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

CRIMINAL APPEAL NO: AAU 24 OF 2015
(High Court Criminal Case No: HAC 208 of 2014 [Suva])

BETWEEN : **THE STATE**

Appellant

AND : **ASIKINASA WAQA**

Respondent

Coram : **Prematilaka JA**
Fernando JA
Nawana JA

Counsel : **Mr Y Prasad for the Appellant**
Mr T Lee for the Respondent

Date of Hearing : **21 February 2019**

Date of Judgment : **7 March 2019**

JUDGMENT

Prematilaka JA

[1] I have had the privilege of reading in draft the judgment of my brother Fernando, JA. With all due respect, I am unable to agree with the outcome proposed by my brother Fernando, JA and give my reasons and proposed orders below.

[2] The State had filed summons for leave to appeal out of time along with the supporting affidavit on 27 February 2015 accompanied by the notice for leave to appeal in terms of Rule 40 of the Court of Appeal Rules. The State had sought an extension of time within which to appeal and leave to appeal against sentence.

[3] The purpose of the an application for extension of time to accompany the application for leave to appeal is for the Court to see *inter alia* whether there is a ground of merit or a ground of appeal that will probably succeed in deciding the issue whether an enlargement of time to file a belated application for leave to appeal should be granted or not. However, because this application came up before the Full Court it has to decide not only whether enlargement of time and leave to appeal should be granted but also whether it should act in terms of section 23(3) of the Court of Appeal Act in relation to the sentence, if extension of time and leave are granted.

[4] 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.

[5] In ***Rasaku*** the Supreme Court held

> *'[18] The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application. As the Judicial Committee of the Privy Council emphasised in Ratnam v Cumarasamy [1964] 3 All ER 933 at 935 at 935:*
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> *The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.*
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> *[19] Enlargement of time has generally been permitted by courts only exceptionally, and only in an endeavor to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court.*

[6] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors 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] In ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[8] I shall now consider each of the above factors.

Reasons for the failure to file within time

[9] I am in agreement with Fernando, JA that the reasons given in the affidavit for the delay of 47 or 48 days are not strong enough to excuse the delay. The reasons adduced for the failure to file a timely application for leave to appeal are not beyond the control of the Respondent. They are not unavoidable and could have been addressed with due diligence, particularly given the fact that the appellant is not an unrepresented accused but a State organisation with adequate human resources and technical expertise.

The length of the delay.

[10] As pointed out by Fernando, JA the delay is about 47 or 48 days which is not acceptable in the light of reasons adduced. In my view, the length of delay has to be considered not in isolation but in relation to the reasons for that delay. I am in agreement with Fernando, JA that length of delay is substantial and does not warrant this Court's indulgence.

Is there a meritorious ground of appeal or a ground of appeal that will probably succeed?

[11] I think this consideration is the most important of all. To me, it will supersede all other considerations.

[12] I can do no better than quoting from the sentencing order of the Learned High Court Judge to understand the gravity of the offences and the inadequacy of the sentence imposed on the respondent.

> *'**1ST COUNT:***
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> *Between the 1st day of January 2013 and the 31st day of December 2013, the child Complainant had gone with his grandmother at Yanuca Village for a swim. The first accused then called to the child Complainant to accompany him towards the Bamboo trees, next to a creek. As they reached the bamboo trees, first accused, took the hands of the child complainant and placed them on his penis and told the child complainant to suck his penis, where he placed his penis into the child complainant's mouth.*
>
> *While the child complainant was sucking his penis, he heard his grandmother calling, and he wanted to respond, but the accused stopped him from responding. The first accused only ran away when he heard the grandmother approaching.*
>
> ***2ND COUNT:***
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> *Between the 1st day of January 2013 and the 31st day of December 2013, the child complainant had gone to the second accused's house, as he had asked the child complainant to massage his legs. While the second accused was being massaged, he made the child complainant lie facing downwards and then he took off the child complainant's pants and penetrated the child complainant's anus with his penis. At that time the complainant was still 10 years old. In 2013, the second accused did this conduct to the child complainant more than once.*

3RD COUNT:

On the 19th day of June 2014, at Yanuca Village, the child Complainant was picking up some rubbish around his house after school and was called to the second accused person's house. As he went to the second accused's house, the second accused was seated on his bed and called the child complainant to go to him. He then drew the curtains that separates the living room from the bedroom and asked the child complainant to wait for him in his bedroom. The second accused then went and had his tea and came back to the bedroom, removed his pants and told the child to suck his penis. At that time P.S. the child complainant was a child under the age of 13 years.

