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

CRIMINAL APPEAL NO.AAU 128 of 2019
[In the High Court at Lautoka Case No. HAC 205 of 2016]

BETWEEN : **JONE KALE**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. S. Babitu for the Respondent**

Date of Hearing : **18 November 2021**

Date of Ruling : **19 November 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with two counts of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 and six counts of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 committed at at Balevuto, Ba in the Western Division from January 2015 to October 2016.

[2] The information read as follows:

'COUNT 1

Statement of Offence

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

Particulars of Offence

JONE KALE *also known as* ***SIRELI BATIRATU****, sometime between the 1st day of January, 2015 and the 18th day of January, 2015 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of* ***RM****, a child under the age of 13 years.*

COUNT 2

Statement of Offence

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

Particulars of Offence

JONE KALE *also known as* ***SIRELI BATIRATU****, sometime between the 19th day of January, 2015 and the 24th day of January, 2015 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of* ***RM****, a child under the age of 13 years.*

COUNT 3

Statement of Offence

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

Particulars of Offence

JONE KALE *also known as* ***SIRELI BATIRATU****, sometime between the 1st day of May, 2015 and the 31st day of May, 2015 at Toge, Ba in the Western Division had carnal knowledge (penile sex) of* ***RM****, without the said* ***RM's*** *consent.*

COUNT 4

Statement of Offence

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

Particulars of Offence

JONE KALE *also known as* ***SIRELI BATIRATU****, on the 31st day of December, 2015 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of* ***RM****, without the said* ***RM's*** *consent.*

COUNT 5

Statement of Offence

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

Particulars of Offence

***JONE KALE** also known as **SIRELI BATIRATU**, sometime between the 1st day of August, 2016 and the 31st day of August, 2016 at Babriban, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.*

COUNT 6

Statement of Offence

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

Particulars of Offence

***JONE KALE** also known as **SIRELI BATIRATU**, on the 3rd day of September, 2016 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.*

COUNT 7

Statement of Offence

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

Particulars of Offence

***JONE KALE** also known as **SIRELI BATIRATU**, on the 5th day of September, 2016 at Babriban, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.*

COUNT 8

Statement of Offence

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

Particulars of Offence

***JONE KALE** also known as **SIRELI BATIRATU**, on the 3rd day of October, 2016 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.'*

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of all counts. The learned trial judge had agreed with the assessors' opinion, convicted the appellant of all counts and sentenced him on 26

March 2019 to an aggregate sentence of 20 years and 06 months of imprisonment (after the remand period was deducted it became 20 years and 04 months) with a non-parole period of 19 years.

[4] The appellant had in person sought enlargement of time to appeal against conviction and sentence out of time (12 August 2019) followed by additional grounds of appeal subsequently. Thereafter, the Legal Aid Commission had tendered formal papers for extension of time with amended grounds of appeal, affidavit and written submission on 12 March 2021. The state had tendered its written submissions on 15 November 2021.

[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 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?

[6] 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)].

[7] The delay of the appeal (almost 03 ½ months) is not substantial for an appellant who had initially pursued his appeal in person. The appellant had pleaded his ignorance of the law and procedure applicable to appeal process for the delay. He had not explained why he did not approach the Legal Aid Commission whose counsel defended him at the trial to attend to filing his appeal papers in time. However,

without penalising the appellant for the delay, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] The grounds of appeal urged on behalf of the appellant against conviction are as follows:

> *'**Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in fact and in law when he did not properly consider and analyze the doubts raised in the complainant's evidence on Count 8 through the evidence elicited by the State through PW 2 – Dr. Farina Bibi Fatima.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in fact and in law when he did not properly consider and analyze the inconsistency in the evidence of the police officers pertaining to the arrest of the appellant and also the assaults inflicted on the appellant.*
>
> ***Sentence***
>
> ***Ground 3***
>
> *THAT the sentence imposed on the appellant is harsh and excessive.'*

