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

CRIMINAL APPEAL NO.AAU 55 of 2017
[In the High Court at Suva Case No. HAC 248 of 2015]

BETWEEN	:	**ESALA VUETI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Appellant in person**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**19 August 2021**
Date of Ruling	:	**20 August 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva with two counts of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and one count of sexual assault contrary to Section 210(1)(a) of the Crimes Act, 2009 committed at Maumi Village, Tailevu in the Central Division in 2015.

[2] The information read as follows:

FIRST COUNT

(Representative)

Statement of offence

Rape *–Contrary to Section 207(1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of the Offence

ESALA VUETI *between the 20th day of January 2015 and the 24th day of April 2015, at Maumi Village, Tailevu in the Central Division, penetrated the vagina of T.B. with his penis without her consent.*

SECOND COUNT

(Representative)

Statement of offence

Sexual Assault *–Contrary to Section 210(1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of the Offence

ESALA VUETI *on the 5th day of July 2015 at Maumi Village, Tailevu in the Central Division, unlawfully and indecently assaulted T.B. by fondling the vagina of the said T.B.*

THIRD COUNT

(Representative)

Statement of offence

Rape *–Contrary to Section 207(1) and (2) (b) of the Crimes Decree No. 44 of 2009.*

Particulars of the Offence

ESALA VUETI *on the 5th day of July 2015, at Maumi Village, Tailevu in the Central Division, penetrated the vagina of T.B. with his finger without her consent.*

[3] At the end of the summing-up the assessors had in unanimity opined that the appellant was guilty of all three counts. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 11 December 2015 to 10 years and 07 months of imprisonment on each of the rape counts and 05 years of imprisonment on sexual assault count (all sentences to run concurrently) with a non-parole period of 06 years.

[4] The appellant had appealed in person against conviction more than 01 year and 03 months out of time (25 April 2017). Despite this Court having advised the appellant to seek enlargement of time to appeal, he had neither sought an extension of time as required by the Court of Appeal Rules nor filed an affidavit explaining the delay. He had tendered written submissions attempting to provide an explanation for the delay and submitted, for the first time, four grounds of appeal against sentence (note - there was no appeal against sentence up to that time) on 22 September/24 November 2020. The state had tendered its written submissions on 19 February 2021. The appellant had had filed a written reply to the state's submissions on 03 March 2021 *inter alia* seeking an extension of time and again attempting to explain the delay to which the state had replied by written submissions filed on 18 August 2021. Both parties have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or *via* Skype.

[5] Despite the non-compliance with procedural steps to seek enlargement of time, since the appellant is pursuing his appeal in person this court would treat the appellant's appeal on the basis of an application for extension of time to appeal against conviction and sentence.

[6] 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 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, the factors to be considered in the matter of enlargement of time 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] 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 [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[8] It is clear that the delay in the appeal against conviction is more than 01 year and 03 months and very substantial. The grounds of appeal against sentence were late by more than 04 years and 08 months. The appellant has attributed the long delay to the alleged but unsubstantiated failure on the part of his Legal Aid trial counsel and his own relatives having rejected him. However, despite the allegations against the trial counsel, it appears that counsel from the Legal Aid Commission had appeared for him initially before this court until the LAC decided to reject his application for legal aid. He has also said that that he had been later helped by other inmates to appeal and therefore his appeal against conviction and sentence could possibly be an afterthought. Thus, he had not provided any credible explanation for the long delay. Nevertheless, if there is a real prospect of success in the belated grounds of appeal in terms of merits this court would be inclined to grant extension of time [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent had not averred any prejudice that would be caused by an enlargement of time.

[9] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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) and they are whether the sentencing judge had:

> *(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.*

[10] The grounds of appeal urged on behalf of the appellant are as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *THAT the verdict to be set aside on the ground that it is unreasonable.*

Ground 2

THAT it cannot be supported having regard to the evidence.

Ground 3

THAT the judgment of the Court should be set aside on the ground of a wrong decision of any question of law.

Ground 4

THAT on any ground there was miscarriage of justice:-

a. *The consistency of the complaint's allegation affects the reliability and truthfulness of the stated case on the first count of rape and thus the conviction was unsafe.*

b. *That the allegation of the complainant with respect to the 2nd and 3rd count of sexual assault and rape were based on what she said about touching of her private parts and this is inconsistent with the finding of the medical officer and was initially told to her mother thus the conviction is unsafe.*

c. *That the complainant failed to mention twice to Police that the appellant was drunk on 05th July 2015 and had a beer bottle with him which was inconsistent evidence and an inference can be made that she made it up or was coached to put it in to enhance reliability at trial and to damage the truthfulness of the appellant's defence thus the conviction was unsafe.*

d. *That the complainant was consistent while cross-examined by the appellant when she agreed to what truth the appellant had put to her thus her agreement was consistent to the reliability and truthfulness of the appellant's defence and therefore the conviction was unsafe.*

e. *That the evidence of the complainant should be rejected totally because they consist of inconsistent allegations and the defence had clearly inferred that vaginal abrasions could be caused by the tampons used by her or infer that she is also having sex based on the medical report although the appellant do not wish to infer that she could had sex with someone within the 12 hours before she was medically examined and therefore the conviction was unsafe on the basis that there are inconsistencies of the state's case.*

f. *That the complainant's complained is quite consistent with information regarding rape available online in the internet and on Facebook. Thus it is not inconsistent to draw an inference that a complaint would cause the strict 'old man' of the house who is not her real father to be put in jail and she can have her new found*

freedom thus the conviction would be unsafe on that basis if she cries every time she is confronted about the use of Facebook because Facebook means freedom of information and a link to the outside world informing the complainant of many things.

g. *That finally the complainant did not confirm any penile penetration on cross-examination. She had a long pause before confirming but when asked to confirm the second and third time, she did not answer thus the conviction is quite unsafe as it can infer or even confirm a malicious prosecution.*

Sentence

Ground 5

The administration of justice require that any sentence for any term of imprisonment is subject to 1/3 remission of the sentence (section 27, 28 of Cor Act 2006). There is only one sentence that was imposed which was 10 years. A non-parole period of 6 years was fixed and the Appellant is required by law to serve the 'effective sentence' only.

Ground 6

The effective sentence is the sentence minus 1/3 remission of that sentence which in the Appellant's case is 10 years – 3 years 4 months, thus the effective sentence is 6 years and 8 months.

Ground 7

That would be the lawful sentence to serve and therefore any term freed under the non-parole will cancel when the release date determined correctly under the law is lesser than the fixed non-parole period.

Ground 08

In any case, the effective sentence is 6 years 8 months and the non-parole period fixed i.e. 6 years. The remand time, and remission can be applied to the fixed term or non-parole term as ordinarily, it determines eligibility for parole considerations. But there is no Parole Board thus the question on parole and the fixing of a non-parole period become an exercise with bad motives at it miscalculates the release date of the Appellant surpassing the serving of 6 years 8 months effective sentence.

[11] The trial judge had summarized the prosecution and defense cases in the judgment as follows:

> *'**[5]** Prosecution case was based primarily only on the evidence of the complainant. According to her the accused is her step father, who brought her up from infancy. She was living in his house with her step mother. Her step mother was away on the morning the accused had penetrated her vagina with his penis. Having told her to remove her pants, he had also asked her to lay on the bed before he penetrated her vagina. She felt pain and did not agree for what the accused did. This incident happened during 1st term of 2015. She did not complaint about it, as the accused had threatened her.*
>
> ***[6]** On 5th July 2015, the accused returned home in the morning after work. He was drunk and had a bottle of beer with him. He also had a tablet with him. He called out to the complainant and told to open Facebook. He had then slid his hand into the panties of the complainant and moved his hand touching her vagina. When her small sister came in with a plate of pan cakes, he withdrew his hand. He then asked the complainant to go near the bed. He then "poked" his finger into her vagina.*
>
> ***[7]** Thereafter, the complainant was seen crying and when asked by her step mother, she related the incident to her. Thereafter, both of them complained to Nausori Police. The complainant was examined by a medical officer on the same day. The medical examination revealed that her hymen was not intact and she also had an abrasion with redness on the wall of her vaginal vault. The Doctor was of the opinion that the abrasion may have caused by insertion of a finger within 12 hours of examination. She also opined that her hymen could have been damaged due to forceful sexual penetration.*
>
> ***[8]** Complainant's step mother in her evidence stated that the accused had controlled the complainant more than other children and would punish her more. She also said after the arrest, when she visited the accused in remand, he wanted her to withdraw the complaint against him.*
>
> ***[9]** The accused in his evidence said the allegation is not true and that it is a fabrication by the complainant as she hated him for disciplining her strictly. She was told not to access interned or to use Facebook. He has seen her photos on Facebook and he did not like the way she was dressed in the photos. On 5th July morning he had confronted her with the photos on Facebook. Referring to his instructions to his wife, the accused said judging by her conduct, he inferred that she regretted in making this allegation against him and that is why he instructed her to terminate proceedings.*

01st and 02nd ground of appeal

[12] The test for an appeal ground that the verdict is 'unreasonable' or 'cannot be supported having regard to the evidence' was set down in **Kumar v State** [2021]; AAU 102.2015 (29 April 2021) as follows:

> *'[23] Therefore, it appears that where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.*
>
> *[24] However, it must always be kept in mind that in Fiji the assessors are not the sole judges of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016]. Therefore, there is a second layer of scrutiny and protection afforded to the accused against verdicts that could be unreasonable or cannot be supported having regard to the evidence.'*

[13] The prosecution had led the evidence of the complainant, 17 year old student at the time of the incidents, her step mother and the doctor. There had been a prompt complaint to the police after the second and third incidents which happened on the same day. Medical evidence is supportive of the complainant's version of what

happened on the two days. The appellant, 65 year old step father of the complainant also had given evidence and floated the theory of fabrication as he used to discipline the complainant.

[14] In the detailed summing-up which is well-balanced, objective and fair, the trial judge had thoroughly ventilated all the evidence before the assessors. The assessors having had the benefit of listening to evidence and observing the demeanor of witnesses had obviously believed the prosecution witnesses and found the appellant guilty of all counts. The trial judge himself had examined the evidence of both parties once again in the judgment and been satisfied that the prosecution had proved its case beyond reasonable doubt.

[15] Upon examining the summing-up and the judgment, I am of the view that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied and have found the appellant guilty of two acts of rape beyond reasonable doubt. I cannot say that the assessors and the trial judge 'must', as opposed to 'might', have entertained a reasonable doubt about the appellant's guilt on the three counts [see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[16] Therefore, there are no merits in these grounds of appeal and have no real prospect of success.

03rd ground of appeal

[17] The appellant has not demonstrated the alleged wrong decision on a question of law by the trial judge.

[18] Therefore, this ground of appeal misconceived.

04th ground of appeal

[19] The appellant alleges a miscarriage of justice. The appellant submits that there were inconsistencies in the complainant's evidence with that of medical evidence and omissions with her police statements.

[20] The trial judge in the summing-up had addressed the assessors on what surfaced during the trial as inconsistencies and omissions as highlighted by the appellant at paragraphs 59-67 based on the evidence of the complainant and then on medical evidence at paragraphs 68, 69, 77 & 78 and at paragraphs 70 and 72. He had earlier directed them how to approach inconsistencies at paragraphs 17 & 18 of the summing-up. The trial judge had considered the inconsistencies and omissions to be on peripheral matters but wanted the assessors to still consider them. The trial judge had referred to the issue of inconsistencies at paragraph 10 of the judgment and concurred with the assessors.

[21] The conviction on all three counts seems inevitable when the assessors and the trial judge decided to act on the prosecution evidence and rejected the appellant's version. No irregularities in the proceedings have been pointed out by the appellant. Therefore, I cannot conclude that there has been a substantial miscarriage of justice either [see **Baini v R** (2013) 42 VR 608; [2013] VSCA 157 and **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021)].

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

05th to 07th ground of appeal (sentence)

[23] In **Waqanituva v State** [2021] FJCA 100; AAU131.2015 (27 May 2021) the Court of Appeal dealt with issues relating to remissions *vis-à-vis* non-parole period:

> *'[30] Corrections Service (Amendment) Act 2019 (22 November 2019) amended section 27 of the Corrections Service Act 2006 and Sentencing and Penalties Act 2009 significantly affecting some aspects of section 18 of the Sentencing and Penalties Act 2009, as follows.*

Section 27 amended

2. *Section 27 of the Corrections Service Act 2006 is amended after subsection (2) by inserting the following new subsections—*

> *"(3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009,* ***for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period.***
>
> *(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, the prisoner must serve the full term of the non-parole period.*
>
> *(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019.".*

Consequential amendment

3. *The Sentencing and Penalties Act 2009 is amended by—*

> *(a) in section 18—*
>
> *(i) in subsection (1), deleting "Subject to subsection (2), when" and substituting "When"; and*
>
> *(ii) deleting subsection (2); and*
>
> *(b) deleting section 20(3).*

[31] In terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019 (22 November 2019), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court ***must*** *fix a period during which the offender is not eligible to be released on parole (i.e. the non-parole period) and irrespective of the remission that a prisoner earns by virtue of the provisions in the Corrections Service Act 2006, such prisoner* ***must*** *serve the full term of the non-parole period. In addition, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the final/head sentence not taking into account or with no consideration to the non-parole period. Therefore, when there is a non-parole period included in a sentence, the earliest date of release of the prisoner for all practical purposes would be the date of completion of the non-parole period notwithstanding or even if he/she may be entitled to be released early upon remission of the sentence.'*

[24] Therefore, the appellant must fully serve the non-parole period prescribed by the trial judge and thereafter his date of release from prison is a matter for the Corrections Department to decide in terms of the provisions of the Corrections Service Act 2006.

[25] Therefore, there is no merit in his complaint under these grounds of appeal.

08th ground of appeal

[26] The Court of Appeal also dealt with fixing the non-parole period in **Waqanituva v State** (supra):

> *'[26] 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."*
>
> *[27] 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:*
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> *"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'.*
>
> *[28] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal at [114] stated (see also **Chirk King Yam v State** [2015] FJCA 23; AAU0095 of 2011 (27 February 2015) and **Kumova v The Queen** [2012] VSCA 212)*
>
> *'[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.'

[29] 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 09 years (when the head sentence was 10 years and 09 months) fixed by the trial judge is in compliance with section 18(4). Therefore, the gap of 01 year and 09 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.'

[27] Thus, the non-parole period of 06 years imposed by the trial judge is perfectly in harmony with the statutory regime and previous judicial pronouncements.

[28] Therefore, there is no merit at all in this ground of appeal against sentence.

Orders

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL