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

CRIMINAL APPEAL NO.AAU 162 of 2017
[In the High Court at Suva Case No. HAC 216 of 2014]

BETWEEN	:	**JONE TUICAKAU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**01 October 2020**
Date of Ruling	:	**02 October 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on three counts of rape contrary to section 207 (1) and (2) of the Crimes Act, 2009 committed between 01 December 2012 and 31 August 2013 at Levuka, in the Central Division.

[2] The information read as follows.

First Count
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (c) and (3) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

JONE TUICAKAU *between the 1st day of December 2012 and the 31st day of December 2012, at Levuka, in the Central Division, penetrated the mouth of XXX, a child under the age of 13 years, with his penis.*

Second Count
Statement of Offence

RAPE: *Contrary to 207 (1) and (2) (a) and (3) of the Crimes Decree No. 44 of 2009.*

Particulars Offence

JONE TUICAKAU *between the 1st day of December 2012 and the 31st day of December 2012, at Levuka, in the Central Division, had carnal knowledge of XXX, a child under the age of 13 years*

Third Count
Statement of Offence

RAPE: *Contrary to 207 (1) and (2) (a) and (3) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

JONE TUICAKAU*, between the 1st day of August 2013 and the 31st day of August 2013, at Levuka in the Central Division, had carnal knowledge of XXX, a child under the age of 13 years.*

[3] On 21 October 2014 the appellant had been sentenced to 11 years of imprisonment with a non-parole period of 10 years on each of the counts to run concurrently upon his plea of guilty to the information.

[4] I find the following paragraphs in the sentencing order regarding the facts of the case as presented in the summary of facts.

> *'[3] The facts of the case are that the accused at the time of the offences was 40 years of age.*

[4] "Alice" (not her real name), the victim was at the time was 11 years old and at primary school. They lived in the same house, the accused being married to Alice's grandmother, so to all intents and purposes he was her grandfather. At the time Alice's mother had left and gone to the Lau group and she doesn't know who her father is.

[5] One day in the month of December 2012 the accused called Alice into his bedroom on the pretext of showing her something. When she approached he quickly removed her clothes and he then forced her to perform an act of oral sex on him. He then immediately made her lie on the bed – he spread her legs and penetrated her with his penis. Alice asked him to stop because she was in pain but he continued his actions. He then told her to dress and not to tell anybody.

[6] On a day in August 2013, in the middle of the day, Alice returned to the house from church and only the accused was at home. He called her into the bedroom where he immediately exposed his penis to her. He undressed the girl and made her lie on the bed. He then, using coconut oil, lubricated her vagina and again penetrated her with his penis. Afterwards he told her to dress and not tell anybody.

[7] When interviewed under caution the accused stated that the child had been living with them for 8 years. He acknowledged that she would have been only 11 years old in 2012, below the age of legislative consent. He said he had sex with her because she looked "pretty"

[5] The appellant's notice of appeal/application for leave to appeal against conviction and sentence filed by the appellant in person had been received by the CA registry on 27 November 2017. Thus, the appeal is out of time by more than 03 years. He had filed written submissions on 04 January 2019 and additional submissions on 16 April 2019. The state had responded by its written submission tendered on 10 June 2020.

[6] Both the appellant and the counsel for the state informed at the hearing that they would rely on their respective written submissions.

[7] 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

[8] 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?*

[9] ***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.'*

[10] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'.** In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

> *'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a **'real prospect of success'** (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal.....'*

Length of delay

[11] As already pointed out the delay is more than 03 years and therefore very substantial.

[12] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 3 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

> *'In **Julien Miller v The State** AAU0076/07 (23rd October 2007) Byrne .J considered 3 months in a criminal matter a delay period which could be*

considered reasonable to justify the court granting leave. The appellant in that case was 11½ months late and leave was refused.'

[13] Faced with a delay of 03 years in **Khan v State** [2009] FJCA 17; AAU0046.2008 (13 October 2009) Pathik J observed that *'There are Rules governing time to appeal. The appellant thinks that he can appeal anything he likes. He has been ill-advised by inmate in the prison. The court cannot entertain this kind of application'*

[14] I also wish to reiterate the comments of Byrne J, in **Julien Miller v The State** AAU0076/07 (23 October 2007) that *'that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'*

[15] Therefore, delay of over 03 years alone is sufficient to defeat the appellant's appeal.

Reason for the delay

[16] The appellant has not explained at all the reason for the unacceptable delay. Thus, the unexplained and unreasonable delay of over 03 years would make the appellant's appeal even more untenable and liable to be rejected.

[17] This court should and will not be hesitant to take a strict view in appropriate cases to ensure that the process of court is not abused and judicial time is not wasted by frivolous and vexatious appeals which are filed belatedly more out of trying the appellant's luck than out of any genuine grievance against the decision of the trial court.

Merits of the appeal

[18] In the **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."

[19] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well.

[20] Grounds of appeal urged on behalf of the appellant are as follows.

Against Conviction:

Ground 1: That the Learned Judge erred in law and in fact to accept pleaded guilty to the three rape charges when the charges particulars prepared against the accused were lacking in precision in terms of the exact and the accurate dates the rape were occurred that the accused had the clear understanding about these dates.

Ground 2: That the Learned High Court Judge erred in law and in fact to convict the accused when there was no evident to prove that the accused intended to rape the victim and that the accused need to confirm himself of the act of intention.

Ground 3: That the Learned Trial Judge erred in law and in fact when he failed to consider making an order to allow the accused to appeal against his decision and that would be an unfair proceed of trial tantamount to a miscarriage of justice carried in a court of law.

Ground 4: That the Learned Judge erred in law and in fact when he accepted the accused guilty pleas on the three counts of rape according to the accused legal counsels advised who failed to represent the accused properly and that when the accused had not opportunity to proper trial before court of law.

Ground 5: That the Trial Judge erred in law and in fact in failing to consider or direct himself that the doctors medical report could not have confirmed that there were no forceful penetration, therefore there was a reasonable doubt as to whether the accused intended to rape the victim and as such a substantial miscarriage of justice.

Ground 6: That the Learned Judge erred in law and in fact when he failed to convict the accused on a lesser offence when the total evidence tender in case against the accused was not fully submitted and proved by the prosecution while awaiting a proper trial when the accused counsel him to plead guilty in order to run the case fast and not to waist the accused time while in remand center.

Against Sentence:

Ground 7: That the appellants appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.

Ground 8: That the Learned Judge erred in law and in fact taking irrelevant matters into consideration when sentencing the appellant and not taking into relevant consideration.

Ground 9: That the Learned Trial Judge erred in law and in fact in not taking into consideration the provisions of the sentencing and the penalties decree 2009 when sentencing the appellant.

Ground 10: That the Learned Sentencing Judge erred in law and in fact when he sentenced the accused to ten years (10) non-parole which was too close to the head sentence which was eleven years (11) and that would denied the accused from the rehabilitation program for a second chance.

01st ground of appeal

[21] The appellant complains that the charges levelled against him lacked details and particulars as to exact dates where he had allegedly committed the crimes and therefore, the trial judge should not have accepted his plea of guilty.

[22] I do not find any merits in this argument. The information is very clear as to when the appellant had allegedly committed the acts of rape. The first two acts had happened between 01 and 31 December 2012 (within a month) while the third act of rape had taken place between 01 and 31 August 2013 (within a month). The victim being a child of 11 years of age would not have been able to give the exact dates of the incidents and therefore, it is entirely reasonable for the prosecution to give a period of time in the information.

[23] It is exactly in the same manner as in the information that the summary of facts had also described the three acts of rape. The appellant had been defended by an experienced counsel from the Legal Aid Commission and the appellant could have raised any concern with him regarding the details given in the information. Further, being armed with the summary of facts it was open to the appellant to raise any issues with his counsel regarding lack of understanding of the details of the exact dates of the charges before admitting the same.