[9] The trial judge in the summing-up had summarized the complainant's evidence against the appellant as follows:

> *'2. The brief facts were as follows:*
>
> > *In January, 2015 the victim was 12 years and 8 months. Between 1st January, 2015 to 18th January, 2015 she had returned from the river to change her wet clothes. She wanted to change her clothes in the bathroom but the accused insisted that she did so in the house which did not have any rooms.*

3. *There was no one else in the house other than the victim and the accused. After sometime the accused pulled the hand of the victim and made her lie on the bed. The victim was still wearing her towel.*

4. *The accused then forced his penis into the vagina of the victim when she shouted he blocked her mouth with a pillow. After this, the accused threatened the victim with a knife and warned her if she told anyone about what he had done to her he would kill her.*

5. *When the victim's mother came home she did not tell her anything about what the accused had done because of the threat made to her by the accused.*

6. *The second incident also happened in January, 2015 after returning home from school the victim was changing her clothes, the accused was in the house.*

7. *While changing her clothes the accused came and pulled her hand and held it tightly. The accused warned her not to shout since he had a knife ready. The accused made her lie down and forcefully inserted his penis into her vagina. The victim was crying and tried to call for help but the accused was blocking her mouth.*

8. *The accused thereafter threatened the victim not to tell anyone about what he had done otherwise he will kill her. The victim's mother was not at home at the time, when her mother came home she did not tell her mother about what the accused had done to her because the accused had threatened her with a knife not to tell anyone.*

9. *The third time was in May, 2015 at around 11.00pm the accused and the victim went on horseback to a village in Toge, when they were returning the accused forcefully had sexual intercourse with her. The accused had a cane knife with him, he told the victim to remove her clothes or else he will do something to her.*

10. *When the victim refused he forcefully removed her clothes, made her lie down in the bush and forcefully inserted his penis into her vagina. The victim wanted to shout but did not since it was night time and they were far away from the village. The accused thereafter warned the victim not to tell her mother or anyone about what he had done to her. The victim did not tell anyone about the incident.*

11. *The fourth incident happened on New Year's Eve on 31st December, 2015 in the night there was a church service on the other side of the village.*

12. *When the church service was about to end the victim was sent home by her mother to bring the torch. When the victim reached home the accused opened the door and asked the victim whether the church service had finished.*

13. *The victim told the accused it had not upon hearing this the accused pulled her into the house and closed the door. The accused made the victim lie on the bed*

removed her clothes and forcefully inserted his penis into her vagina. The accused also blocked the victim's mouth. He threatened the victim with a knife and warned her not to tell anyone about what he had done.

14. *After this the accused gave the victim the torch, when she arrived at the church she did not tell anything to her mother because the accused had threatened her with a knife not to tell anyone.*

15. *The fifth incident happened in August, 2016 at Babriban when the accused and the victim were returning home on horseback. It was night time around 11.00pm the accused after pulling some cassava plants forcefully removed the victim's clothes and forcefully inserted his penis into her vagina. The victim wanted to shout for help but did not since they were in the middle of the bush and no one would hear her. After this the accused warned the victim not to tell her mum or anyone otherwise he would kill her.*

16. *When the victim reached home she did not tell her mother about what the accused had done to her because of his threats.*

17. *The sixth incident happened on 3rd September, 2016 when the victim came home from town after about 6.00pm. The accused was at home the victim went and changed her clothes and then had tea.*

18. *After a while the victim went to lie down on the bed shortly after she saw the accused lying beside her. When the victim told the accused to go and lie down on the floor he blocked her mouth and told her to remove her clothes. After this, he forcefully inserted his penis into her vagina. The victim tried to shout but the accused pushed her down and blocked her mouth. Her mother was not at home at this time.*

19. *The accused warned the victim not to tell anyone about what he had done to her. The victim's mother returned home in the night but she did not tell her mother what the accused had done to her because the accused had threatened her if she told anyone he would kill her.*

