

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

**CRIMINAL APPEAL NO.AAU 094 of 2016**  
**[In the High Court at Labasa Case No, HAC 32 of 2014]**

**BETWEEN** : **MATEO ROKOVESA**

*Appellant*

**AND** : **STATE**

*Respondent*

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

**Counsel** : **Mr. T. Lee for the Appellant**  
: **Ms. S. Kiran for the Respondent**

**Date of Hearing** : **02 October 2020**

**Date of Ruling** : **05 October 2020**

**RULING**

- [1] The appellant had been indicted in the High Court of Labasa on a single count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed on 03 March 2014 at Waica Settlement, Taveuni, in the Northern Division.
- [2] The information read as follows.

***First Count***

***Statement of Offence***

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

### *Particulars of Offence*

*Mateo Rokovesa on the 3rd day of March 2014 at Waica Settlement, Taveuni, in the Northern Division, had carnal knowledge of TA without her consent.*

- [3] After the summing-up on 12 March 2015 the assessors had unanimously opined that the appellant was guilty of the charge of rape and in the judgment delivered on the same day the learned trial judge had agreed with them and convicted the appellant as charged. On 13 March 2015 the appellant had been sentenced to 13 years and 10 months of imprisonment with a non-parole period of 11 years.
- [4] The appellant had written to the CA registry on 23 May 2016 requesting information of the status of his appeal purportedly filed on 03 April 2015 but no such appeal is available in the file. He had then in person filed an application seeking leave to appeal against conviction on 20 July 2016. He had filed an application for extension of time on 17 April 2017. Admittedly the appeal against conviction is out of time by more than 01 year and 03 months. The Legal Aid Commission had subsequently filed an application for extension of time to appeal against conviction and sentence and written submissions on 06 July 2018. Thus, the appeal against sentence is out of time by almost 03 years and 03 months. The state had responded by its written submission tendered on 24 June 2020.
- [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] I think the remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGIIC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

*(a).....*

*(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.*

*(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.*

*(d) Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained.*

*(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'*

[9] Sundaresh Menon JC also observed

*'27..... It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward*

*sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.*'

- [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 01 year and 04 months against conviction and almost 03 years and 03 months against sentence and therefore very substantial and unacceptable.
- [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 alone is sufficient to defeat the appellant's appeal if that is the only consideration.

***Reason for the delay***

- [16] The appellant had stated in his affidavit that he was not sure whether he wanted to appeal and thought that the trial court was correct in passing judgment against him. Later with the assistance of his prison inmates and having obtained the summing-up, judgment and sentencing order he had realized that the court may have erred in its deliberations of the facts and evidence against him during the trial and tendered a notice of appeal in person on 22 July 2017 (sic).
- [17] The appellant was defended by a counsel at the trial who, according to the state, was from the Legal Aid Commission and the appellant could have sought advice from him or LAC as to whether he should appeal against conviction and sentence. Therefore, the reasons given by the appellant for the substantial delay is not justifiable and the real reason appears to be that he had no real concerns about his conviction and sentence until inmates 'advised' him to appeal.
- [18] Therefore, I am not convinced that the appellant has satisfactorily explained the delay.
- [19] 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 unmeritorious 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***

- [20] 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."*

[21] Therefore, I would proceed to consider the third and fourth factors in Kumar regarding the merits of the appeal as well in order to consider whether despite the substantial delay and want of an acceptable explanation, still the prospects of his appeal would warrant granting enlargement of time.

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

**Against Conviction:**

*Ground 1: That the Learned Trial Judge erred in law by not adequately and properly directing the assessors on the issue of consent.*

*Ground 2: That the Learned Judge caused the trial to miscarry when the Summing Up lacked fairness and balance.*

**Against Sentence:**

*Ground 1: That the Learned Trial Judge erred in principle when sentencing the Appellant, in particular, to the following:*

- a) considering 11 years as the appropriate starting point;*
- b) enhancing the sentence by 4 years after considering the aggravating factors;*
- c) considering the Applicant as a first offender as the only mitigating factor (thus deducting only 1 year); and*
- d) choosing a non-parole period that is close to the head sentence.*

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

[23] The defence taken up by the appellant had been 'consent' on the part of the complainant. He alleges that the trial judge had not given adequate directions on the question of consent. He cites paragraphs 39, 45 and 47 as examples to highlight the evidence of what he called consent on her part.

