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

CRIMINAL APPEAL NO.AAU 138 of 2017
[In the Magistrates Court at Suva Case No. 1617of 2010]
In the High Court at Suva Case No. HAC 102 of 2017S]

BETWEEN	:	**PANAPASA BOLA**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Mr. M. Fesaitu for the Appellant**	
	:	**Mr. R. Kumar for the Respondent**	
Date of Hearing	:	**23 November 2020**	
Date of Ruling	:	**24 November 2020**	

RULING

[1] The appellant had been arraigned in the Magistrates Court of Suva on a single count of rape contrary to section 149 and 150 of the Penal Code at Yadua Village, Gau in the Central Division.

[2] The charge read as follows.

Statement of the offence

Rape: Contrary to Section 149 and 150 of the Penal Code, Cap. 17.

Particulars of Offence

Panapasa Bola on the 24th day of May 2008 at Yadua Village, Gau in the Central Division had unlawful carnal knowledge of girl namely Asenaca Naio without her consent.

[3] At the conclusion of the trial the learned Magistrate 28 February 2017 had delivered the judgment and convicted the appellant as charged but transferred the case to the High Court for sentencing. The learned High Court judge on 10 August 2017 had sentenced the appellant to 14 years of imprisonment with a non-parole period of 12 years.

[4] The appellant's lawyers had filed a notice of appeal against conviction and sentence along with an affidavit and a notice of motion seeking leave to appeal out of time on 12 October 2018. The delay is about a month. Thereafter, the Legal Aid Commission had filed an amended notice of appeal and written submissions on 10 August 2020. The state had tendered its written submissions on 01 September 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] 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

[9] As already pointed out the delay is about one month.

[10] 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.'*

[11] In the appellant's case the delay of one month is not substantial.

Reasons for the delay

[12] The appellant has stated that he was in prison after conviction and sentence and had to wait for his father to engage private counsel to file his appeal. However, the appellant had been convicted on 28 February 2017 and sentenced only on 10 August 2017. He should have known that after his conviction he would be invariably be sentenced and should have made arrangements in advance to obtain legal assistance in order to have the appeal filed against conviction and sentence within the appealable time after he was sentenced. Therefore, his explanation for the delay is unacceptable.

[13] Byrne J, in **Julien Miller v The State** AAU0076/07 (23 October 2007) said 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.'*

[14] Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 remarked

> *"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."*

Merits of the appeal

[15] 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."*

[16] 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 short period of delay and want of an acceptable explanation, still the prospects of his appeal would warrant granting enlargement of time.

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

> ***Ground One*** *(conviction):*
>
> *The learned Magistrate erred in law and in facts in not directing his mind in assessing the delay in the complaint.*
>
> ***Ground Two*** *(sentence)*
>
> *That the learned sentencing judge erred in principle in double counting by considering some aggravating factors that is subsumed in the starting point selected at the higher end of the tariff.*

Ground Three *(sentence)*

That the learned sentencing judge erred in principle in considering as an aggravating factor that the Appellant had shown lack of remorse, whereas the Appellant has exercised his right to stand trial.

[18] The learned Magistrate had summarized the evidence led by the victim who was aged 13 years and that of the appellant, who was 30 years old at the time of the incident, in the judgment as follows.

> *3. In order to prove this charge the Prosecution led evidence of 3 witnesses including the prosecutrix. The Prosecution case is as follows.*
>
> *The victim was a 13 year old girl as at the date of this incident. On 24th of May 2005 in the afternoon, after 2.00pm she went to "plantation" to collect some coconuts. She was accompanied by "Lorima" who was her younger brother in law. In the "plantation" Lorima went away to pick some "young coconuts" for them. During this time the accused who came with 2 other men had sexual intercourse with the victim without her consent.*
>
> *4. The accused did not dispute the sexual intercourse. His defense is consent. Accused the only witness for the defence, said in his evidence that he received a message from one Samisoni that the victim wants to have sex with him. According to the accused he asked again from the victim before having sexual intercourse whether she she still wants to have sex with him. She said "yes".*
>
> *The accused further went on to say that the victim herself took off her clothes. He took off his clothes and they had sexual intercourse for about 5 minutes according to the accused. He said in evidence that she enjoyed what they did. The accused further says that the victim was holding his back when they were having sex. "She didn't tell me to stop, she didn't say anything". After the accused went to the shore from where he came to that place and he doesn't know what happened to the victim.*

[19] The Magistrate had further highlighted the victim's evidence as follows.

