

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 95 OF 2016
(High Court Action No: HAC 44 of 2014)

BETWEEN : **JOVESA CAGILEVU**
Appellant

AND : **THE STATE**
Respondent

Coram : **Chandra, RJA**

Counsel : **Ms S Ratu for the Appellant**
Ms S Kiran for the Respondent

Date of Hearing : **19 June, 2019**

Date of Ruling : **17 July, 2019**

RULING

- [1] The Appellant pleaded guilty in the High Court of Labasa and was convicted of one representative count of rape contrary to section 207(1) and 207(2) (a) and (3) crimes Act, 2009.
- [2] The Appellant was sentenced on 10 September 2014 to 13 years imprisonment with a non-parole term of 12 years imprisonment.

- [3] The victim who was 7 years old at the time of the incidents was the Appellant's niece, her mother being the Appellant's sister. The Appellant had inserted his penis into the victim's vagina in December 2013, January 2014, and May 2014. The child had been mentally unwell when she turned 8 years old. On 14 May 2014 the Appellant admitted the incidents in his caution interview.
- [4] He had appealed out of time against his sentence when he had realized that his appeal had not been filed by his Counsel who appeared for him, though he had been assured that an appeal would be filed.
- [5] His application for extension of time to file leave to appeal against sentence was late by about a year and 7 months.
- [6] His amended notice advanced the following grounds of appeal:
1. *That the learned Trial Judge erred in law when he passed sentence which is harsh and excessive considering the circumstances.*
 2. *That the learned trial Judge has acted upon a wrong principle and faulted in his discretion to extend the non-parole period too near to the head sentence.*
 3. *That the learned Trial Judge erred in fact and law when he failed to justify the imposition of a non-parole period considering the circumstances of the Appellant.*
- [7] The reasons for the delay in filing his appeal are not satisfactory and the grounds of appeal would be considered to see whether there is any merit in them.
- [8] The sentence that was imposed on the Appellant was 13 years imprisonment with a non-parole term of 12 years imprisonment.
- [9] The tariff for rape of a child at the time of sentencing was 10 to 16 years. **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014). This tariff was increased by the supreme Court recently to 11 to 20 years in **Aitcheson v The State** [2018] FJSC 29; CAV0012 of 2018 (02 November 2018).

- [10] The sentence imposed was within the tariff and considering that it was a representative count on which the Appellant was charged for abusing the 7 year old victim several times, it cannot be argued that it was harsh and excessive. There is no merit in ground 1.
- [11] The second ground is on the fact that the non-parole period is too close to the head sentence.
- [12] According to section 18(4) of the Sentencing and Penalties Act, 2009 any non-parole period fixed under section 18 must be at least 6 months less than the term of the sentence.
- [13] The non-parole term imposed on the Appellant is above the six months limit and is one year. To say that the learned Judge erred in imposing such a non-parole term cannot be argued to be erroneous.
- [14] There is no merit in this ground.
- [15] The third ground of appeal is on the basis that the learned Judge erred in not justifying the imposition of the non-parole term.
- [16] In **Prasad v State** [2018] FJCA 152; AAU0010.2014 (4 October 2018). The Court of Appeal dealt with this issue and stated that where the non-parole term is fixed very close to the head sentence so as to negate the aspect of re-habilitation of an accused in the society that a trial Judge should ordinarily give reasons for such a decision, but went on to state that there may be cases where the decision to fix the non-parole period close to the head sentence is fully justified on the facts and circumstances of the case.
- [17] In the present case the learned Judge in his sentencing judgment appears to have had in mind the deterrent effect of a sentence when he stated that those who violate children must not complain when a severe sentence is given to them and that it is designed to deter other would be offenders.
- [18] In the present case, the sentence imposed on the Appellant was on the lower end of the tariff, where the nature of the abuse on the 7 year old victim was a repetitive one. Even if it is argued that the non-parole term imposed is too close to the head sentence, the circumstances of the case would appear to justify imposition of such a non-parole term.
- [19] This ground of appeal is not arguable.

Order of Court:

Application for extension of time seeking leave to appeal is refused.



A handwritten signature in blue ink, appearing to read "Suresh Chandra", is written over a horizontal line.

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL