IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO.AAU 0009 of 2015

(High Court Criminal Case No. HAC 042 of 2014)

BETWEEN : **THE STATE**

Appellant

AND : **JOSEVA COKAKOSOVA**

Respondent

Coram : **Calanchini, P**
Prematilaka, JA
Nawana, JA

Counsel : **Ms. P. Madanavosa for the Appellant**
Mr. M. Fesaitu for the Respondent

Date of Hearing : **20 February 2019**

Date of Judgment : **7 March 2019**

JUDGMENT

Calanchini, P

[1] I agree that the appeal against the sentence should be allowed. The sentence imposed by the court below should be quashed. The Respondent should be sentenced to 13 years imprisonment with a non parole term of 11 years.

Prematilaka, JA

[2] I agree with the reasons and conclusions of Nawana, JA.

Nawana, JA

[3] This is an application for extension of time to appeal by the Director of Public Prosecutions (DPP) against an ultimate operational sentence of ten years and four months imposed on the respondent by the High Court, Lautoka, on 26 November 2014.

[4] The sentence was consequent to the conviction upon pleas of guilt of the respondent in respect of three counts of rape and two counts of indecent assault as contained in the information of the DPP dated 08 May 2014.

[5] The offences, as particularized in the information, were as follows:

FIRST COUNT
REPRESENTATIVE COUNT
Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) of the Crimes Decree 44 of 2009*

Particulars of Offence
JOSEVA COKAKOSOVA *between the 1st day of September, 2010 and the 31st day of December, 2011 at Nadi in the Western Division penetrated the vagina of* ***ADI LITA TUPOU TALEI****, with his finger, without her consent.*

SECOND COUNT
Statement of Offence

RAPE*: Contrary to Section 207 (1) and (2) of the Crimes Decree 44 of 2009.*

PARTICULARS OF OFFENCE

JOSEVA COKAKOSOVA *on the 1st day of January, 2012 at Nadi in the Western Division penetrated the vagina of* ***ADI LITA TUPOU TALEI****, with his penis, without her consent.*

THIRD COUNT
REPRESENTATIVE COUNT
Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) of the Crimes Decree 44 of 2009.*

Particulars of Offence

***JOSEVA COKAKOSOVA** between the 2nd day of January, 2012 and the 31st day of December, 2012 at Nadi in the Western Division penetrated the anus of **ADI LITA TUPOU TALEI**, with his finger, without her consent.*

FOURTH COUNT
REPRESENTATIVE COUNT
Statement of Offence

***INDECENT ASSAULT**: Contrary to Section 212(1) of the Crimes Decree 44 of 2009.*

Particulars of Offence

JOSEVA COKAKOSOVA** between the 1st day of January, 2013 and the 31st day of December, 2013 at Nadi in the Western Division unlawfully and indecently assaulted **ADI LITA TUPOU TALEI.

FIFTH COUNT
REPRESENTATIVE COUNT
Statement of Offence

***INDECENT ASSAULT**: Contrary to Section 212(1) of the Crimes Decree 44 of 2009.*

Particulars of Offence

JOSEVA COKAKOSOVA** between the 1st day of February, 2014 and the 28th day of February, 2014 at Nadi in the Western Division unlawfully and indecently assaulted **ADI LITA TUPOU TALEI.

[6] The learned judge imposed following sentences in respect of each count:

(i)	First Count of Rape	:	Ten years and four months
(ii)	Second Count of Rape	:	Ten years and four months
(iii)	Third Count of Rape	:	Ten years and four months
(iv)	Fourth Count of Indecent Assault	:	Three years
(v)	Fifth Count of Indecent Assault	:	Three years

The sentences were ordered to run concurrently resulting in the ultimate operational sentence of ten years and four months, as referred to above.

