

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

CRIMINAL APPEAL NO.AAU 0094 of 2018
[In the High Court at Lautoka Case No. HAC 58 of 2014]

BETWEEN : **MIRA SAMI**

AND : **STATE**

Appellant

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. S. Babitu for the Respondent**

Date of Hearing : **23 September 2021**

Date of Ruling : **24 September 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with three counts of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed at Lautoka in the Western Division on 21 August 2013.

[2] The information read as follows:

‘First Count

Statement of Offence

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

Particulars of Offence

MIRA SAMI on the 21st day of August, 2013 at Lautoka in the Western Division penetrated the vagina of ***KRITIKA SHARMA*** with his penis, without her consent.

Second Count

(Representative Count)

Statement of Offence

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

Particulars of Offence

MIRA SAMI between the 22nd day of August, 2013 and the 6th day of November 2013 at Lautoka in the Western Division penetrated the vagina of ***KRITIKA SHARMA*** with his penis, without her consent.

Third Count

(Representative Count)

Statement of Offence

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

Particulars of Offence

MIRA SAMI between the 07th day of November, 2013 and the 8th day of November, 2013 at Lautoka in the Western Division, penetrated the vagina of ***KRITIKA SHARMA*** with his penis, without her consent.'

- [3] At the end of the summing-up the assessors had opined that the appellant was not guilty as charged. The learned trial judge had disagreed with the assessors' opinion, convicted the appellant and sentenced him on 12 March 2018 to an imprisonment of 13 years, 10 months and 15 days with a non-parole period of 10 years.
- [4] The appellant had appealed in person against conviction out of time (12 September 2018). Thereafter, the Legal Aid Commission had filed a notice of motion seeking enlargement of time, amended notice of appeal against conviction and sentence the appellant's affidavit along with written submission on 14 October 2020. The state had tendered its written submissions on 04 January 2021. Counsel for both parties had consented to take a ruling on written submissions without an oral hearing *via* Skype.

- [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. Thus, 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?
- [6] 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)].
- [7] The delay of the appeal (being over 05 months for the conviction appeal and 2 ½ years for the sentence appeal) is substantial. The appellant had pleaded his lack of knowledge in the law and non-availability of relevant papers as the reason for the delay up to 12 September 2018. However, there is no explanation at all as to why he had not appealed against sentence even in September 2018. Considering the fact that his 'appeal' tendered on 12 September 2018 was just a letter without any grounds of appeal, none of the reasons adduced by him could have prevented him from filing a similar 'appeal' in time against conviction and sentence. Thus, his explanation for the delay is unacceptable. Nevertheless, I would see whether there is a real prospect of success for the belated grounds of appeal against conviction and sentence 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.

[8] 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 allowed hearsay evidence through the State's case which caused a miscarriage of justice towards the Appellant.

Ground 2

THAT the Learned Trial Judge erred in law and fact when he failed to fully and properly consider the issue of delayed reporting of the complaint thus questioning the credibility of the victim and the veracity of her complaint and the credibility of the State case.

Ground 3

THAT the Learned Trial Judge erred in law and in fact when he failed to consider and warn the Assessors and himself the danger of convicting the Appellant on the evidence of the complainant especially when she had admitted to lying.

Ground 4

THAT the reasoning of the Trial Judge cannot be relied on as cogent reasoning for overturning the assessors finding given the inconsistencies in the States case to which the Trial Judge failed to carefully and fully consider.

Sentence

Ground 5

THAT the Learned Trial Judge erred in fact and in law when considering as an aggravating factor the giving of evidence of the complainant in the trial process and that the Appellant ejaculated inside her and made her pregnant which should not have been considered as such and aggravated the sentence making the sentence harsh and excessive.'

[9] The trial judge in the sentencing order had summarized the evidence against the appellant as follows:

3. *Victim is your niece. She is from a broken family. Victim's stepmother sent the victim to your place for protection and wellbeing when your wife agreed to look after her. She was sent only for a visit. However, you persuaded her to work at your work place without the permission or knowledge of her parents. She was only 17 years old minor at that time.*

4. *On the first day of her work, you started touching her breast. On the second day, 21st August, 2013, you pushed her to the ground, took off all her clothes and forcibly inserted your erected penis inside her vagina and had sexual intercourse with her without her consent.*
5. *You covered her mouth and threatened to kill her if she told anything to anybody.*
6. *You repeated the same thing on 22nd, 23rd, 26th, 27th, 28th, 29th and 30th August 2013 when you forcibly had sexual intercourse with her without her consent.*
7. *Again between 7th and 8th of November 2013, you had sexual intercourse with her without her consent when your wife went to visit her grandparents in Ba.*

[10] The appellant (who was 40 years old at the time of the incidents) had taken up the position that all his acts of sexual intercourse with the complainant were consensual and it was the complainant (she was 17 years of age at the time) who had seduced and lured him into those acts.

01st ground of appeal

[11] The complaint is based on a piece of evidence of PW2 - Kulsum Bano who is the complainant's stepmother referred to in paragraph 60 of the summing-up. The impugned portion is '*..Then she rang Maureen. Maureen denied giving money for an abortion...*'

60. *Kritika was very close to her. After two to three days of her arrival, Kritika informed her everything. At first, Kritika talked only about the abortion. She said that the baby belonged to one person from Nadi. Kritika further said that the abortion was done at Dr. Michael's surgery and the money for this was given by Maureen. Then she rang Maureen. Maureen denied giving money for an abortion. In a short while, Mira Sami his wife, in-laws, Maureen and her husband came to her place and started a conversation. Kritika then opened up and implicated Mira Sami. Mira Sami begged her husband and said, 'brother, I have done a mistake and please forgive me'. She said 'no, if you have done something wrong then I will take this matter to Court'. Then, after two days, she went and reported the matter to Women's Crisis Centre, Police and also Social Welfare.*

[12] The argument is that Mauren had not been called as a witness and therefore what she had supposedly told PW2- Bano is hearsay resulting in a miscarriage of justice.

[13] However, the complainant's evidence narrated at paragraph 45 sheds more light on what the complainant had said about Maureen lending money to the appellant's wife Ashni ('aunty') who was the complainant's father's sister.

45. Then aunty went to her neighbour Maureen's place and told her that she was pregnant. She asked for some money from Maureen, and took her to Dr. Michael's surgery where an abortion was done. Neither she nor her aunty informed about this to her parents.

[14] Thus, there was already a narrative relating to Maureen lending money to the appellant's wife coming from the direct evidence of the complainant which had apparently gone unchallenged. The prosecution does not appear to have relied on the truth of what Maureen had told PW2 - Kulsum Bano in this instance and therefore **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) would not apply here. In the circumstances, though the impugned portion of PW2- Bano's evidence may be technically hearsay in nature it could not have caused a miscarriage of justice in the overall context of the case. In any event, Maureen had denied such a transaction and that answer was favourable to the appellant. Further, the appellant's trial counsel had not sought any redirections on this piece of evidence nor objected to that during the trial. Therefore, the appellant is not even entitled to raise this point in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].

[15] Thus, there is no real prospect of success in this appeal ground.

02nd ground of appeal

[16] The allegation is that the trial judge had failed to fully consider the issue of delayed reporting. I cannot agree.

- [17] The trial judge had identified this as a one of the mains points raised by the defence. Then from paragraph 07-18 of the judgment the trial judge had fully ventilated the issue of belated complaint. He had gone through ‘the totality of circumstances test’ formulated in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) and satisfied himself that the belated complaint had been well explained in evidence by the prosecution.
- [18] Therefore, there is no real prospect of success in this appeal ground.

03rd ground of appeal

- [19] The basis of the complaint under this ground of appeal is at paragraph 53 of the summing-up about the complainant having admitted to have lied.

53. She denied having had consensual sexual intercourse with Mira on 6th in his room. She admitted that she had not complained to her aunty or police at the earliest opportunity. She admitted that she had lied to her aunty when she became pregnant.

- [20] The appellant argues that the trial judge should have warned the assessors of the danger of convicting the appellant on the complainant’s evidence as she had admitted to have lied. His counsel relies on **Singh v The State** [2006] FJSC 18; CAV0007U.2005S (19 October 2006)
- [21] In this case, the complainant is not alleged to have made a statement on oath directly inconsistent with her evidence in court as in **Singh**. What is highlighted by the appellant relates to her admission in court that she had lied to the appellant’s wife (her aunt) about her pregnancy which she later attributed to the appellant. He had also referred to the fact that the complainant had not mentioned in her police statement that the appellant covered her mouth and she received injuries on her thigh as testified in court by her.
- [22] The complainant’s explanation why she lied to her aunt on pregnancy is at paragraph 16 and 17 of the judgment.

16. Obviously, the Complainant had another opportunity to complain when she was taken to several doctors after she started vomiting. However, every time she went to see a doctor she was accompanied either by her aunty or Accused. She said that she wanted to tell the story to Dr. Bhaggat but Accused's presence prevented her from doing that. Accused himself admitted that he took the Complainant to the doctors in his van. When Dr. Bhaggat's scan revealed that Complainant was pregnant, she could no longer hide the fact of sexual intercourse. When aunty asked who the father of baby was she lied and said that it was one boy from Nadi. Complainant frankly admitted that she had to lie to her aunty because, at that time, the Accused was present watching them.
17. Complainant finally felt comfortable to reveal the truth when she was taken to her parents in Ba. Her stepmother confirmed how she received the complaint after Complainant's arrival at home. At the beginning Complainant was a bit hesitant and told only about the abortion and attributed baby's fatherhood to a boy in Nadi. Eventually, she opened up and revealed that it was the Accused who made her pregnant. She asked Complainant as to why she never informed earlier about what was happening, she said that Accused had threatened her that he would kill her. Then after two days, she went and reported the matter to Women's Crisis Centre, Police and also Social Welfare.

[23] The same issue had been recorded in the summing-up as well:

44. Mira Sami had forceful sexual intercourse with her again when her aunty went to visit her grandparents on 7th and 8th of November 2013. When aunty returned on the 10th she did not tell aunty about what happened. She was sick and started vomiting. Her aunty took her to a lady in the village who massaged her stomach. She was still not well. She was then taken to Lautoka Hospital. Finally her aunty took her to Dr. Bhaggat's clinic in Mira Sami's van for a scan. The scan revealed that she was pregnant. Aunty questioned her as to how she became pregnant. She lied to aunty and said that she was involved with a boy in Nadi. Then aunty hit her. Mira Sami was standing beside and was staring at them when this incident happened.
47. After two days of her return home, she told everything to her step mother Kulsham Bano. Kritika did not tell anything to her father because he was suffering from a heart attack. Step mother took her to Women's Crisis Centre and then to the Ba Police Station and reported the matter. She was referred to Lautoka Police Station because the incident took place in Lautoka. Her parents contacted Mira Sami about this. Mira admitted.

[24] Thus, the so called lie is not an inconsistency, a contradiction or an omission in her police statement with her evidence in court but only relates to the complainant having implicated ‘one boy’ for her pregnancy but not told that she was impregnated by the appellant to her aunt, the appellant’s wife. She had amply explained why she refrained from implicating the appellant but told that lie to the aunt. Therefore, I do not think that a warning envisaged in Singh was required in this case.

[25] Regarding the complainant’s evidence that the appellant covered her mouth and she received injuries on her thigh and the fact that her police statement had not recorded the same the trial judge had considered both in the following manner in his judgment.

20. *It was also suggested that Complainant should have received injuries if she had struggled or resisted. Complainant said that she had some injuries on her both thighs. However, there was no medical report to that effect. She said that she told police about injuries and when she went to the Police Station in December, those injuries were not visible. Complainant was medically examined nearly one month after the last incident. It is possible that the injuries may have healed by the time of medical examination.*

21. *Furthermore, presence of injuries in victim’s body is not crucial to prove lack of consent. The offence of rape may or may not be accompanied by violence, force or the threat of force. It is no part of the Prosecution’s obligation to prove that the Accused used force or the threat of force in order to bring about a rape conviction.*

22. *Complainant in her statements to police had not mentioned that her mouth was closed and that she received injuries. Complainant said that she could not tell everything to police. That is a possibility and also I do not consider omissions highlighted by the Defence to be material in this case.*

[26] The broad guideline is that discrepancies in the form of contradictions, inconsistencies and omissions which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance but the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case (vide Nadim v State [2015] FJCA 130; AAU0080.2011 (2 October 2015) particularly when the all-important ‘probabilities-factor’ echoes in favour of the version narrated by the witnesses [vide Turogo v State [2016] FJCA 117; AAU.0008.2013 (30 September 2016)]).

[27] The trial judge had not considered the omissions to be material and been convinced that the complainant was a credible and truthful witness as stated at paragraph 26 in the judgment.

26. I observed the demeanor of the Complainant. She was straightforward and not evasive. When the Defence Counsel was suggesting repetitively that she was lying, she burst into tears and registered her protest. She even refused to give evidence any further. I had to adjourn Court for a while for her to relax. I am convinced that the Complainant is a genuine and honest witness.

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

04th ground of appeal

[29] The appellant has drawn the attention of this court to paragraphs 15, 17 and 20 of the judgment and submits that the trial judge had made certain findings which were not included in the summing-up.

[30] It is somewhat difficult to understand the argument here. The impugned paragraphs are as follows:

15. It was argued at the trial that this type of behavior is not expected from a typical rape victim. However, a reasonable explanation was available in evidence in this case. Complainant had to answer the phone in the presence of aunty when the phone was given to her. Therefore, it would not have been possible for Complainant to talk to her stepmother frankly, and convey the complaint as she wished. Furthermore, Complainant's behavior has to be looked at in the context of the warning and death threat she had received from the Accused.