[24] I have examined the cautioned interview of the appellant which would have been part of the disclosures received by the appellant from the prosecution in preparation of the trial and would have been before the trial judge as well. The allegation put to him at the commencement of the interview had covered the period from 01 December 2012 to June 2014, a longer period of time and not exact dates. However, the appellant had described in very clear words with minute details the two incidents of rape that happened in December 2012 and the single act of rape that happened in August 2013 in the cautioned interview.

02nd ground of appeal

[25] The appellant argues that it was wrong for the trial judge to have convicted him when there was no evidence to prove the charges and that he had intended to commit rape.

[26] This argument is utterly misconceived. Having perused the summary of facts, I have no doubt whatsoever that all elements of the charges have been made out. Sentencing order too sets out the same facts in similar terms. It is very clear from the appellant's answers to Q31 –Q33, Q37 and Q38, Q44 and Q47 that the appellant had intentionally or with the knowledge had committed rape on the child victim. The Court of Appeal in **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) exhaustively analysed the fault element of rape and stated

> *'[34] ..... Therefore, in a case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one of the three fault elements would be sufficient to prove the fault element of the offence of rape*
>
> *[42] ..... I have already held that it is recklessness that is the fault element of the offence of rape. However, as stated above the prosecution could prove the fault element of recklessness by proving intention, knowledge or recklessness'.*

03rd ground of appeal

[27] The appellant seems to be under the impression that the trial judge should have given him the right of appeal after his guilty plea and sentence. This challenge too lacks any merits at all. The appellant was defended by counsel and he could have obtained

advice as to his right of appeal. He has not cited any legal provision to support his contention that after a plea of guilty and sentence a trial is under a legal obligation to accord a right of appeal to an accused.

04th ground of appeal

[28] The appellant criticizes his trial counsel for not having properly advised him in tendering the guilty plea.

[29] The appellant courts in Fiji had considered complaints of equivocation of the plea of guilty, incompetency of defence counsel, guilty plea being ambiguous and the admitted facts not disclosing the offence against the appellant, as grounds of appeal against conviction upon a plea of guilty in the recent past in different factual contexts. Examples are **Nalave v The State** [2008] FJCA 56 AAU 4 and 5 of 2006, 24 October 2008; AAU 4 and 5 of 2006, 24 October 2008; **Praveen Ram v The State** [2012] 2 Fiji LR 34; **Darshani v State** [2018] FJSC 25; CAV0015.2018 (1 November 2018); **Masicola v State** AAU73 of 2015: 10 May 2019 [2019] FJCA 64, **Vosa v State** [2019] FJCA 89; AAU0084.2015 (6 June 2019), **Ali v State** [2020] FJCA 11; AAU31.2015 (27 February 2020), **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019), **Hicks v State** [2020] FJCA 87; AAU02.2017 (23 June 2020), **Godrovai v State** [2020] FJCA 125; AAU0008.2017 (24 July 2020), **Bhan v State** [2020] FJCA 121; AAU0094.2017 (4 August 2020) and **Kumar v State** [2020] FJCA 136; AAU086.2016 (18 August 2020).

[30] In **K** [2017] EWCA Crim 486; [2017] Crim. L. R. 716 it was held that the Court of Appeal would only intervene where it believed the defendant had been deprived of what was in all likelihood a good defense in law, which would quite probably have succeeded and thus a clear injustice had been done.

[31] But the court will only intervene if it believes that with the benefit of correct advice, there would quite probably have been an acquittal and that, therefore, an injustice has been done (vide **Boal** [1992] 1 Q. B 591; (1992) 95 Cr. App. R. 272, **Mohamed (Abdalla); V. (M); Mohamed (Rahma Abukar); Nofallah** [2010] EWCA Crim

2400; [2011] 1 Cr. App. R. 35; **McCarthy** [2015] EWCA Crim 1185; [2016] Crim.L.R.145).

[32] In **Willcock**, The times, 31 March 1982 it was held that firm advice by counsel as to consequences of being found guilty as opposed to pleading guilty did not vitiate a subsequent plea of guilty and in **Nazham and Nazham** [2004] 4 Archbold News 1, CA it was emphasized that there is a burden on the defendant to show not only that there was an irregularity, but also that it so influenced the decision to plead guilty as to render it a nullity.

[33] It was held in **Saik** [2005] 1 Archbold News 1, CA that where a defendant enters a guilty plea and subsequently appeals on the basis that the plea was entered following erroneous legal advice as to likely sentence and or the likelihood of any confiscation proceedings affecting the security of matrimonial home, the facts must be so strong as to show that the plea of guilty was not a true acknowledgement of guilt; the advice must have gone to the heart of the plea, so as to render it a nullity as not being a free plea; and stated that it was difficult to see how erroneous advice as to the length of sentence likely to be imposed could ever go to the heart of a plea, except perhaps where the maximum penalty for the offence was understated, for the decision as to the length of sentence lies with the judge or the Court of Appeal. **Evans** [2009] EWCA Crim. 2243 has approved the approach taken in ***Saik.***

[34] In **Keenan v The Queen** [2020] VSCA 105 at [52], the Court of Appeal spelt out some factors that may influence a person to plead guilty which will not undermine the validity of the plea:

> *A person may enter a plea of guilty even though they do not believe that they are guilty of the offence for pragmatic reasons, such as, to avoid worry, inconvenience or expense, avoid publicity, to protect family or friends or in the hope of obtaining a more lenient sentence. But a plea entered on such a basis will not be set aside unless a miscarriage of justice is shown. Advice, even strong advice to plead guilty, does not undermine the plea. As long as the argument or advice does not constitute harassment or other improper pressure and leaves the accused free to make the choice, no interference with the administration of justice occurs.*

[35] In any event, the Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) pronounced judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal urged on behalf of the appellant. The appellant has not taken any steps in this regard.

[36] Therefore, this ground of appeal cannot be considered at all. Nevertheless, even if his complaint is considered it is clear that the appellant's cautioned interview and the summary of facts reveal that the appellant, aged 42 having his own two daughters older than the victim in the same house, had prayed upon his 'granddaughter' of 11 years of age, the victim in her own home because he had been tempted by the victim's looks as she was pretty (Q44) knowing that it was an offence to have sex with her with or without consent (Q47). The appellant is supposed to have told that victim while engaged in sex *'iko na watiqu'* or 'you are my wife'. Faced with the daunting task of defending the appellant at the trial his counsel clearly appears to have taken the best course of action in advising him to plead guilty and as a result the appellant had got a relatively lenient sentence of 11 years of imprisonment. The trial counsel, in my view had achieved the best for the appellant.

05th ground of appeal

[37] The appellant argues that the trial judge had failed to consider that medical evidence could not have proved forceful penetration.

[38] This again is a totally misguided submission. The prosecution does not undertake to place any evidence leave aside medical evidence when an accused pleads to the information having admitted the summary of facts. A plea of guilty is a formal and conclusive admission of all elements of that charge. When the accused pleads guilty, the prosecution does not need to lead any evidence to prove that charge (see **R v Broadbent** [1964] VR 733; **De Kruff v Smith** [1971] VR 761; **Maxwell v R** (1996) 184 CLR 501; [1996] HCA 46)

[39] In any event, medical evidence is not decisive in cases of sexual abuse. The summary of facts has mentioned that on the first occasion of penile rape the child victim had asked the appellant to stop penetration of her vagina as she was feeling pain but he had continued regardless. On the second occasion he had applied coconut oil on her vagina before inserting his penis into the vagina. The appellant in his cautioned interview had stated that he had warned the victim not to tell anyone after having sex with her on both occasions. Thus, the element of forceful penetration is very much evident in the summary of facts and the cautioned interview. In any event, even if the penetration of the victim's vagina has been consensual, it would make no difference to the criminal liability of the appellant as the child victim was still less than 13 years of age when he sexually abused her as alleged in the information.

06th ground of appeal

[40] The appellant also argues that the trial judge should have convicted him for a lesser offence as the total evidence against him had not been tendered and the case against him had not been proved by the prosecution. He also alleges that while waiting for the trial his counsel advised him to plead guilty to 'run the case fast' and not to waste time in remand.