*'39. Prosecution called complainant as the fourth witness. She is 17 years old now. In January 2014 she had gone to Navivi to visit her maternal grandmother. She had stayed there till 28.2.2014. Then she had visited her uncle (accused) and aunt. Aunt was her mother's younger sister. On 3.3.2014 around 6.30 a.m. she was sleeping with her aunt in the bed room on a double bed. Aunt got up and went to Naniu village looking for some herbal medicine. The accused came to the bed room and told her to shift in the bed. She thought that he came to put the blanket and the pillow. When she shifted, he started to*

*touch her breast and take off her clothes. Then he sucked her nipples. Then he took off her sulu and grabbed her. He pressed her shoulders. Then he took off his clothes. Then he inserted his penis in to her vagina. She was frightened. She did not shout as he could kill her or hurt her. She tried to push him away. She did not consent to sexual intercourse. She told him that she was not consenting. She knew that the accused is her small father and he could not do that to her. It was for about two minutes.*

'45. *The accused elected to give evidence. He stated that he is 41 years old and married with three children. The complainant is his niece. On 3.3.2014 around 6.30 a.m. he was alone at home with niece as wife had gone to another village. He had gone to the place where the complainant was sleeping. He told her to shift. Then he lay beside her for few seconds. Then he started to hug her. He felt that she wanted what he was doing to her. Then he touched her breast and took off her top. Then she asked her 'where is the aunt? He had told her that she had gone to get some herbal medicine. Then he got down and took off her panty. When he was about to insert his penis in to her vagina she told him to ejaculate outside. He had sexual intercourse with her for about two minutes. His understanding is that she consented. Then she was asked to go and wash herself and prepare the breakfast. He did not threaten her.*

'47. *Under cross examination he stated that the complainant did not say anything about consent. Then he assumed that consent was given. She did not by words consented to him to have sexual intercourse. He did not pin her down but was holding her. She was not able to move as he was holding her. He told the complainant to keep it between him and her. He admitted that he is telling the complainant consented to avoid the guilt.*

- [24] It is clear that the appellant had assumed consent on the part of the complainant as he had felt that she wanted what he was doing and his understanding was that she was consenting as she did not say anything about consent. The evidence of the complainant was, of course, otherwise. She seemed to have been taken aback by the totally unexpected behaviour of the appellant who was her small father (mother's sister's husband) and she had not physically resisted a great deal other than trying to push him away and telling him that she was not agreeing with what he was doing as she thought that the appellant could not do something like that to her. This feeling is quite understandable on the part of a 17 year old girl in front of one of her own elders or protectors.

- [25] The appellant naively seems to think that lack of consent means putting up a lot of resistance or the absence of a declaration, loud and clear, of withholding consent by the victim, for otherwise consent would be presumed! Given the relationship between the appellant and the complainant this assumption on the part of the appellant could only be described as opportunistic and self-serving.
- [26] The trial judge on his part had addressed the assessors on the legal concept of consent in paragraphs 19 and 20 of the summing-up. He had then given them the factual context in paragraphs 39-42.

19. *Consent as defined by section 206 of the Crimes Decree, means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent. A child under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The complainant in this case was above 13 years of age on 3.3.2014 and therefore, she had the capacity under the law to consent. So, the prosecution has to prove the absence of consent on the part of the complainant and the accused knew that she was not consenting. Further bear in mind submission without physical resistance by a person to an act of another person shall not alone constitute consent.*

20. *A person's consent to an act is not freely and voluntarily given if it is obtained-*

*(i) by force; or*

*(ii) by threat or intimidation; or*

*(iii) by fear of bodily harm; or*

*(iv) by exercise of authority; or*

*(v) by false and fraudulent representations about the nature or the purpose of the act.*

40. *After that he told her to go and have a bath and fry bread fruit. He told her not to inform the aunt. The aunt returned home after 7.00 a.m. She told the aunt the following day. She was frightened to tell her earlier. The matter was reported on 24th March. Aunt told her if the accused goes to jail no one to look after the children and family. The matter was reported as the accused and aunt had an argument. She identified the accused in Court.*

41. *Under cross examination she admitted that there are houses nearby to the accused's house. She admitted that she never shouted or yelled. She woke up when the accused came and started touching her. She did not run out. She did not ask the accused 'where is the aunt?' before the accused took off her panty. She was frightened and confused. The accused grabbed her and took off her clothes using both hands. She denied telling the accused not to ejaculate in side. Accused had sex while kneeling on the bed. She was frightened the way the accused told her not to tell the aunt. She did not complain to aunt when*



*she returned that morning. Seeing aunt she felt some guilt inside her. She was frightened about the accused when she saw the aunt. Accused kept repeating not to tell the aunt. She pushed the accused at the time he was having sex but the accused grabbed her. She did not yell or ran out of the house. She denied that the reason not to yell or ran out of the house is that she consented to sexual intercourse. After the incident she continued to live in that house. Before and after the incident the accused treated her nicely in the house. But sometime he talked like ordering her.'*

42. *In re-examination she said that she did not run out as the accused had grabbed her by shoulders. She felt frightened and confused.*

[27] It is obvious that the appellant had used his authority as the small father of the complainant to subdue her and obtained her surrender to satisfy his lust. Such 'consent' is not consent at all.

[28] In paragraphs 43 and 49 of the summing-up respectively the trial judge had addressed the assessors as to how to evaluate the evidence of the complainant and the appellant.

43. *You watched her giving evidence in court. What was her demeanour like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? What is the relationship between her and the accused? Was there any reason for her to falsely implicate the accused? How she conducted herself after the incident? Was there any explanation for the delay in informing the aunt? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject. In your deliberation. If you accept the evidence of the complainant beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish all elements of the charge.'*

49. *You watched the accused giving evidence in court. What was his demeanour like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? His position taken up in Court that the complainant consented for the sexual intercourse is different from the position taken in the charge statement. In other words his evidence is inconsistent. It is up to you to decide whether you could accept his version and his version is sufficient to establish a reasonable doubt in the prosecution case. If you accept his version accused should be discharged. Even if you reject his version still the prosecution should prove its case beyond reasonable doubt.'*

[29] Therefore, there were two versions before the assessors and the trial judge on the issue of consent. What is required of a trial judge when there is a 'word against word' conflict between prosecution and defence had been dealt with in **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017). What is known as *Liberato* principles deal with evaluating the evidence of the prosecution and defence and this direction is usually given in cases turning on the conflicting evidence of a prosecution witness and a defence witness. The direction requires that, ". . . even if the jury does not positively believe the defence witness and prefers the evidence of the prosecution witness, they should not convict unless satisfied that the prosecution has proved the defendant's guilt beyond reasonable doubt".

[30] In **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 High Court of Australia held:

*'11. When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue....'*

[31] In **De Silva v The Queen** [2019] HCA 48 (decided 13 December 2019) the position taken up by the majority on the High Court was that a "Liberato direction" is used to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that ". . . the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt." As a result, a "Liberato direction" need only be given in cases where the trial judge perceives a real risk that the jury might view their role in this way.

regardless of whether the accused's version of events is on oath or in the form of answers given in a record of police interview.

- [32] **Prasad** was a case where (of course, in different circumstances to the current appeal) the appellant took up the consistent position that his indulgence in the act of sexual intercourse with the victim was consensual whereas the complainant's evidence was that the appellant engaged in sexual intercourse with her without her consent and there was seemingly no other credible evidence (though some evidence led at the trial) to buttress the complainant's version the credibility of which itself was called into question. the Court of Appeal said as follows.

*[44] In my opinion, trial judges dealing with evidence of a case should necessarily leave the assessors with the following directions:*

*(i) that the onus of proving each ingredient of a charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.*

*(ii) that in assessing the evidence, the totality of evidence should be taken into account as a whole to determine where the truth lies.*

*(iii) that in situations where there is evidence adduced on behalf of an accused, it is incumbent on the assessors to examine such evidence carefully to decide, not necessarily whether they believe that evidence or not, but whether such evidence is capable of creating a reasonable doubt in their minds.*

*(iv) that in other words, if they believe the evidence adduced on behalf of the defense, which means the prosecution has failed to prove the case beyond any reasonable doubt and hence the benefit of the doubt should enure in favor of the accused and he shall therefore be acquitted.*

*(v) that on the other hand in the scenario of the assessors neither believe the evidence adduced on behalf of the accused nor they disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution's case and the benefit of doubt should then enure in favor of the accused and he should then be acquitted.*

*(vi) that in a situation where the assessors totally disbelieve the evidence adduced on behalf of the accused, the assessors should still consider whether the prosecution's case can stand on its own merits.*

*Which means whether the case has been proven beyond any reasonable doubt. In another word, the mere fact that the accused's version has been rejected for its veracity, it does not mean the case for the prosecution has been proven beyond any reasonable doubt.*

[33] It is clear that from paragraphs 50-55 of the summing-up the trial judge had directed the assessors more or less on what was prescribed in Prasad.

*50. I must remind you that when an accused person has given evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.*

*51. You will generally find that an accused gives an innocent explanation and one of the three situations then arises:*

*(i) You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offence.*

*(ii) Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.*

*(iii) The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offence. The situation then would be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offence then the proper opinion would be Guilty.*

*54. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt.*

*55. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt of the charge you must find him guilty for the charge. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of accused's guilt, you must find him not guilty for the charge.*

[34] Therefore, I conclude that there is no real prospect of success in the first ground of appeal.

[35] In the present appeal the wife of the appellant had confirmed that the complainant looking scared had told her on the following day (04 March 2014) at the breakfast time that the appellant had raped her and started crying. In his charge statement which was agreed to as an admitted fact at the trial, the appellant had admitted that he had raped the complainant. The appellant's wife's evidence enhances the credibility of the complainant's evidence while the appellant's confession in the charge statement greatly diminishes the credibility of his narrative of consensual act of sexual intercourse advanced at the trial.

[36] The trial judge in his judgment in paragraphs 5 and 6 had once again considered the aforesaid items of evidence and rightly rejected the appellant's defence and held that the prosecution evidence had established the guilt of the appellant beyond reasonable doubt.

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

[37] The appellant argues that the summing-up lacked fairness and balance. He states that nowhere had it been said by the trial judge that absence of consent must be established by the prosecution. I find that in paragraphs 7 and 8 of the summing-up the judge had informed the assessors that the burden of proof rested on the prosecution and the standard of proof was beyond reasonable doubt. With regard to the elements of the offence of rape in paragraphs 19 and 21 he had stated that the prosecution had to prove absence of consent and that the appellant knew that she was not consenting. Since then the Court of Appeal had held that even recklessness on the part of the accused is sufficient to establish the fault element of rape. 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.*

[38] The appellant also argues that the trial judge had taken away the issue of consent from the assessors by stating in paragraph 49 of the summing-up that *'His position taken up in Court that the complainant consented for the sexual intercourse is different from the position taken in the charge statement. In other words his evidence is inconsistent.'*

[39] I do not agree. The trial judge had every right to draw the attention of the assessors to the marked inconstancy arising from the charge statement of the appellant recorded as an admitted fact at the trial where he had confessed to the act of rape and his stance taken up at the trial that he had engaged in sexual intercourse with the consent of the complainant. This had been highlighted to direct the assessors to the question of credibility of the appellant's position and not to take away his defence of 'consent'. The decision in **Tamaibeka v State** [1999] FJCA 1: AAU0015u.97s (8 January 1999) is helpful in this regard.

*'In considering the effect of the summing up it is necessary to look at it overall to judge whether it was a fair and objective presentation of the case for the prosecution and the case for the defence.....'*

*'A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced....'*

[40] As already pointed out the judge had given his mind too in his judgment to this vital inconsistency which would have irreversibly and adversely affected the credibility of the appellant's stand of 'consensual sex'.

[41] Therefore, the second ground of appeal too has no real prospect of success in appeal.

### ***03<sup>rd</sup> ground of appeal (sentence)***

#### ***Ground 3(a)***

[42] The trial judge had correctly applied the tariff applicable to juvenile rape of 10-16 years of imprisonment to the appellant's case [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.* 11 years to start with. This cannot be faulted based on the decision in Koroivuki v State [2013] FJCA 15; AAU0018 of 2010 (05 March 2013). It appears that the trial judge had considered the objective seriousness of the offending including the opportunistic manner it was committed (though not mentioned by the judge) in taking 11 years as the starting point. For the rest of the aggravating features in paragraph 12(i), (ii), (v) and (vi) of the sentencing order concerning the offender the judge had enhanced the sentence by 04 more years and deducted 01 year for the appellant being a first offender and 02 months for the previous period of remand. Thus, the judge seems to have followed the two-tiered approach as expressed in Naikелеkelevesi v State[2008] FJCA 11; AAU0061.2007 (27 June 2008), Qurai v State[2015] FJSC 15; CAV24.2014 (20 August 2015).

*Ground 3(b)*

- [44] The appellant submits that aggravating features in paragraph 12 (i), (ii), (v) and (vi) mean the same thing *i.e.* ‘breach of trust’ and 12(iii) and (iv) also the same. Paragraph 12 of the sentencing order is as follows.

12. *The aggravating factors are:*

- (i) Serious breach of trust by the victim towards you as uncle and niece*
- (ii) The age gap is 24 years,*
- (iii) Lack of remorse,*
- (iv) You let the victim relive her experience in Court,*
- (v) You took advantage of the victim's vulnerability,*
- (vi) The total disregard of the victim's safety and wellbeing.*

- [45] In my view, aggravating features mentioned under paragraph in 12 (i), (ii), (v) and (vi) are distinct considerations and can be counted separately. Thus, there is no double counting. However, I doubt whether lack of remorse and letting the victim relive her experience in court could have been taken as aggravating features as the appellant had a constitutional right to go through the trial, though the converse of those

considerations signified by a guilty plea may warrant a discount as mitigating features.

- [46] I also find that the trial judge had not considered the appellant's repeated warnings to the complainant not to tell the aunt designed to prevent the complainant reporting the incident as an aggravating factor. Blackmail or other threats made and any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution are legitimate aggravating factors that could be taken into account by a sentencing judge as aggravating features.
- [47] 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 [**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)]
- [48] In my view, the ultimate sentence of 13 years and 10 months is well within the tariff for rape and as said in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) quantum can rarely be a ground for the intervention by an appellate court. Sentencing is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and arriving at a sentence that fits the crime (**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)). I cannot by any means say that the appellant's ultimate sentence does not fit the crime.

*Ground 3(c)*



[49] Contrary to the appellant's claim the trial judge had in deed considered his previous good character/ his being a first time offender and discounted 01 year.

[50] The more serious the offence, the less the weight which should normally be attributed to good character of the accused. In the context of rape, previous good character/exemplary conduct should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence.

*Ground 3(d)*

[51] The appellant complains about the non-parole period being too close to the head sentence.

[52] 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 **Ruogo** 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.'*

[53] 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."*

[54] 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".*

[55] 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 02 years and 10 months 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.

[56] I see no real prospect of success in any of the grounds of appeal against sentence.

[57] Thus, none of the grounds of appeal against conviction and sentence urged by the appellant has a real prospect of success in appeal.

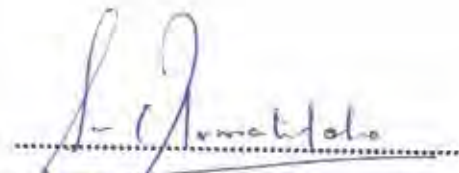
*Prejudice to the respondent*

[58] The lapse of over 06 years since the commission of the offence may well diminish the chances of a successful prosecution and therefore may 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.

**Order**

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



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