4TH COUNT:

After doing what is stated above under 3rd Count. The second accused then told the child complainant to remove his pants and to lie facing downwards. The second accused then penetrated his penis into the child complainant's anus.'

[13] The Learned Trial Judge had taken the tariff for rape of a child as between 10-14 years when it had already been increased to 10-16 by the Court of Appeal in **Raj v State** AAU0038 of 2010: 05 March 2014 [2014] FJCA 18, picked the lowest end of 10 years as the starting point without picking the starting point, as a good practice, from the lower or middle range of the tariff as stated in **Koroivuki v State** AAU0018 of 2010: 05 March 2013 [2013] FJCA 15.

[14] The Supreme Court in **Raj v State** CAV 0003 of 2014: 20 August 2014 [2014] FJSC 12 said as to when the appellate court should interfere with sentence.

> *[54] Counsel referred us to **Simeli Bili Naisua v. The State** Crim. App. No. CAV 0010 of 2003. At paragraphs 19, 20 Goundar JA in the Supreme Court set out the correct approach to sentencing appeals. It is worth repeating those clear directions:*
>
> *"[19] It is clear that the Court of Appeal will approach an appeal against sentencing using the principles set out in **House v The King** [1936] HCA 40; (1936) 55 CLR 499 and adopted in **Kim Nam Bae v The State** Criminal Appeal No. AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*
>
> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*

(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in ***Chirk King Yam v The State*** *Criminal Appeal No. AAU0095 of 2011 at [18]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of* ***Kim Bam Bae's*** *case."*

[15] In my view, the Learned High Court Judge had acted on a wrong principle in taking the tariff for child rape as 10-14 years when it was 10-16 years. He also erred in taking the lowest end of the tariff as the starting point of the sentence.

[16] The Learned Judge had considered the following as mitigating factors and reduced 05 years for those factors.

(a) The accused persons pleaded guilty before the commencement of the trial.
(b) By pleading guilty they have saved the victim from having to re-live his ordeal all over again whilst giving evidence.
(c) Accused persons were 20 and 27 years respectively at the time of committing the offence. They are now 21 and 28 years old and have no record of any previous convictions. They are first offenders.

(d) Both accused persons are brothers and come from a very disadvantaged and a poor family. They lost their father when they were small.

(e) Both accused persons support their family.

(f) They co-operated with the police and made confession in their record of Caution Interview Statement.

(g) They have apologized to the victim's family and their family in the traditional manner and this has been accepted by the victim's family.

(h) They are remorseful and seek leniency from this court.

[17] Firstly, I do not subscribe to the trial Judge's view that the respondent should be considered a first offender when he had committed at least 04 acts of rape over a period of time. An accused who commits multiple acts of sexual offences on multiple occasions should not be categorized as a first offender.

[18] Secondly, the factors mentioned under (d), (e) and (g) should not have been considered as mitigating factors. By considering personal and family circumstances as mitigating factors the trial Judge had afforded leniency that the respondent did not deserve (see the CA Judgments in ***Raj*** and SC Judgment in **Raj v State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12 and **Rokoloba v State** CAV 0011 of 2017: 26 April 2018 [2018] FJSC 12) and wrongly deducted 05 years for those 'mitigating factors' ending up with 07 years of imprisonment with a non-parole period of 05 years.

[19] The Learned Judge had accordingly allowed himself to be guided and affected by extraneous or irrelevant matters in the matter of sentence. As a result, in my view, the head sentence of 07 years of imprisonment with a non-parole period of 05 years had become manifestly inadequate.

[20] On the other hand, the trial Judge had failed to take into consideration some relevant factors such as the age gap of 17 years between the respondent and the victim and the fact that he had exposed the child to sexual activity at the tender age of 10 years. These factors should have been considered as aggravating factors.

If time is enlarged, will the Respondent be unfairly prejudiced?