[41] On a perusal of the summary of facts and the appellant's cautioned interview I have no doubt that there was absolutely no lesser charge that the appellant could have hoped to be convicted of even after a full trial. The other allegations under this ground of appeal have already been dealt with above. In fact I am baffled by the fact that the state had failed to level another charge against the appellant in respect of the third act of rape the appellant had confessed to in his cautioned interview as having been committed on the victim in June 2014.

07th, 08th and 09th grounds of appeal *(sentence).*

[42] In any event, the ultimate sentence of 11 years of imprisonment is well within the tariff applicable to juvenile rape of 10-16 years of imprisonment [vide **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and

Raj v State (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. Now it is 11-20 years of imprisonment in **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018).

[43] The trial judge had guided himself on the correct tariff and started at the lower end of the tariff *i.e.* 10 years to start with. Having considered aggravating and mitigating circumstances he had arrived at the sentence of 11 years of imprisonment which was on the lower end of the tariff. Therefore, by any stretch of logic could it be said that the sentence was harsh and excessive. In fact, the appellant should consider himself lucky that he got such a lenient sentence for a grave crime of rape of a child on more than one occasion.

[44] I have not come across any irrelevant matters considered by the trial judge in sentencing the appellant. Nor have I seen in the sentencing order any relevant matters not having been considered by the trial judge.

[45] Though, the sentencing judge had not specifically mentioned the Sentencing and Penalties Act he had applied the relevant provisions in the sentencing order.

[46] The appellant had not demonstrated where in the sentencing order the trial judge had erred in respect of his complaints under the above grounds of appeal.

10th ground of appeal

[47] The appellant's complaint relates to the non-parole period of 10 years being too close to the head sentence of 11 years.

[48] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal examined a similar argument extensively having considered all previous authorities on this matter and *inter alia* stated as follows.

> *'[89] The Learned Trial Judge while sentencing the Appellant to 17 years imprisonment had fixed the period during which he is not eligible to be released as 16 years in terms of section 18(1) of the Sentencing and Penalties Decree.....'*

'[90] However, the complaint of the Appellant is that the non-parole period of 16 years has the effect of denying or discouraging the possibility of rehabilitation and is inconsistent with section 4(1) of the Sentencing and Penalties Decree and the decision in ***Tora v State*** *AAU0063 of 2011:27 February 2015 [2015] FJCA 20.'*

'[114] The Court of Appeal guidelines in ***Tora*** *and* ***Raogo*** *affirmed in* ***Bogidrau*** *by the Supreme Court required the trial Judge to be mindful that (i) the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation (ii) Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent (iii) the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court.'*

[49] The Supreme Court in **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23 had quoted from **Raogo v The State** CAV 003 of 2010: 19 August 2010 on the legislative intention behind a court having to fix a non-parole period as follows.

"The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences."

[50] In **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

"While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that ***the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case.***"

'.... was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission'.

[51] Section 18(4) of the Sentencing and Penalties Act states that any non-parole period so fixed must be at least 06 months less than the term of the sentence. Thus, the non-parole period of 10 years fixed by the trial judge is in compliance with section 18(4). Therefore, in my view that the gap of 01 year between the final sentence and the non-

parole period cannot be said to violate any statutory provisions and it is not obnoxious to the judicial pronouncements on the need to impose a non-parole period.

Prejudice to the respondent

[52] The respondent objects to an extension of time. The lapse of 08 years since the commission of the offence may well diminish the chances of a successful prosecution and therefore would prejudice the respondent. It would also be unfair by the victim to force her to go through a trial once again after such a long time.

[53] None of the grounds of appeal against conviction and sentence urged by the appellant has a real prospect of success in appeal. Further, in all circumstances discussed above I determine that the appellant's appeal as a whole is vexatious and frivolous.

Order

1. Enlargement of time to appeal against conviction and sentence is refused.
2. Appellant's appeal is dismissed in terms of section 35(2) of the Court of Appeal Act as it is vexatious and frivolous.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL