

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

**CRIMINAL APPEAL NO.AAU 99 of 2019**  
**[High Court of Labasa Criminal Case No. HAC 01 of 2015]**

**BETWEEN** : **ADONI TAVUKI**

*Appellant*

**AND** : **THE STATE**

*Respondent*

**Coram** : **Prematilaka, JA**

**Counsel** : **Mr. M. Fesaitu for the Appellant**  
: **Ms. S. Kiran for the Respondent**

**Date of Hearing** : **28 August 2020**

**Date of Ruling** : **31 August 2020**

**RULING**

- [1] The appellant had been charged in the High Court of Labasa on one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Decree 2009, two counts of indecent assault contrary to section 212 (1) of the Crimes Decree 2009. The alleged act of rape had been committed between the 18 November and 24 November, 2013 at Duavata Primary School in Labasa in the Northern Division and the other two acts of indecent assaults had also happened at the same venue.
- [2] After full trial, the assessors had expressed a unanimous opinion of guilty on all three counts on 22 September 2016. The learned High Court judge in the judgment delivered on the same day had agreed with the assessors and convicted the appellant as charged. He was sentenced on 23 September 2016 to 14 years of imprisonment for

rape subject to a non-prole period of 11 years and 04 years of imprisonment each for two counts of indecent assault; all sentences to run concurrently.

[3] The appellant himself had signed an untimely notice of appeal on 25 June 2019 against sentence. The delay is over 02 years and 08 months. Later, Legal Aid Commission had tendered an application seeking enlargement of time along with written submissions on 15 October 2019. The state had tendered its written submissions on 30 October 2019.

[4] The evidence against the appellant as described in the sentencing order is as follows.

*[2] The complainants in all three counts were young girls, two were 13 years old and one was 11 at the time. They were all studying at a district primary school in Bua. **The accused and his wife were the cooks at the school***

*[3] On three separate occasions each of the girls told of circumstances in which they were alone in the company of the accused and how he sexually abused them.*

*[4] The first girl went to the accused quarters where he lived with his wife and daughter to see the daughter who was her friend. Her friend was not there but the accused pulled her into the room, undressed her and himself and pinning her hands with his hands forced her on to a bed and then raped her.*

*[5] A second girl told of her visit to the kitchen in order to get food. She had asked the accused when he was attending to maintenance work in the girls' dormitory. He told her he had buns and to come to the kitchen alone. When she got to the kitchen, he pulled her inside his room, kissed her and fondled her breasts. She was resisting all the while.*

*[6] The third girl is the niece of the accused. She had been helping a senior teacher clean his house when he asked her to go to the cook and ask for a pair of pliers. She went and the accused and his wife were in the room. The accused told his wife to go out and serve lunch to the students. He then pushed the young girl on to a bed and kissed her then fondled her breasts.*

[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, **Kumar v State**; **Sinu v State** CAV0001 of 2009; 21 August 2012 [2012] FJSC 17.

[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] 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] Under the third and fourth factors in Kumar, test for enlargement of time now is '**real prospect of success**'. I would rather consider the third and fourth factors in Kumar first before looking at the other factors which will be considered, if necessary, in the end. In Nasila v State [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

[9] **Grounds of appeal**

*1. The Learned sentencing Judge erred in principle double counting the aggravating features of the offending.'*

*2. The Learned Trial judge erred in law and fact when he failed to consider that the Appellant was a first offender.'*

***01<sup>st</sup> ground of appeal***

[10] The appellant's argument on double counting is based on paragraph 9 and 10 of the sentencing order. They are as follows

*'[9] The rape of this young girl is aggravated by the fact that apart from being of a vulnerable age she was away from her family and in the care of the*

*teachers and staff of the boarding school. Any child and her parents should be secure in their perception that a boarding school would be a safe environment and to that extent the rape is a gross breach of trust. The accused went to great lengths in his defence to tell the Court that he was regarded as a father figure to the students and he would care for them and hug them whenever they met. This may well be a culturally acceptable way of life in Fiji but only if it were to stop there. To extend that affection to sexual abuse is abominable.*

*[10] I take a starting point of 10 years for the first count of rape and for the breach of trust referred to in the preceding paragraph I add to that a further term of 5 years bringing the interim total sentence to one of 15 years. There is little to be said in mitigation except for his clear record and his advanced age, but for those two factors I reduce the sentence by 1 year bringing his final sentence to a term of 14 years. That is the term that he shall serve and I order that he serve a minimum term of 11 years before being eligible for parole.*

[11] The appellant's contention is that the learned trial judge had already considered the aggravating features in taking the starting point of 10 years and therefore had double counted when he had added 05 years for the same factors. He relies on **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018).

[12] In **Kumar** Keith J remarked as follows.

*[57] Two words of caution. First, a common complaint is that a judge has fallen into the trap of "double-counting", i.e. reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.*

*[58] Secondly, the lower of the tariff for the rape of children and juveniles is long. Sentences of 10 years' imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of "double-counting", which must, of course, be avoided.*

[13] However, Keith J also said in Kumar

*[56] ..... Whatever methodology judges choose to use, the ultimate sentence should be the same. If judges take as their starting point somewhere within the range, they will have factored into the exercise at least some of the aggravating features of the case. The ultimate sentence will then have reflected any other aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise any of the aggravating factors, and they will then have to factor into the exercise all the aggravating features of the case as well as the mitigating features. Either way, you should end up with the same sentence. If you do not, you will know that something has gone wrong somewhere.*

[14] The trial judge seems to have followed the two tier process of sentencing in starting with 10 years as the base and adding 05 years for the aggravating features cumulatively referred to as a serious breach of trust and deducting 01 year for the appellant's clear past record and advanced age and arrived at the final sentence of 14 years with a non-parole period of 11 years. This is the system of sentencing followed mostly in Fiji consequent to remarks in Naikelekelevesi v State [2008] FJCA 11; AAU0061.2007 (27 June 2008) and Koroivuki v State [2013] FJCA 15; AAU0018 of 2010 (05 March 2013).

[15] In Nadan v State [2019] FJSC 29; CAV0007.2019 (31 October 2019) it was said that in many jurisdictions, the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors. This method too had been followed in Fiji by the trial judges in the past [for. e.g. State v Bhurrah - Sentence [2018] FJHC 133; HAC27.2016 (2 March 2018) and State v JD - Sentence [2018] FJHC 766; HAC222.2015 (20 August 2018)], I had the occasion to make some comments on the former in Bhurrah v State [2020] FJCA 134; AAU029.2018 (19 August 2020) as the sentence had been challenged by the appellant.

[16] I do not see a real prospect of success in the appellant's argument based on 'double counting'. The trial judge had followed the sentencing tariff applicable to child rape *i.e.* 10-16 years of imprisonment [vide Raj v State [2014] FJCA 18; AAU0038.2010

(5 March 2014) and **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) which is now 11- 20 years of imprisonment - **Aicheson v State** [2018] FJSC 29; CAV0012.2018 (02 November 2018)] and started the two tier process at the lowest of the accepted tariff. Therefore, he cannot be taken to have factored aggravating features set out in paragraph 09 of the sentencing order into the starting point. The mere fact that the trial judge had highlighted the aggravating factors present in the case prior to fixing the starting point cannot be a necessary or unequivocal pointer to such a possibility. Different judges have different ways of organising their judgments and orders. There is no prescribed formula or format to be followed by all judges. Reading the sentencing order in its totality it is very clear that the trial judge had not taken aggravating factors twice into equation.

- [17] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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)].

### *02<sup>nd</sup> ground of appeal*


- [18] The appellant's counsel did not argue the second ground of appeal with a lot of enthusiasm. Nor has the appellant's written submission made any specific submissions on the second ground of appeal.
- [19] The trial judge had in fact considered that he was a first offender and coupled with his advanced age had given a discount of 01 year.
- [20] There is no real prospect of success in this ground of appeal.

[21] The delay in appealing is very substantial and reasons are unconvincing and unacceptable. This appeal is clearly an afterthought on the part of the appellant. However, enlargement of time would not prejudice the respondent.

**Order**

1. Enlargement of time to appeal against sentence is refused.



  
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**Hon. Mr. Justice C. Prematilaka**  
**JUSTICE OF APPEAL**