carnal knowledge of ***SM***, a child under the age of 13 years.

SECOND COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (c) (3) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

WILLIAM PETERS on the 29th day of April, 2015, at Nadi in the Western Division, penetrated the mouth of ***SM*** with his penis, a child under the age of 13 years.

- [3] At the end of the summing-up, the assessors had in unanimity opined that the appellant was not guilty of both counts. The learned trial judge had disagreed with the assessors' opinion, overturned their opinion and convicted the appellant of both counts. The trial judge had sentenced the appellant on 25 October 2018 to an imprisonment of 10 years with a non-parole period of 07 years on each count; both sentences to run concurrently.
- [4] The appellant's appeal against conviction and sentence filed in person (05 December 2019) is out of time by nearly 11 ½ months. Later, the Legal Aid Commission had tendered a notice of motion seeking enlargement of time to appeal only against conviction along with written submissions on 17 February 2021. The state had tendered its written submissions on 24 February 2021. Both parties made oral submissions *via* Skype in addition to the written submissions already filed.
- [5] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.

- [6] 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?
- [7] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained (vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100).
- [8] It is clear that the delay is substantial and appellant's explanation for the delay is that he was ignorant of the law and legal procedure in lodging an appeal. According to him, he had given appeal papers initially in October and November 2018 to two officers at Natabua correction facility to be lodged with the Court of Appeal registry but that effort had not materialised. Thereafter, he had resent his appeal papers to the registry in November 2019 though some other correction officers in October 2018 had asked him to file his appeal papers again. Thus, it appears that he had waited from October 2018 to November 2019 to file another set of his appeal papers and therefore, he has offered no reasonable excuse for the delay. The DPP had, however, not averred any prejudice that would be caused by an enlargement of time. If there is a **real prospect of success** in the belated grounds of appeal in terms of merits this court would be inclined to grant extension of time (vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)).
- [9] The grounds of appeal urged on behalf of the appellant are as follows:

'Conviction

Ground 1:

THAT the Learned Trial Judge erred in law and in fact when he did not properly analyse the evidence of conduct by the victim and her mother in light of the defence case of the complaint being fabricated by the victim's mother.

Ground 2:

THAT the Learned Trial Judge erred in law and in fact when he stated in his Judgment that he is unable to agree with the opinion of the assessors which he thinks was motivated by the assessor's reluctance to send the young accused to prison.'

[10] The trial judge had summarised the case against the appellant in the sentence order as follows:

3. *You were a 19 year-old young person when these offences were committed on your step-cousin who was only 4 years old at that time. You are now 23 years old.*
4. *You were staying at victim's house when the incident happened. When victim's mother was washing clothes, the victim went to the toilet. You pushed opened the door and entered the toilet. You then carried her and put your penis in her mouth. Then you lifted her up and bent her over and inserted your penis inside her vagina. When she tried to shout, you blocked her mouth. You slapped her and informed her not to inform the incident to anybody. The victim complained to her mother a few days after the incident. The matter was reported to police and the victim was medically examined. The doctor who examined the victim found her hymen not intact and the area around inner wall of the vagina red.*

[11] The appellant had elected to exercise his right to remain silent. His counsel had put the appellant's case to the prosecution witnesses in cross examination. Defence case had been one of denial and also that the victim's mother had made up this story and falsely implicated the appellant because she wanted him out of her house.

01st ground of appeal

[12] As stated by the respondent in the written submissions this ground of appeal and submissions made to buttress it are somewhat opaque.

[13] The prosecution case was built on the victim's unsworn evidence (PW2), her mother's recent complain evidence (PW1) and supporting medical evidence (PW3). The appellant did not adduce any evidence but cross-examined PW1 and PW2 on the basis that the allegations of rape was a fabrication as result of a domestic dispute between

PW1 and the appellant's step mother. In other words, the victim had been coached to falsely implicate the appellant in order to remove the appellant from home.

- [14] Since the assessors had thought that he appellant was not guilty of the two charges the trial judge had a duty embark on an independent assessment and evaluation of the evidence and to give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and those reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)] and **Fraser v State** AAU 128.2014 (5 May 2021)]
- [15] However, in that exercise the trial judge is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors [vide **Fraser v State** (supra)].
- [16] The above legal positions are consistent with the fact that the trial judge is the sole judge of fact (and law) in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015) and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].
- [17] The appellant submits that the trial judge had not discharged his duty by failing to analyse the evidence of PW1 and PW2 in the light of the defence of fabrication.

[18] It is clear from a perusal of the judgment that the trial judge had first considered the prosecution evidence (see paragraph 5-10) and thereafter analysed that evidence in the light of the proposition advanced by the defence (see paragraphs 11-21) and satisfied himself that the appellant had penetrated the victim's mouth and vagina with his penis. In doing so in addition to what was stated in the judgment, the judge had directed himself on the lines of the summing-up too (see paragraphs 3 and 22).

[19] Therefore, I do not think that there is merit in the appellant's complaint under the 01st ground of appeals and he has no real prospect of success in appeal either.

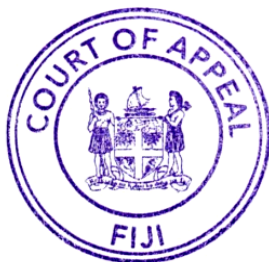
02nd ground of appeal

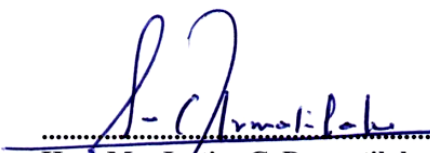
[20] While it is true that the trial judge had stated in the judgment that the assessors' not guilty opinion was motivated by their reluctance to send the young appellant to prison, it was an unwarranted passing reference which cannot take anything away from the trial judge's well-focused and succinct analysis of evidence of PW1 and PW2 in the light of the defence position. Merely because the trial judge had expressed his intuition in the open as to why, he thought, the assessors had been reluctant to find the appellant guilty that would not in any way affect the otherwise satisfactory and cogent reasons given in convicting the appellant.

[21] Therefore, there is no merit in the appellant's complaint under the 02nd ground of appeals which also has no real prospect of success in appeal.

Order

1. Leave to appeal against conviction is refused.




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