[21] The respondent will obviously be prejudiced as I propose to enhance the sentence. However, in my view, he is not going to be unfairly prejudiced because he had in the first instance got a sentence which he did not deserve due to the reasons above mentioned. The sentence was totally inadequate and not commensurate with gravity and circumstances of the offence. Therefore, the fact that the respondent would reach the end of his non-parole period towards 2019 is not a relevant factor, for if he had been sentenced according to correct legal principles he would not have been nearing the end of a non-parole period so quickly. He cannot be benefited by a wrong sentence.

[22] By way of some general observations I wish to place on record that the Courts in Fiji for many years had taken 05 years as the starting point with no aggravating or mitigating circumstances for rape committed by an adult until it was increased to 07 years in **Kasim v State** AAU 0021 of 93s: 27 May 1994 [1994] FJCA 25. In ***Drotini*** the starting point for cases of rape committed by fathers or step fathers was increased to 10 years as such cases happen far too frequently. The Court of Appeal then decided that the accepted range of sentence for rape of juveniles (under the age of 18 years) is 10-16 years [vide **Raj v State** AAU0038 of 2010: 05 March 2014 [2014] FJCA 18] as the heavy sentences had still not deterred would be 'family rapists' and still more and more of such heinous crimes come before courts. The Supreme Court in **Raj v State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12] confirmed that the tariff for rape of a child is between 10-16 years which was raised to be between 11-20 years imprisonment in **Aitcheson v State** CAV0012 of 2018: 02 November 2018 [2018] FJSC 29 by the Supreme Court stating that increasing prevalence of these crimes characterised by disturbing aggravating circumstances means the court must consider widening the tariff for rape against children.

[23] Therefore, I grant enlargement of time and leave to appeal. Consequently I allow the appeal. In the circumstances, I think a different sentence should have been passed on the respondent and acting under section 23(3) of the Court of Appeal Act, I quash the sentence passed on the respondent by the trial Judge and pass on him a sentence of 12 years of imprisonment with a minimum serving period of 10 years of imprisonment before he becomes eligible for parole.

Fernando JA

[24] This is an application to the Full Court seeking an extension of time to appeal under section 35(1)(b) of the Court of Appeal Act and leave of this Court to appeal against a sentence imposed by the High Court pursuant to section 21(2)(c) of the Court of Appeal Act.

[25] The Respondent had been charged on three counts of rape committed during the period of January 2013 to June 2014 on a child under the age of 13 years. As per the particulars set out in the three counts the Respondent had penetrated the anus of the victim on two occasions and the mouth on one occasion. The Respondent had pleaded guilty to the charges and had been sentenced on the 10th of December 2014, to periods of imprisonment of seven years in respect of each of the three counts with an order that the said sentences to run concurrent to each other and with a non-parole period of five years.

[26] This Court has to first consider the application for extension of time to file the appeal before considering the application to leave to appeal against the sentence. The application to leave to appeal had to be filed 30 days after the pronouncement of the sentence in accordance with the interpretation given to section 26(1) of the Court of Appeal Act, in the judgment **Sevanaia Soronaivalu v State** [1998] CAV 1/96 (AAU 12/95). 20 March 1998. Since the sentence in this case had been pronounced on the 10th of December 2014, the appeal had to be filed on before the 9th of January 2015.

[27] Power is granted to this Court under section 35(1)(b) of the Court of Appeal Act to extend the time within which notice of appeal or an application for leave to appeal may be given.

[28] The Appellant in his Submissions filed before this Court had stated that the State is out of time to appeal by 47 days. In my calculation, it is 48 days.

[29] In the case of **Kamlesh Kumar vs The State** [2012] FJSC17: CAV0001.2009, 21st August 2012, the Supreme Court stated: "*Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*

- *i. The reason for the failure to file within time.*
- *ii. The length of the delay*
- *iii. Whether there is 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?"*

[30] The State has filed a sworn affidavit of the counsel in carriage of the case in the High Court, in support of its application seeking an extension of time. According to the affidavit of Amelia Vavadakua, a legal officer of the Office of the Director of Public Prosecutions, the week following the Wednesday of 10th of December 2014, in which the sentence was passed, she had been engaged in a murder trial from the 15th to the 19th of December. The week following that she had taken her annual leave and had resumed duties on the 6th of January 2015. After resuming duties she had been occupied preparing for another trial fixed for the 15th of January 2015. It was on the 19th of January 2015 she had become aware that the appeal period had lapsed 3 days after she had resumed duties. On the 19th she has had a brief discussion with her Superiors on the matter. Thereafter she was preparing for another trial set for the first week of February 2015. She had stated that before the appeal could be filed she had to discuss the merits of the appeal with her Superiors who reviewed the matter and decided to seek the leave of this Court in the interest of justice. She had stated that the delay is 47 days. It is difficult to conceive why it took the Officer from the DPP's office another 37 days from the date she realized that the appeal had lapsed, namely the 19th of January, to file the application seeking leave to appeal, and that against the sentence of the Respondent.

[31] On being questioned Counsel for the appellant informed Court that Amelia Vavadakua had represented the State when sentence was passed. The learned Sentencing Judge in his concluding paragraph 18 of the sentence dated 10th December 2014 had stated: "*30 days to appeal*". I am therefore in a difficulty to understand the averment of the legal officer in the affidavit that she became aware that the appeal period had lapsed only on the 19th of January 2015. Time for appealing is set out in section 26(1) of the Court of Appeal Act and a legal officer of the Director of Public Prosecutions cannot be said to have been unaware of it.

[32] In the case of Kamlesh Kumar cited at paragraph 7 above the learned Chief Justice said: "*The rights of appeal are granted by statute within a framework of rules. Enlargement normally can only be granted because of specific powers granted to the appellate courts. No doubt because of a need to bring litigation to finality, once there is non-compliance, the courts can only exercise a limited discretion…Enlargement of time has generally been permitted by courts only exceptionally, and only in an*

endeavour to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court." (emphasis added by me). In Rhodes 5 Cr. App. R 35 it was said: "*A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time-a month or more-elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons*". (emphasis added by me) In Queen v Brown(1963) SASR 190 it was held: "*The practice is that, if any reasonable explanation is forthcoming, and if the delay is, relatively, slight, say for a few days or even a week or two, the Court will readily extend the time provided that there is a question which justifies serious consideration.*" (emphasis added by me) In **Ratnam v Cumarasamy** [1964] 3 All ER 933 the Judicial Committee of the Privy Council emphasised "*The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure require to be taken there must be material upon which the court can exercise its discretion.*" (emphasis added) In **Revici v Prentice Hall Incorporated and Others** [1969] All ER 772 it was held: "*...the rules are there to be observed; and if there is non-compliance (other than of a minimal kind), that is something which has to be explained away. Prima facie if no excuse is offered, no indulgence should be granted.*"

[33] What appears to have been emphasised in the judgements referred to above is the reason for the failure to file within time. Otherwise the rules of the Court will be thrown into the winds to accommodate a litigant who has slept over his or her right of appeal provided by statute in the name of remedying an alleged injustice and open the flood gates. As stated in Kamlesh Kumar the Court has also prior to acceding to an application for an extension of time give serious consideration to the question whether the respondent will be unfairly prejudiced as a result. According to the respondent's submissions he "*will be prejudiced if time is enlarged since he will be eligible for parole come the year 2019*", i.e. in nine months time from the date of this judgment. What we have then to consider in this case is there a 'grave injustice' that needs to be remedied by the 'State' that is otherwise irremediable?. I place emphasis on the word 'State' as this is an appeal against sentence. Four years have gone by since the sentence was imposed and there have been many Supreme Court and Court of Appeal judgments since then which have placed emphasis on passing stiff sentences in cases of sexual abuse of young children.

[34] According to the Order on Sentence the respondent who was at the time of offending 28 years old had been charged along with his younger brother who was 21 years old for the offences that were committed on the victim who was then 10 years old and a nephew of theirs. The respondent's brother had one charge of rape for penetrating the mouth of the victim. Both the respondent and his brother had pleaded guilty to the respective charges laid against them on the very first occasion the case came up in Court and had been convicted on their own guilty pleas. The respondent had also admitted to all three offences he was charged with in his caution statement of 26 June 2014. The brother of the respondent had been given the same sentence that was imposed on the respondent as referred to at paragraph 3 above. The State has not appealed against the sentence imposed on the respondent's brother. According to the summary of facts as narrated by the Counsel for the State and admitted by the respondent and as recorded in the Sentence, there is nothing to indicate that any compulsion or force had been used on the victim by the respondent prior to the commission of the three offences he had been charged with.

[35] The learned sentencing Judge had referred to the cases of **Chand v State** [2007] AAU005 (25 June 2007), **Sireli v State** [2008] FJCA 86; AAU0098 (25 November 2008) and **State v AV** [2009] FJHC 24 (2 February 2009), where our courts had expressed strongly the positive obligation under the Constitution to protect the vulnerable from any form of violence or sexual abuse as it violates and degrades a fellow human being and the physical and emotional consequences of the victim of such offences are likely to be severe and thus the sentences imposed by the courts for such crimes must more nearly reflect an understandable public outrage especially where the victims are children. The learned sentencing Judge was well aware that the sentence must reflect the offending behaviour. But where the learned Sentencing Judge erred was stating that the tariff for rape at the time of sentencing was 10 -14 years, probably not taking into consideration the Court of Appeal decision in the case of Anand Abhay Raj AAU0038 of 2010 pronounced on 5 March 2014, i.e 9 months before he passed sentence on the respondent and despite this having been drawn to his attention in the State's Sentencing Submission. In Abhay Raj this Court stated: "*Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the accepted range of sentences is between 10 and 16 years*".

[36] The learned sentencing Judge had in respect of all three charges taken 10 years as the starting point, added two years for aggravating factors and deducted 5 years for the mitigating factors to reach a term of 7 years imprisonment in respect of each offence, which he had ordered to run concurrently. He had, as stated at paragraph 3 above, imposed a non-parole period of 5 years.

[37] The State had raised two grounds of appeal namely:

> i. *"That the sentences were manifestly lenient having regard to the sentencing guidelines and applicable tariff for rape of a child victim.*
> ii. *That the learned sentencing Judge erred in law in not adequately considering the totality principle by ordering concurrent sentences which therefore failed to reflect all the offending behaviour".* (verbatim)

[38] The appellant in its submissions filed before this Court in respect of ground (i) of their appeal had relied on the tariff 'recently' decided by the Supreme Court of Fiji in the matter of **<u>Gordon Aitchson v State</u>** [2018] CAV 0012.2018, 2 November 2018. I have no hesitation in dismissing this argument as this tariff had been fixed almost 4 years after the appellant had been sentenced and therefore should not be applicable in view of the provisions of article 14(2)(n) of the Constitution.

[39] I have no hesitation in stating that the final sentence passed on the appellant is undoubtedly lenient and the learned sentencing Judge had erred in not taking into consideration the tariff prevalent at the time of sentencing for sexual abuse of young children. But considering the delay of 48 days to make application for an extension of time and the expiry of 38 days after becoming aware of the lapse on the part of the legal officer who had the carriage of the case; the unacceptable reasons attributed by her as to the delay as referred to at paragraph 8 above; the unfair prejudice that will be caused to the respondent who is eligible to parole in 9 months from the date of this judgment and that vis-a-vis his brother against whose sentence the State has not preferred an appeal and more so because this is not a case where a grave injustice would be done to the State by not granting an extension of time, I decline to grant an extension of time to appeal against sentence.

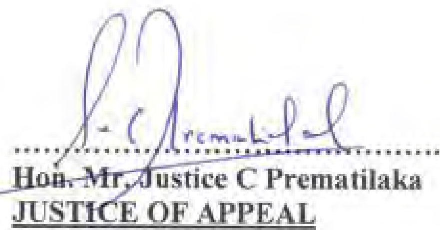
Nawana JA

[40] I have read in draft the judgment and the Orders of Fernando JA. I agree with the reasons and conclusions.

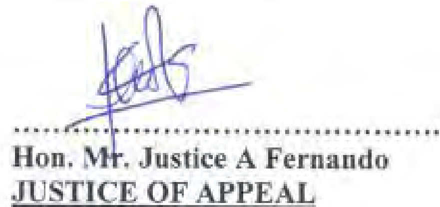
Orders of Court:

i. *Application for an extension of time to appeal against sentence refused.*

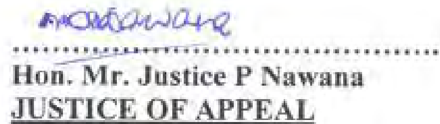
ii. *Application dismissed.*



Hon. Mr. Justice C Prematilaka
JUSTICE OF APPEAL



Hon. Mr. Justice A Fernando
JUSTICE OF APPEAL



Hon. Mr. Justice P Nawana
JUSTICE OF APPEAL