20. *The seventh incident also happened in Babriban on 5th September, 2016 the victim went with the accused during the night, her mother had allowed her to go with the accused. They had gone to check the fence, on their way back the accused forcefully removed her clothes and forcefully inserted his penis into her vagina.*

21. *The victim shouted for help but they were far away from the village, after this the accused warned the victim not to tell anyone about what he had done to her. He also threatened her that he will kill her if she told anyone.*

22. *The eighth incident happened on 3rd October, 2016 at home when she returned from the Ba Riverside Carnival.*

23. *The victim came home at night her mother was not at home. The accused was at home, the victim went to change her clothes at this time the accused got hold of her and pulled her to the bed. The accused forcefully inserted his penis into her vagina.*

24. *The victim shouted for help but no one came to rescue her. The accused later showed her the knife and threatened her not to tell anyone.*

25. *During a counseling session by her School Teachers on an allegation of vandalism against the victim she told her teachers about what the accused was doing to her. The matter was reported to the police by her School Teachers.'*

[10] The defense had taken up the position by way of cross-examination that the appellant did not penetrate the vagina of the complainant with his penis as alleged and that the complainant made up a story to avoid any suspension or expulsion from school on allegation of vandalism and that she was also under the influence of a couple in the village who hated the appellant.

01st ground of appeal

[11] This ground of appeal is concerned only with the 08th count relating to the last act of rape. The appellant's counsel submits that PW2, Dr. Farina Bibi's evidence upon her examination of the complainant three days after the last incident *i.e*. 06 October 2016 had not revealed any signs of forceful penetration as alleged by the complainant.

[12] The summing-up describes doctor's evidence as follows:

71. *On 6th October, 2016 the doctor recalled examining the complainant at Ba Mission Hospital. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no.2.*

72. *The initial impression of the complainant was that the complainant was alert, coherent and not in distress. The specific medical findings of the doctor were:*

    (a) The abdomen (stomach) of the complainant was soft, private part had no bruises, laceration or hematoma. The doctor explained hematoma was a collection of blood;

(b) Hymen was perforated meant it was broken. This could have been caused by penetrative injury such as sexual activity, penis or finger or by an object.

73. *The professional opinion of the doctor was that the complainant's hymen was perforated and there were no signs of forceful penetration.*

74. *In cross examination the doctor stated that there was no way she could have determined the age of the perforated hymen. The doctor agreed there were no signs of any forceful penetration, however, the doctor's findings could be consistent with forceful penetration but that depended upon the force used.*

[13] Thus, the doctor had amply explained why there could not be signs of forceful penetration in the victim and also why the red marks on the arms spoken to by the complainant and PW2 were not present when the doctor examined her. In any event, it also has to be kept in mind that the appellant had penetrated the complainant 07 times before and that factor too must have contributed to lack of any signs of any forceful penetration on the last occasion.

[14] Further, lack of consent need not necessarily be evidenced by physical injuries. The complainant appears to have submitted herself to continuous sexual exploitation by the appellant as she was under threat after every incident of rape and the appellant had backed up his threat by showing his knife on the last occasion as he had done on several occasions before. In that context, forceful penetration does not mean physical resistance on the part of the complainant. It only means lack of consent on her part. Therefore, to look for injuries in the complainant in respect of the last act of penetration is meaningless. Finally, the law as it stands now does not require any corroboration of the evidence of the victim of a sexual offence by way of medical evidence or otherwise.

[15] Therefore, there is no real prospect of success at all in the first ground of appeal.

02nd ground of appeal

[16] The appellant's contention is that the trial judge had not analyzed the alleged inconsistencies in the evidence of police officers *i.e.* between PW4 and PW6 in the

matter of admitting his cautioned interview. The appellant also submits that the fact that the appellant had asked for pain killers for his headache during the cautioned interview had some bearing on the admissibility of the cautioned interview.

[17] It is clear from the *voir dire* ruling on 07 March 2019 that the allegation that the police officers had not explained the reasons for his arrest was not one of the grounds of challenging the cautioned interview. The appellant had given evidence at the *voir dire* inquiry and it is not clear whether he had taken up that position.

[18] The appellant had not given evidence at the trial proper. However, his counsel seems to have cross-examined PW4 who had admitted that it was not in the appellant's police statement that the reason for the arrest had been explained and he had explained that he forgot to record that fact. PW6 had however said in evidence that he had explained the reasons for the arrest. Thus, I do not see any material inconsistency between the evidence of PW4 and PW6 in this respect. In any event, from the line of questioning the reason for his arrest would have been amply clear to the appellant. The trial judge had at paragraph 72 of the *voir dire* ruling accepted that the appellant was promptly informed of the reasons for his arrest and he understood the same in compliance with section 13(1) (a) of the Constitution of Fiji.

[19] At the *voir dire* inquiry, the appellant had given evidence that he asked for and took pain killers during the cautioned interview. Cpl. Miriama Nadumu's evidence (the investigating officer as well as the interviewing officer) at the *voir dire* inquiry on this matter is recorded by the trial judge in his *voir dire* ruling as follows:

> *'[28] Nobody including the witness forced or verbally abused the accused to answer the questions asked. The accused was asked on the 8th if he wished to consult a doctor at Q. 7 of the interview. The answer given by the accused was "No I want to have pain killer". On the 9th the accused was again asked at Q. 64 if he wished to see a doctor the answer given by the accused was "It's enough I am taking a pain killer tablet."*
>
> *'[33] On the 8th the witness stated the accused had not complained about having headaches she had asked if he was suffering from any sickness and whether he wanted to see a doctor to which the accused had asked for a pain killer which was given. The witness denied the accused had*

asked to see a doctor but she had refused. On the 9th the accused was not handcuffed at all.

[34] The witness denied the suggestion that the accused had asked for pain killers due to assault on him by Police Officers. She also stated it was not true that after the accused denied everything during the initial stages of the interview other Police Officers came and further physically assaulted and verbally abused the accused. The accused was given breaks to go to the toilet, drink water, coffee and given biscuits to eat.

[37] There were other Police Officers in the crime office doing their usual work. The crime office was a secured place. The handcuff of the accused was removed on the 8th after the interviewing officer requested it to be removed before lunch. The accused had informed the interviewing officer that he had a headache before being asked whether he wanted to go to the hospital. The witness disagreed the accused was not well and in pain before the commencement of the interview. He also disagreed the accused had asked for pain killer because his request to be taken to the hospital was denied by the interviewing officer.'

[20] Thus, the trial judge had fully considered the appellant having asked for pain killers and stated at paragraph 71 of the *voir dire* ruling that he preferred the evidence of the police officers that the appellant did not wish to go the hospital but preferred to take pain killers as a result of headache unrelated to any assault.

[21] According to paragraph 58 of the *voir dire* ruling *'The accused agreed the answers he gave in his caution interview were given voluntarily by him......'* and that *'[61] The accused also clarified he said "yes" that he gave his answers in his caution interview voluntarily because he was hurt by what the Police Officers had done to him and he was forced to give his answers.'*

[22] Having analyzed all the evidence before him, the trial judge had determined that the caution interview of the appellant dated 8 October 2016 was admissible in evidence and the prosecution may tender the same.

[23] The trial judge had placed before the assessors all the evidence of police officers including that of Cpl. Miriama Nadumu on the appellant's allegation of assault and his asking for pain killers. The trial judge had not changed his mind regarding the

voluntariness of the cautioned statement during the trial proper, for there was no fresh material that came up during the trial. He had then directed the assessors as follows:

> 120. *The caution interview of the accused is before you, the answers in the caution interview are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in the caution interview.*
>
> 121. *During the cross examination of the Police Officers the counsel for the accused had asked questions of these officers suggesting verbal abuse, assault and unfairness by them on the accused. This means counsel was putting to these witnesses that the admissions made by the accused contained in the caution interview was not voluntarily given by him and therefore you should disregard those admissions.*
>
> 122. *It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made those admissions in his caution interview then you should disregard them. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.*

[24] These directions are substantially in compliance with the directions proposed in **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30], **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51, **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19 and **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017).

[25] The trial judge had once again given his mind to this aspect in the judgment and concluded:

> *'59. A perusal of the caution interview of the accused does suggest that the accused had given the answers voluntarily and they were the truth.*
>
> *60. This court accepts the evidence of all the Police Officers that the accused was treated fairly, without any assault, inducement, verbal abuse or impropriety.'*

[26] A trial judge is not expected to repeat everything he had stated in the summing-up in his written decision as long as he had directed himself on the lines of his summing-up to the assessors (vide **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021).

[27] In any event, even if the appellant's confessions are excluded there is ample evidence coming from the complainant to justify the conviction.

[28] Therefore, the seconds ground of appeal has no real prospect in appeal.

03rd ground of appeal (sentence)

[29] The only submission made on the sentence appeal is that the trial judge had not given any weight to his mitigation and the sentence is harsh and excesive.

[30] The trial judge had dealt with this matter as follows:

> *'27. The following personal details and mitigation have been presented by the counsel for the accused:*
>
> *a) The accused is 58 years of age but was 55 years at the time of the offending;*
>
> *b) He is in a defacto relationship;*
>
> *c) He is a Farmer and sole breadwinner of his family;*
>
> *d) He has two children who live with his mother;*
>
> *e) He has been a hardworking church member serving the church and the community.*
>
> *28. I accept in accordance with the Supreme Court decision in Anand Abhay Raj v The State, CAV 0003 of 2014 (20 August, 2014) that the personal circumstances of an accused person has little mitigatory value in cases of sexual nature.'*

[31] In New Zealand it has been held that in sentencing those convicted of dealing commercially in controlled drugs, the personal circumstances of the offender must be subordinated to the importance of deterrence. But this does not mean that personal

circumstances can never be relevant. Rather, such circumstances are to be weighed in the balance with the needs of deterrence, denunciation, accountability and public protection. These considerations, in conjunction with the maximum sentence scale enacted, require a stern response to offending of this kind [vide **Zhang v R** [2019] NZCA 507; [2019] 3 NZLR 648 (21 October 2019)**.** Fiji seems to have already adopted more or less a similar approach to serious sexual offences in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014).

[32] Accordingly, there is no sentencing error in the trial judge's decision not to consider any of the so-called mitigating features for a reduction in the sentence.

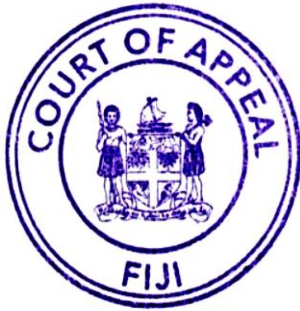
[33] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate 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)]. The Trial Judge had followed sentencing tariff in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018).

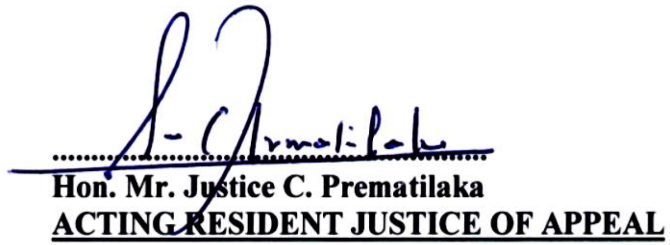
[34] I see no real prospect of success in the appellant's appeal against sentence which given the heinous crime committed by the appellant cannot be called disproportionate, harsh or excessive.

[35] In my view, as a whole the appeal has no real prospect of success [vide **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)] against conviction or sentence.

Orders

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
ACTING RESIDENT JUSTICE OF APPEAL