17. Complainant finally felt comfortable to reveal the truth when she was taken to her parents in Ba. Her stepmother confirmed how she received the complaint after Complainant's arrival at home. At the beginning Complainant was a bit hesitant and told only about the abortion and attributed baby's fatherhood to a boy in Nadi. Eventually, she opened up and revealed that it was the Accused who made her pregnant. She asked Complainant as to why she never informed earlier about what was happening, she said that Accused had threatened her that he would kill her. Then after two days, she went and reported the matter to Women's Crisis Centre, Police and also Social Welfare.

20. *It was also suggested that Complainant should have received injuries if she had struggled or resisted. Complainant said that she had some injuries on her both thighs. However, there was no medical report to that effect. She said that she told police about injuries and when she went to the Police Station in December, those injuries were not visible. Complainant was medically examined nearly one month after the last incident. It is possible that the injuries may have healed by the time of medical examination.*

[31] It is very clear that what the trial judge had stated in the above paragraphs had been drawn from evidence and not out of his imagination. He had told the assessors that:

‘37. I will now remind you evidence led in the trial. I will only summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant.’

[32] Thus, the summing-up contains only a summary of the evidence and not a substitute for the evidence given at the trial heard by the assessors. I do not see any reason why the trial judge could not draw the logical conclusions that he had drawn in the above paragraphs from the evidence available on the record. If the trial judge had not stated them in the summing-up the omission had only favoured the appellant and it perhaps explains why the assessors found the appellant not guilty.

[33] The judge is the sole judge of fact 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).

[34] The trial judge had given cogent reasons to convict the appellant and for departing from the assessors’ opinion in the judgment. He had fully considered the appellant’s evidence as well before deciding to disbelieve the same. The judgment substantially comply with **Fraser v State** [2021]; AAU 128.2014 (5 May 2021) where the Court of Appeal held:

[24] *When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must 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 the 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)]’*

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

05th ground of appeal (sentence)

[36] The appellant challenges the sentence on the premise that the trial judge should not have considered the fact that the appellant had contested the case forcing the complainant to give evidence and his having made her pregnant as aggravating features.

[37] The trial judge had listed the aggravating factors as follows:

‘13. I now consider the aggravating circumstances of your offence.

- I. Victim was 17 year old minor at the time of offence. You were 40 years old and a fatherly figure to the victim in a position of authority. You sexually abused a child and had no regard to moral, cultural and spiritual values to be observed by an adult in our society.*
- II. Victim is from a broken family. She was in a vulnerable position at your house and workplace. You exploited her vulnerability.*
- III. Victim is your niece. She was sent to your place for protection and wellbeing. You breached the trust reposed on you by the victim and their parents.*
- IV. You did everything at your disposal to conceal this monstrous crime. You used force to cover her mouth and threatened to kill her if she told*

anything to anybody. Finally an abortion was facilitated to put everything under carpet.

V. You ejaculated inside her vagina and made her pregnant.

VI. You repeatedly raped the victim over a period of time.

VII. According to the Victim Impact Statement, victim has suffered physically and psychologically. You have not only violated victim's privacy and personal integrity, but caused psychological as well as physical harm and destroyed her whole personality.

VIII. You have not saved the young girl from giving evidence and reliving the ordeal. Victim was re-traumatized in the trial process.

[38] I do not see why the fact that the appellant had made the complainant pregnant could not be treated as an aggravating factor. The complainant being traumatised in the trial process is borne out of paragraph 26 of the judgment.

'26. I observed the demeanor of the Complainant. She was straightforward and not evasive. When the Defence Counsel was suggesting repetitively that she was lying, she burst into tears and registered her protest. She even refused to give evidence any further. I had to adjourn Court for a while for her to relax. I am convinced that the Complainant is a genuine and honest witness.'

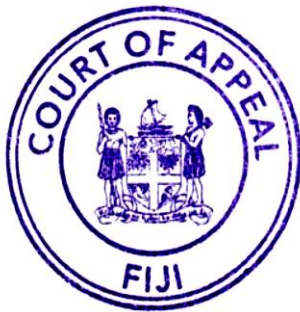
[39] Even if the complainant having been traumatised is excluded from aggravating circumstances I think the ultimate sentence cannot be treated as harsh and excessive in the factual context of this case.

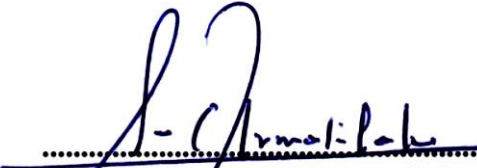
[40] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (**vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)). The approach taken by the appellate court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]. The sentence of 13 years, 10 months and 15 days of imprisonment is well within 10-16 years of tariff set in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014).

[41] Thus, there is no real prospect of success in the appellant's sentence appeal.

Orders

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




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