> *6. The victim said in her evidence that she was grabbed by these three men first. They made her lay down. It is the accused who had took off her clothes. Then the accused had sexual intercourse with her. She said it was painful for her. The accused had sexual intercourse for about 2 minutes. The victim further said in evidence that she cried and shouted. She clearly said that she didn't want to have sex with those three men. Other 2 men also had sex with her after the accused. She called "Lorima" for help. According to the victim's evidence she was thrown to the nearby river by these three men after having sex with her.*

7. Lorima was called as a prosecution witness. He said in his evidence that he heard his sister shouting when he was at a distance. Then he saw Maikeli, another person who came with the accused, was pulling coconuts from the victim's hand. Then he left for the village seeking help.

8. Could Lorima hear victim's shouting? This question was raised by the defence. Lorima said in evidence that he was about 100 meters away when he heard the victim's voice. He was small boy at the time and three men were adults. So he went to the village seeking help. The first one who witnessed the forcible actions of these three men is Lorima. It is very clear that this first sight of Lorima indicated that the victim was resisting from the beginning. I have no doubt about Lorima's evidence.

[20] The Magistrate had analyzed the appellant's defense too.

'12. I shall now examine the defence of consent. The accused's version is that he received a message from one Samisoni that the victim wants to have sex with him. However this was not at least put to the victim in cross examination. It has firstly brought in the accused evidence. At least presence of Samisoni was never suggested to the victim in her cross examination.'

14. I do not find any reason for the victim to propose to the accused to have sex with her. She didn't have any affair with him. Accused doesn't say that she had any interest in him before this. The accused in fact said in evidence.'

Q. She had no reason to make this allegation against you or to bring a false allegation?

A. No.'

01st ground of appeal

[21] The appellant argues that the trial judge had failed to address the assessors on delayed reporting on the basis that the case had been filed in the Magistrate court in 2010 and since the appellant's defense had been consent the Magistrate should have considered the issue of delay.

[22] The issue of delay does not figure at all in the judgment of the Magistrate suggesting that it was not a live issue at the trial. The mere fact that the case reference number is 1617/2010 does not mean that the complaint had been made belatedly. The appellant too admits that the offence had taken place on the island of Gau of Lomaiviti Group of islands. There could have been many a reasons why the matter had not come to

court earlier than that. Therefore, the basis of the appellant's challenge to the conviction on alleged delayed reporting is simply based on conjecture.

[23] The appellant does not seem to have raised the issue of delayed reporting at the trial. It was the paramount duty on the part of the trial lawyers to challenge the evidence of the prosecution on the ground of belated complaints at the appropriate stage of the trial itself so as to enable the witnesses to explain, if possible, why their complaints were delayed.

[24] I dealt with a complaint of delay by an appellant in **Bulago v State** [2020] FJCA 94; AAU084.2016 (2 July 2020) as follows.

> *'[25] However, the delay in reporting the acts of sexual abuses does not feature in the summing-up or the judgment. It appears that the appellant had not challenged the credibility of the complainant on the basis of delay thus preventing the learned trial judge from addressing the assessors in the summing-up and himself in the judgment on that issue. The appellant was defended by counsel at the trial. Lack of any motive attributed to the complainant to have falsely implicated the appellant in a series of acts of sexual abuses over a long period of time is also intriguing. Had the defense counsel raised the question of delay even at the very last stage of closing addresses that would have prompted the trail judge to have directed the assessors on the issue of delay in the summing-up. The fact that the complainant had not been confronted with the question as to why she had not reported these acts of sexual abuses going on since 2010 until 2014 may have prevented her from presenting an explanation for the assessors and the trial judge to consider whether it was satisfactory and credible.*
>
> *[26] Therefore, it appears that the complainant had not been afforded an opportunity, either deliberately or otherwise, from explaining whether she made the complaint at the first available opportunity within a reasonable time (according to the appellant's written submissions the last sexual act was said to have occurred in October 2014 and the complaint was also made in October 2014) or if not whether there was a reasonable explanation for the delay since February 2010.*
>
> *[28] The appellant has not refereed to me any authority to buttress his argument that in a situation such as this the trial judge has a duty or is obliged as a matter of law to raise the issue of delay in reporting with the assessors and take it up himself on his own in the judgment. Perhaps, if the appellant decides to renew his appeal before the full court he may attempt to convince the court of any merits of his argument with legal authorities.'*

[25] I also considered the issue of delay in complaints of sexual abuse cases in **Vulaono v State** [2020] FJCA 209; AAU0004.2018 (28 October 2020) where I said as follows.

> *'[32] As far as the appellant's case is concerned there is nothing to indicate in the summing-up that he represented by counsel had challenged the victim's credibility on the basis of delayed reporting of the incidents relating to first to third counts. If the appellant had wished to discredit the victim on the basis of fabrication of allegations as a subsequent reflection as evidenced from the late complaint the victim must have been confronted with that line of defense in cross-examination. Only then could the victim have explained reasons for not making a prompt complaint regarding the incidents in 2006, 2007 and 2008. Otherwise, the appellant's argument based on 'delay' in reporting remains only an afterthought taken up simply as an appeal point.'*

[26] I also had the occasion to make the following comments in **Umesh Prasad v State** AAU 02 of 2018 (20 November 2020) on a similar complaint.

> [21] *The credibility of a witness is not diminished simply because his or her complaint is late until and unless he or she is impeached on the footing that either he or she has complained belatedly due to the sinister motive of implicating the accused falsely or the delay enabled fabricating false allegations, embellishments or after thought as a result of deliberation and consultation. Delayed reporting should be a trial issue for the judge to address the assessors and himself on. It should not be simply taken up as an appeal point for the first time for want of any other legitimate grounds of appeal. If the delayed complaint is made a live issue at the trial it has be assessed by using "the totality of circumstances test" as expressed in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) and appropriate directions should be given to assessors. If not, it has to be assumed that the defense has no issue with the complaints not made within a reasonable time and seeks no explanation for the delay.*

[27] Therefore, there is no real prospect of success in appeal on this ground of appeal.

02nd and 03rd grounds of appeal

[28] The appellant submits that the trial judge had picked 13 years as the starting point in the sentencing process and added further 04 years for aggravating factors which were rape of a child, not showing any regard to the victim as a human being and throwing her into the river after raping her and showing no remorse. He complains that the sentencing judge should not have increased the sentence after taking 13 years as the starting point on account of 'rape of children' and 'lack of remorse'.

[29] It appears that rape of a child could not have been considered in this instance separately as an aggravating factor to enhance the sentence, for the tariff for juvenile rape between 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)] obviously includes the fact that the victim is a child as well. Therefore, when 13 years was taken as the starting point the judge may well have included also the fact that the victim was a child in that equation, for he had not given any other reasons why he selected 13 years to start with.

[30] It amounts to a form of double counting. The Supreme Court in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) identified this instance of double counting by stating that many things which make a crime so serious have already been built into the tariff and that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which already have been reflected in the tariff itself.

[31] The appellant's lack of remorse certainly deprived the appellant of any discount for 'genuine remorse' but it could not have been treated as an aggravating factor to enhance the sentence (vide paragraph [54] in **Alfaaz v State** [2018] FJCA 19; AAU0030.2014 (8 March 2018). Section 4(2)(g) of the sentencing and Penalties Act should be read in the overall context of the rights of the appellant under section 14 and 15 of the Constitution.

[32] The appellant had got a reduction of 01year and 02 months for his period of remand and another reduction of 01 year and 10 months for being a 'first offender'.

[33] However, 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. Recognising the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. 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) and **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017)]. 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).

[34] **The State Of Punjab vs Gurmit Singh & Ors** 1996 AIR 1393, 1996 SCC (2) 384 (16 January, 1996) it was held

> *'.....We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female.'*

[35] The ultimate sentence of 14 years imprisonment is within the 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 the tariff is 11-20 years of imprisonment as per **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018). In the appellant's case, even if the starting point had been taken as 10 years of imprisonment still the manner in which the 13 year old victim who was alone in an isolated place had been overpowered by more than one adult male for the appellant to rape her and then throw her into the river seems to justify a very substantial increase in the sentence.

[36] Therefore, it cannot be said at this stage that there is a real prospect of success in this ground of appeal.

Prejudice to the respondent

[37] No prejudice to the respondent has been submitted. Yet, given the fact that the offences had been committed from 2008, it may pose difficulties for any fresh prosecution in terms of untold hardship to the victim.

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