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

CRIMINAL APPEAL NO.AAU 0035 of 2018
[In the High Court at Labasa Case No. HAC 048 of 2016LAB]

BETWEEN	:	**VILIAME VALO**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	:	**02 December 2020**
Date of Ruling	:	**03 December 2020**

RULING

[1] The appellant had been indicted in the High Court of Labasa on two counts of rape contrary to section 207(1), (2)(a) and (3) and 207(1), 2(b) and (3) of the Crimes Act, 2009, and one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act of 2009 committed at Bua, in the Northern Division. The victim was 06-11 years old during the time of the offences while the appellant was aged 60-65. The appellant is the victim's grandfather.

[2] The information read as follows.

FIRST COUNT

Statement of Offence

***RAPE**: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act 2009.*

Particulars of Offence

VILIAME VALO, *between 24th of January 2011 and the 29th of April 2011, in Bua, in the Northern Division, had carnal knowledge of* ***N.D.***, *a child under the age of 13 years.*

SECOND COUNT

[REPRESENTATIVE COUNT]

Statement of Offence

SEXUAL ASSAULT: *Contrary to section 210 (1) (a) of the Crimes Act of 2009.*

Particulars of Offence

VILIAME VALO, *between 24th of January 2011 and the 15th of August 2016, in Bua, in the Northern Division, unlawfully and indecently assaulted* ***N.D.***

THIRD COUNT

Statement of Offence

RAPE: *Contrary to section 207 (1) and 2 (b) and (3) of the Crimes Act of 2009.*

Particulars of Offence

VILIAME VALO, *on 15th August 2016, in Bua, in the Northern Division, penetrated the vagina of* ***N.D.***, *a child under the age of 13 years, with his tongue.*

[3] At the conclusion of the summing-up on 15 December 2017 the assessors' opinion had been unanimous that the appellant was guilty of all charges leveled against him. The learned trial judge had agreed with the assessors in his judgment delivered on the same day, convicted the appellant and on 18 December 2017 sentenced him to 13 years of imprisonment each on rape counts and 12 months imprisonment on the sexual assault count; all to run concurrently subject a non-parole period of 11 years.

[4] The appellant had filed an untimely notice of appeal on 17 April 2018 against conviction and sentence. The delay is about 03 months. He had tendered amended grounds of appeal on 10 June 2019. Thereafter, the Legal Aid Commission on his behalf had filed an application for enlargement of time along with his affidavit on 03

August 2020. Amended grounds of appeal and written submissions on the appellant's behalf had been tendered by the LAC on 18 September 2020. The state had filed its written submissions on 06 October 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] The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 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 stated, the delay is about 03 months which is not so substantial by itself as to defeat the appellant's application.

[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 03 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.'*

[13] However, 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.'*

Reasons for the delay

[14] The appellant's excuse for the delay is that he was waiting for his lawyer to come back to him for post-conviction steps but he failed to do so. He also states that he found it difficult to draft proper grounds of appeal as a layman without the benefit of the papers and assistance of his counsel. The appellant had been defended by two lawyers at the trial and there is no reason for at least one of them not to have attended to the filing of his appeal within time if he had expressed his desire to canvass the conviction and sentence. The explanation is, therefore, not convincing.

[15] In **Qarasaumaki v State** [2013] FJCA 119; AAU0104.2011 (28 February 2013) the Court of Appeal said

> *'[4] ..... The Notice is late by 3 ½ months and the reason for the delay is that the applicant was unaware of the statutory 30-day appeal period. The delay is significant and the applicant's ignorance of the law and its procedures is not a good excuse (**Rasaku's** case at [31]).*

Merits of the appeal

[16] In **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."*

[17] 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 delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.

[18] The grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows.

> ***Ground 1****(conviction)*
>
> *The Learned Trial Judge had erred in law and in fact when he did not give a fair and balanced summing-up to the assessors causing a substantial miscarriage of justice.*
>
> ***Ground 2*** *(sentence)*
>
> *That the sentence imposed on the Appellant is harsh and excessive.*

[19] The learned trial judge had summarized the evidence led by the prosecution and the defense in the summing-up as follows.

> ***F. THE PROSECUTION'S CASE***
>
> *19. The prosecution's case were as follows. The time of the alleged offences were between 24 January 2011 to 15 August 2016, a period of 5 years. In 2011, the accused (DW1) was 60 years old, and on 15 August 2016, he was 65 years old. The female complainant (PW2) was 6 years old in 2011, and 11 years old in 2016. The accused and his wife brought the complainant up ever since she was young. They look after and cared for her. The complainant's mother was the accused's wife's daughter. The complainant (PW2) was the accused's grandchild.*
>
> *20. According to the prosecution, sometimes in 2011 when PW2 was in class 1, she was sleeping in their house one afternoon with her grandmother and another relative. PW2 said, the accused returned home drunk. PW2 said, her grandmother and the relative fled from their home. PW2 said, the accused*

then came to her, touched her and took off her panty. He then allegedly inserted his penis into PW2's vagina. According to the prosecution, her vagina allegedly bled and PW2 said, it was painful. PW2 said, the accused allegedly threatened to kill her, if she told anyone about the incident (count no. 1).

21. According to the prosecution, between 24 January 2011 and 15 August 2016, the accused used to come to her while she was sleeping in their house and allegedly touched her vagina. PW2 said, he allegedly poked her vagina when he allegedly touched it. According to PW2, it was often painful and he warned her not to tell anyone, or he will kill her (count no. 2).

22. On 15 August 2016, the accused (DW1), the complainant (PW2), PW2's cousin brother (PW3) and PW2's cousin sister went to the family's plantation. According to the prosecution, the accused told PW2's cousin brother (PW3) and cousin sister to look after the family's cassava patch, while he and PW2 went to get some more cassava. According to the prosecution, the accused took PW2 to a secluded spot, tied her hands, and laid her down on the grass. He then allegedly took off all her clothes and licked the inside of her vagina (count no. 3).

23. The matter was later report to police. An investigation was carried out. The accused was later arrested and charged with the counts in the information. Because of the above, the prosecution is asking you, as assessors and judges of facts, to find the accused guilty as charged on all counts. That was the case for the prosecution.

G. <u>THE ACCUSED'S CASE</u>

24. On 13 December 2017, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to all the counts. In other words, he denied all the allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to give sworn evidence and called no witness. That was his right.

25. The accused's (DW1) case was very simple. On oath, he denied the complainant's (PW2) allegations against him. He denied the allegations in counts no. 1, 2 and 3. According to the defence, the complainant was coached by his mother to make up these allegations. DW1 said PW2's mother and him were not on good terms. Because of the above, the accused asks you, as assessors and judges of fact, to find him not guilty as charged on all counts. That was the case for the accused.

[20] The trial judge had also summarized the evidence of the victim's cousin and medical evidence in the following manner.

'32. PW3 gave evidence for the State. You have heard his evidence in court. You have watched and observed his demeanour in court. I'm sure his evidence is still fresh in your mind, and I will not bore you with the details. Suffice to say that he was at the family farm with the accused, PW2 and his cousin sister on 15 August 2016. PW3 said, he went to look for the accused and PW2 when

they went away. PW3 said, he saw the accused removing PW2's panty in a cassava patch. PW3 said, he saw the accused kneeling over PW2, and PW2's legs were between the accused's legs when he was kneeling down. PW3 said he saw PW2's legs, side of her head and side of her stomach. PW3 said, he saw the accused facing PW2, while kneeling down. What you make of PW3's evidence is a matter entirely for you.

'33. Doctor Voce (PW1) gave evidence on 13 December 2017. He medically examined the complainant (PW2) on 25 August 2016 – 10 days after the incident alleged in count no. 3. He recorded his findings in a medical report, which he tendered in evidence as Prosecution Exhibit No. 1. A copy is with you. Please, read it carefully. PW1 took PW2's medical history through a guardian, see D(10) of the report. PW1 also examined PW2's vagina and recorded his findings in D(12) of the report. As is common in child rape cases, the vagina will reveal whether or not it had been penetrated previously with the presence or non-presence of the hymen. PW1 said, PW2's hymen was not intact. PW1 said, the non-presence of the hymen could be caused by a penis, or other blunt objects. PW1 could not specify which. Although it is not necessary as a matter of law for a rape complaint to be corroborated by independent evidence, how you treat Doctor Voce's evidence is entirely a matter for you.'

01st ground of appeal

[21] The appellant complains that the summing-up is not fair and balanced causing a miscarriage of justice. However, he had elaborated how the summing-up had been unfair and not balanced.

[22] In **Chand v State** [2017] FJCA 139: AAU112.2013 (30 November 2017) having examined a number of previous judicial pronouncements, the Court of Appeal identified *inter alia* the following as possible defects in a summing-up leading to a miscarriage of justice.

(i) The summing up not tailored to the facts and circumstances of the case.

(ii) The weaknesses and defects of the prosecution evidence not appropriately highlighted.

(iii) Little weight given to the strong points for the defence and a fair picture of the defence not given to assessors *i.e.* not putting the defense fairly to the assessors.

(iv) The contentious issues put in a way favourable to the prosecution and

unfavourable to the Appellant.

(v) The Judge at times appears to have usurped the fact finding function of the assessors.

(vi) As a whole the summing up is not a fairly balanced and a fair presentation of the case to the jury.