[7] The DPP, in his application for extension of time to appeal dated 22 January 2015, presented six grounds of appeal. The six grounds of appeal were that:

> *(i) The learned trial judge erred in principle in making the sentences all concurrent;*
>
> *(ii) The learned trial judge erred in principle in failing to give any or any sufficient consideration to the aggravating fact that the same young victim had been subjected to a campaign of sexual abuse for over a 3 year-period;*
>
> *(iii) The learned trial judge erred in law and principle by failing to consider properly or at all the 'one transition' principle which may otherwise justify the concurrent sentencing of offences committed arising from the same set of facts, did not apply in the present matter;*
>
> *(iv) The learned trial judge has erred in principle in sentencing the Respondent as if he had committed only one offence of rape;*
>
> *(v) The learned trial judge has erred in principle by misapprehending the principle of totality and misapplying it in the circumstances of this Respondent; and,*
>
> *(vi) The learned trial judge has erred by passing a sentence, which is devoid of general deterrence and will likely to encourage offenders to believe that multiple offences will be punished by the same sentence as those who offend only one'.*

[8] The application was supported by an affidavit from Antony Michael Delaney, Assistant DPP, sworn on 25 January 2015 setting out reasons for the delay. The reasons adduced principally related to the late transmission of the case file from Lautoka Office of the DPP. It was further claimed that the intervening Christmas and New Year holidays, too, had contributed to the delay.

[9] It was contended by the DPP, on the basis of the affidavit, that there was a higher likelihood for the success of the appeal as urged in the grounds of appeal in paragraph 4 of the application surpassing the threshold of an arguable case for this court to consider an extension of time to appeal.

[10] As regards the potential prejudice that could be caused to the respondent, the DPP contended in his supporting affidavit stating that some discount could be considered by this court in order to compensate any upward adjustment as the fault necessitating an appeal had not laid at the hands of the respondent.

[11] Before the full court, hearing into the applications for the extension of time to appeal; and, the appeal itself were combined and taken-up together on 20 February 2019.

[12] Counsel for the DPP, filed further written submissions dated 20 February 2019 at the hearing and confined the proposed appeal to Ground (2) only.Ground (2) read as follows:

> *'The learned trial judge erred in principle in failing to give any or sufficient consideration to the aggravating fact that the young victim had been subjected to a campaign of sexual abuse for over a period of time'.*

[13] Advancing submissions in support of the above ground of appeal, counsel asserted that the learned judge had understated the gravity of offending by merely stating that *'the victim was subjected to more than one sexual act'*. It was the submission of the learned counsel that this understatement of the learned trial judge, as she put it, had concealed the true gravity of offending within a period of more than three years from 01 September 2010-28 February 2014, on a young girl.

[14] Counsel for the DPP further submitted that the addition only of four years for a set of aggravating circumstances, as clustered by the learned judge, was inadequate to bring in an ultimate operative term of 10 years and 04 month-imprisonment each for two

representative counts of rape; two representative counts of indecent assault; and, one count of penile rape, after making them to run concurrently.

[15] Learned counsel for the respondent, relying on his written-submissions dated 27 April 2018, submitted that the learned trial judge had correctly applied the tariff for rape of a child as being between 10-16 years relying on **Raj v State**; CAV0003.2014 (20 August 2014); [2014] FJSC 12. It was further submitted on behalf of the respondent that the sentence was well within the tariff and it was in compliance with Section 22 of the Sentencing and Penalties Act. Hence, the ground of appeal, as advanced by the appellant, was not arguable and lacked merit.

[16] The criteria for enlargement of time to appeal have been laid down in **Kumar v State** [2012] FJSC 17; CAV0001.2009 (21 August 2012). They are: (i) the reason for failure to file within time; (ii) the length of delay; (iii) Whether there is ground or merit justifying the appellate court's consideration? (iv) Where there has been substantial delay nonetheless is there a ground that will probably succeed; and, (vii) If time is enlarged, will the respondent be unfairly prejudiced?

[17] The length of delay is 24 days. It does not appear to be substantial. Nor is it contextually negligible.

[18] It is impossible to comprehend the failure to lodge a notice of appeal by the DPP within the prescribed period of thirty days; or, earlier than 54 days in this instance, when the only issue to be challenged in appeal was the alleged inadequacy of the sentence upon guilty pleas of the respondent on multiple sexual assaults on a teenager-girl involving no evidential or complicated legal analysis.

[19] I have, nevertheless, carefully considered the reasons adduced by the DPP supported by the affidavit from Mr Delaney, as summarized above, for the delay in invoking appellate intervention of this court in light of the observation above.

[20] I find that the reasons, which are reflective only of regular occurrence, do not, in my view, appear to be convincing and acceptable. I am, therefore, unable to accept the reasons adduced as excusable considering the potential prejudice that could be caused to the prisoner-appellant after serving a remarkable 40% of the term of the sentence in prison as of now. That is because, a convicted accused-person ought to know in law and fact the period of sentence that he was going to serve as passed by a sentencing judge; or, whether his sentence was at the risk of undergoing a change on a timely-taken appeal within the statutory limit provided in the law.

[21] The extension of appealable time, having the effect of intervening with a custodial sentence, in my opinion, is required to be based on a reasonable and justifiable failure associated with real or near impossibility of filing the appeal within the time. This, in my view, is the test prescribed by the Supreme Court under the criterion (i) above, being the reason for delay in **Kumar v State; Sinu v State**; CAV0001.2009 (21 August 2012); [2012] FJSC 17, where His Lordship Gates CJ, considering the rulings in **Rhodes** 5 Cr. App. R. 35; and, **Queen v Brown** (1963) SASR 190 at 191, held that:

> *'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'.*

[22] Rulings in **Rhodes** and **Queen v Brown** (supra) respectively were to the following effect:

> *'A short delay may be disregarded by the Court if it thinks fit, but where 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'*
>
> *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'*

[23] Notwithstanding the delay, I will, upon being guided by the above authorities, propose to consider whether there was an arguable error occasioned in the sentence in light of the factors considered by the learned judge. This, in effect, permits the full court to grant leave to appeal in terms of Section 21 (2) (c) and assume jurisdiction to consider the issue whether a different sentence should have been passed in the exercise of this court's power under Section 23 (3) of the Court of Appeal Act.

[24] Section 23 (3) of the Court of Appeal Act provides that:

> *'On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just.'*

[25] In order to exercise the power in terms of Section 23 (3), as set-out above, this court needs to consider whether the ultimate sentence of 10 years and 4 months each for the two representative counts of rape; one single count of penile rape; and, the sentence of 3 years each for the two representative counts of indecent assault are reflective of due consideration by the learned judge of the applicable principles.

[26] A principal factor to be taken into account in that regard is whether the tariff for the relevant offences had been correctly taken. Another foremost factor is whether the learned judge had exercised his sentencing discretion in the choice and the application of relevant matters for aggravation and mitigation to arrive at the ultimate operative sentence. A third would be whether the learned judge was correct in fixing the mandatory period for the prisoner to serve before a parole is considered by prison administrators.

[27] Learned judge, upon consideration of the sentencing precedents that existed at the time of sentencing especially that of **Raj v State**; AAU 0038.2010 (05 March 2014); [2014] FJCA 18, which was affirmed by the Supreme Court in **Raj v State** CAV0003.2014 (20 August

2014); [2014] FJSC 12 had rightly taken the tariff for the offence of rape as 10-16 years. Learned judge then had picked the starting point of his sentence at 12 years.

[28] In my view, had the learned judge been considerate of the three counts of rape; two counts of indecent assaults; and the single count of penile rape, over a period of more than three years, he would have started the sentences to run from a middle point of the tariff and considered the aggravating and mitigating circumstances in the exercise of his sentencing discretion.

[29] A range of sentence for a particular offence, which is known as tariff, is not a statutory outcome; but, an outcome of judicial pronouncements over a period of time. These judicial pronouncements fix the tariff for each offence resulting in uniformity in the matter of sentences all over Fiji. Courts, time and again, take into account the high incidence of offending and effect enhanced tariff, for example, for the offence of child rape requiring the sentencing judges to be guided by such newly-set tariff as ordered by the Supreme Court in **Gordon Aitcheson v State;** CAV 0012.2018 (02 November 2018); [2018] FJSC 29 as recently as on 02 November 2018.