[23] The appellant contends that the trial judge had referred to his defense only in paragraph 24 and 35 of the summing-up and they had not given a fair account of what his defense was.

[24] The only defense the appellant had taken up in his evidence appears to be that the allegations of sexual abuse were fabrications and the victim had come out of them at the instigation of her mother, who is the appellant's daughter, with whom the appellant was not on good terms. Otherwise, it had been a total denial of the alleged incidents by the appellant. The trial judge had placed his defense fairly and squarely before the assessors.

[25] Having examined the summing-up as a whole, I find that the trial judge had placed the appellant's version of events clearly before the assessors and directed them that the appellant had nothing to prove but the burden of proof beyond reasonable doubt was on the prosecution (vide paragraph 4 and 5 of the summing-up). The trial judge had again directed the assessors in paragraph 35 and 37 as to how they should consider the appellant's evidence *i.e.* if they were to accept the appellant's sworn denials he must be found not guilty and even otherwise they should still consider the prosecution case as a whole and decide whether or not the appellant was guilty as charged.

> *'35. The accused, on oath, denied the allegations against him. You have heard his evidence. You have watched and observed his demeanour in the courtroom. I am sure his evidence is still fresh in your mind and I will not bore you with the details. It you accept the accused's sworn denials, you must find him not guilty as charged on all counts. If otherwise, you will have to consider the State's case as a whole, and decide on whether or not the accused was guilty as charged on all counts.*
>
> *37. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it 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. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. 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 the accused's guilt, you must find him not guilty as charged.'

[26] I do not think that the summing-up as a whole is obnoxious to observations made in **Chand v State** (supra). This was not a case of 'complainant's word against appellant's word'. There was medical evidence supportive of previous penetration of the victim's vagina and the evidence of victim's cousin clearly corroborated the third charge of rape. Therefore, the directions to the assessors when there is a 'word against word' conflict between the prosecution and defence, as prescribed in **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015), **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 were not required in this case. The directions to the assessors in paragraphs 4, 5, 35 and 37 were quite adequate.

[27] Having considered the evidence against the appellant as a whole, it cannot be said that the verdict was unreasonable or cannot be supported by evidence. There was clearly evidence on which the verdict could be based and therefore, there is no reasonable prospect of success of the appellant's appeal under section 23(1) of the Court of Appeal Act [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Ravawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)]. The trial judge also could have reasonably convicted the appellant on the evidence before him (vide **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020) and **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013)].

[28] The state has, not without merits, stated that the appellant's counsel should have sought redirections in respect of the complaints now being made by the appellant on the summing-up as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

[29] Accordingly, there is no real prospect of success in appeal on the first ground of appeal.

02nd ground of appeal

[30] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal filed within time to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[31] The appellant had submitted that his sentence is harsh and excessive in the light of his old age and being a first offender.

[32] The trial judge in the sentencing order had referred to aggravating and mitigating factors and arrived at the final sentence as follows.

> *'7. The mitigating factors were as follows:*
>
> > *(i) **At the age of 66 years, this is your first offence;***
> > *(ii) You had been remanded in custody for approximately 9 months*
>
> *8. On count no. 1 (rape), I start with a sentence of 12 years imprisonment. I add 4 years for the aggravating factors, making a total of 16 years imprisonment. **For being a first offender at the age of 66 years, I deduct 2 years,** leaving a balance of 14 years imprisonment. For being remanded in custody for 9 months, I deduct 1 year from the 14 years, leaving a balance of 13 years imprisonment. On count no. 1 (rape), I sentence you to 13 years imprisonment.*
>
> *9. I repeat the above process and sentence for count no. 3 (rape).*

10. For count no. 2 (sexual assault), I sentence you to 12 months imprisonment.

11. The summary of your sentences are as follows:

> *(i) Count no. 1: Rape - 13 years imprisonment*
> *(ii) Count no. 2 : Sexual Assault - 12 months imprisonment*
> *(iii) Count no. 3 : Rape - 13 years imprisonment.*

[33] Therefore, the trial judge had clearly considered the appellant's age and 'being a first offender' and afforded him a discount of 02 years. In fact the appellant should not have been considered as a first offender because he had been abusing the child victim from 2011 to 2015 which began when the appellant was 60 years old and the victim was 06 years old. Thus, to that extent he had got a discount that he did not deserve.

[34] In any event, the ultimate sentence of 13 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). 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.

[35] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[36] There is no sentencing error committed by the trial judge in the matter of sentence and therefore, there is no real prospect of success of his second ground of appeal.

Prejudice to the respondent

[37] I do not see any real prejudice caused to the respondent as a result of an extension of time. Though the delay itself is not substantial, the reasons for the delay are not convincing. The merits of the appeal which is the most important of all considerations do not favour at all an enlargement of 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