[30] As regards the sentencing discretion, the ruling made by Marsoof J in **Qurai v State**; CAV 24.2014 (20 August 2014); [2015] FJSC 15 is instructive, which states that:

> *'In my considered view, it is precisely because of the complexity of the sentencing process and the variability of circumstances of each case that judges are given by the Sentencing and Penalties[Act] a broad discretion to determine the sentence. In most instances, there is a no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But, this does not mean that proportionality, mathematical concept, has no role to play in determining an appropriate sentence'.*

[31] The complaint of the state, in any event, is not on the choice of the starting point at a lower end of the tariff; but, on the understating of repeated offending of sexual assault on a young girl over a period of three years affecting the ultimate sentence in terms of its length.

[32] The learned judge, in paragraph 12 of the sentencing ruling, considered aggravating factors. They were: (i) The victim was of younger age and tender age; (ii) Victim was subjected to more than one sexual act; (iii) [The respondent had] breached the trust between step-father and the daughter; (iv) The age gap is about 20 years; and, (vi) [The appellant] had made the victim sexually active at a younger age

[33] The factors identified in terms of paragraphs 12 (i)-(iv) as aggravating in the sentencing ruling should have been considered in relation to the period within which the repeated offences of rape and indecent assault were committed by the respondent. It was only then the real weight to the aggravating circumstances could be attached. It appears that the learned judge had not given his mind to the long period of offending when he added only four years. Moreover, what needs to be considered in repeated offending in sexual assault on a child at the hands of an adult are the pain and the fear that are instilled in the mind of the child. In this case, the victim had been made a non-consensual and silent victim at the hands of the respondent for his sexual invasions over the period.

[34] It, therefore, appears that there were inaccuracies in assessing aggravating factors, as briefly noted above. I am of the view that this inaccurate assessment of aggravating factors had a bearing in the failure by the learned judge to effect the right sentence. It becomes clearer when the learned judge summarily stated in paragraph 12 (ii) of the ruling that the *victim was subjected to more than one sexual act*; and, noting beyond that.

[35] I would, therefore, consider factor (ii) of the sentencing ruling against which the sole ground of appeal has been formulated by the DPP in support of the applications for extension of time and for leave to appeal.

[36] Repeated offences of rape referred to in counts (1) to (3) had spanned over a continuous period of twenty-seven months, while the repeated offences of indecent assault in counts (4) and (5) had spanned during a separate fourteen-month period. The single offence of

penile rape in count (2) had taken place on 01 January 2012, approximately at the middle of the offending period.

[37] The series of sexual assaults over a period of three years were too grave to have been dealt with so summarily as the learned judge did in paragraph 12 (ii) of his ruling. Instead, the learned judge should have considered the high incidence of sexual assaults on a fifteen-year old school girl, who had just approached her youth resulting in probable psychological impacts; and, possible eventualities such as ostracizing in the society.

[38] The learned judge, instead, had been guided only by case precedents on single acts of rape where the offenders were dealt with for their single acts of criminality, which had been dealt with, in any event, more severely than by the learned judge in this case. In the process, the learned judge had failed in the task of attaching more weight to the instances of repeated offending.

[39] When the ground of appeal relied upon by the DPP is considered in the context of above facts, I am of the view that the understating of the seriousness of the repeated acts of sexual assault on the young girl by the learned judge could have impacted the sentence to make it less stringent. I hold that the ground of appeal, as urged by the DPP, has merit and leave to appeal should be granted.

[40] I, accordingly, grant an extension of time to appeal in terms of Section 35 (1) of the Court of Appeal Act (the Act); and, leave under Section 21 (2) (c) empowering this court to consider the propriety of the sentence in terms of Section 23 (3) of the Act.

[41] Upon consideration of the material, I am of opinion that an addition of six years for the aggravating factor of repeated sexual assaults within the period of more than three years would be appropriate for the reasons set-out above.

[42] The learned judge had granted one year for the mitigating circumstances of the respondent. They were:

(i) being the first offender at the age of mid-thirty years of age;

(ii) being remorseful and apologetic to the victim and her mother; and,

(iii) being a middle-aged young man, who must still be given the liberty of reforming himself and integrating into the mainstream of life.

[43] There was no challenge against the consideration of mitigating circumstances and their accommodation in the sentence by the learned judge.

[44] Many matters on a sentence are statutorily governed in Fiji in terms of her Sentencing and Penalties Act (SP Act). Section 15 of the SP Act, significantly, states that:

> *'As a general principle of sentencing, a court* ***may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in Section 4****, and sentences of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in [the General Sentencing Provisions of the Act].'*
>
> (Highlighted for emphasis)

[45] The objectives of sentencing, as set-out in Section 4 (1) of the SP Act, are as follows:

> *(a)* ***To punish offenders to an extent and in a manner, which is just in all the circumstances****;*
> *(b) To protect the community from offenders;*
> *(c) To deter offenders or other persons from committing offences of the same or similar nature;*
> *(d)* ***To establish conditions so that rehabilitation of offenders may be promoted or facilitated****;*
> *(e) To signify that the court and the community denounce the commission of such offences; or,*
> *(f)* ***Any combination of these purposes****.*
>
> (Highlighted for emphasis)

[46] Section 4 (2) of the Decree further provides that in sentencing offenders, a court must have regard to:

> *(a) The maximum penalty prescribed for the offence;*
> *(b) Current sentencing practice and the terms of any applicable guideline judgment;*
> *(c) The nature and gravity of the particular offence;*
> *(d) The offender's culpability and degree of responsibility for the offence;*
> *(e) The impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;*
> *(f)* ***Whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;***
> *(g)* ***The conduct of the offender during the trial as an indication of remorse or the lack of remorse****;*
> *(h) Any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Act;*
> *(i) The offender's previous character;*
> *(j) The presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and,*
> *(k) Any matter stated in this Decree as being grounds for applying a particular sentencing option*
>
> (Highlighted for emphasis)

[47] Section 4 of the SP Act on 'Sentencing Guidelines', in my view, has been founded on the jurisprudential principle of *balancing competing interests* of the offender, the victim and the community at large, as noted above. Courts have consistently considered that principle and given effect to the purposes and objectives of sentencing under the SP Act as could be seen fromthe judgements setting tariffsand guidelines for the sentences.

[48] A sentence, *which is just in all the circumstances* on an accused person, as prescribed by Section 4 (1) of the SP Act, could only be achieved by taking into account the matters of aggravation, as urged in this appeal; and, the matters that are in prisoner's favour, as highlighted above, in compliance with the statutory mandates under the SP Act.

[49] When the cumulative sentence of imprisonment for a period of ten years and four months, concurrently passed on the respondent by operation of the law in terms of Section 22 (1) of the SP Act, is concerned, I am of the view that that sentence was not *just in all circumstances*. I am further of the view that the sentence would be *just in all circumstances* if it is made in line with the provisions of 'Sentencing Guidelines' statutorily laid down under Section 4 (1) and (2) of the SP Act.

[50] In the circumstances, I would substitute a term of thirteen years, which I consider as just in all circumstances for each count of rape to run concurrent to the three-year term of imprisonment imposed by the learned trial Judge in respect of each count of indecent assault with. I would further order that the respondent shall not be entitled to parole until the completion of eleven years in imprisonment.

[51] I, accordingly, would allow the appeal.

The Orders of the Court are:

1. *Enlargement of time to appeal granted.*
2. *Appeal against the sentence allowed.*
3. *Sentence imposed by the court below is quashed.*
4. *Respondent is sentenced to a term of 13 years imprisonment with a non-parole term of 11 years with effect from 26 November 2014.*

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Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL